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

October 23, 2014

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 14A00003
ROMANS RACING STABLES, INC., Respondent.	)	

AFFIRMANCE BY THE CHIEF ADMINISTRATIVE HEARING OFFICER OF THE ADMINISTRATIVE LAW JUDGE'S FINAL DECISION AND ORDER

Appearances:

Marvin J. Muller III
For the complainant

William Velie
For the respondent

I. PROCEDURAL HISTORY

This action arises 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 (2012). The Department of Homeland Security, Immigration and Customs Enforcement (ICE), filed a two-count complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against Romans Racing Stables, Inc. (Romans Racing Stables or respondent). Count I of the complaint alleged that the company hired 117 individuals for whom it failed to prepare Employment Eligibility Verification (I-9) Forms, in violation of 8 U.S.C. § 1324a(a)(1)(B). Count II of the complaint alleged that the company hired forty-four individuals for whom it failed to ensure proper completion of an I-9 form, in violation of 8 U.S.C. § 1324a(a)(1)(B). The complaint requested penalties in the amount of $150,535 for the 161 violations (or $935 per violation).

On September 24, 2014, Administrative Law Judge (ALJ) Ellen K. Thomas entered a final decision and order finding Romans Racing Stables liable for all 161 violations and directing

it to pay a civil money penalty in the amount of $76,100.[1] Respondent filed a timely request for administrative review of the ALJ's decision and order with the Chief Administrative Hearing Officer (CAHO), in accordance with OCAHO's procedural rules at 28 C.F.R. § 68.54 (2013). In its request for review, respondent argues that the final order failed to properly consider several mitigating factors and assessed a penalty that was in excess of the penalties assessed in other OCAHO cases with similar mitigating factors. Neither ICE nor respondent filed any additional documents related to the request for administrative review.

II. JURISDICTION AND STANDARD OF REVIEW

Under the applicable statute and regulations, the CAHO has discretionary authority to review any final order of an ALJ in a case brought under 8 U.S.C. § 1324a, and may modify or vacate a decision or order of the ALJ within thirty days of the date of entry of that decision and order. *See* 8 U.S.C. § 1324a(e)(7); 28 C.F.R. § 68.54. Under the Administrative Procedure Act, which governs OCAHO cases, the reviewing authority in administrative adjudications "has all the powers which it would have in making the initial decision." 5 U.S.C. § 557(b). This authorizes the CAHO to apply a *de novo* standard of review to final decisions and orders of an ALJ. *See Maka v. INS*, 904 F.2d 1351, 1356 (9th Cir. 1990); *Mester Mfg. Co. v. INS*, 900 F.2d 201, 203-04 (9th Cir. 1990); *United States v. Red Coach Rest.*, 10 OCAHO no. 1200, 2 (2013); *United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 477, 478 (1995).[2]

III. DISCUSSION

A. Arguments in the Request for Review

Respondent raised four arguments in its request for review. First, it argued that the ALJ's final decision and order failed to properly consider the financial impact of the penalty based on the statutory factor that considers the size of the business being charged. Second, respondent argued that the final decision and order failed to properly consider the respondent's ability to pay because the ALJ considered the financial positions of the other businesses owned by Romans Racing Stables' owner, rather than simply the financial position of the respondent itself. Third, respondent argued that the penalty assessed in the final decision and order is excessive compared to other OCAHO cases with similar facts, citing five OCAHO decisions as comparators.[3] Finally, respondent argued that the ALJ failed to properly consider the remaining statutory factors,

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[1] The respondent had acknowledged that summary judgment was appropriate as to liability for the violations alleged. Therefore, the ALJ's final decision addressed only the civil penalties at issue in the case, and reduced ICE's proposed penalty of $150,535 by almost half.

[2] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and 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 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 OCAHO's website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

[3] The cases respondent relied upon are: *United States v. Siwan & Sons, Inc.*, 10 OCAHO no. 1179 (2013); *United States v. Siwan & Bros.*, 10 OCAHO no. 1178 (2013); *United States v. El Azteca Dunkirk, Inc.*, 10 OCAHO no. 1172 (2013); *United States v. March Constr., Inc.*, 10 OCAHO no. 1158 (2012); and *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137 (2010).

including the history of previous violations, whether the individuals involved in the violations at issue were unauthorized aliens, and the good faith of the employer.

B. Consideration of Statutory Factors Generally

The applicable penalty provision of 8 U.S.C. § 1324a provides that, in determining the amount of a civil penalty for a violation of 8 U.S.C. § 1324a(a)(1)(B), "due consideration shall be given to the size of the business of the employer being charged, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations." 8 U.S.C. § 1324a(e)(5). However, nothing in the statute or the regulations requires that the ALJ give the same weight to each of the factors, nor does the statute prohibit consideration of other factors. *See United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6-7 (2011); *United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000); *United States v. Monroe Novelty Co.*, 7 OCAHO no. 986, 1007, 1016-17 (1998). Additionally, there is no one single, permissible method of calculating penalties, *compare United States v. Felipe, Inc.*, 1 OCAHO no. 108, 726, 731-32 (1989) (affirming use of a mathematical approach), *with United States v. Raygoza*, 5 OCAHO no. 729, 48, 51 (1995) (adopting a judgmental approach), and the weight to be given to each factor in assessing a civil penalty may depend upon the facts and circumstances of the particular case, *see Raygoza*, 5 OCAHO no. 729, at 51. As long as the ALJ has duly considered each of the required statutory factors and the final penalty assessment is just and reasonable, that penalty assessment need not be disturbed. *See Red Coach Rest.*, 10 OCAHO no. 1200, 4-5; *United States v. Chef Rayko, Inc.*, 5 OCAHO no. 803, 650, 652 (1995).

C. Size of the Business

One of the statutory factors that must be taken into consideration when assessing a civil penalty for violations of 8 U.S.C. § 1324a(a)(1)(B) is the size of the business of the employer being charged. 8 U.S.C. § 1324a(e)(5). Respondent argues that the ALJ's final decision and order failed to properly consider this "mitigating factor." However, it is clear from the final decision that the ALJ did give due consideration to the size of the employer's business. The ALJ noted in her final decision that the parties agreed that Romans Racing Stables is a small business, and that ICE appropriately treated the size of respondent's business as a mitigating factor. *See* Final Decision and Order, at 4. Later, in her opinion, the ALJ explicitly invokes the respondent's status as a small business, as well as "the general policy of leniency toward small entities as set out in the Regulatory Flexibility Act, 5 U.S.C. § 601 *et seq.* (2006), as amended by § 223(a) of the Small Business Regulatory Enforcement [Fairness] Act of 1996, Pub. L. No. 104-121, 110 Stat. 864 (1996)," in significantly mitigating the penalties to an amount closer to the midrange of permissible penalties. Final Decision and Order, at 5. Thus, the ALJ properly considered the size of respondent's business in setting the final penalty amount, in accordance with both 8 U.S.C. § 1324a(e)(5) and the Small Business Regulatory Enforcement Fairness Act of 1996.

D. Ability to Pay

Respondent argues in its request for review that the final decision and order "failed to properly consider the Respondent's ability to pay and based the fine amount on other businesses owned by Dale Romans, owner of Romans Racing Stables." Respondent asserts that, under principles of corporate law, a company is separate and distinct from its owners. Respondent

therefore argues that it was improper to consider the other companies owned by Dale Romans when assessing the fines for Romans Racing Stables.

Although the respondent's ability to pay is not one of the statutory factors that must be duly considered in assessing a civil penalty, numerous OCAHO cases have considered the ability to pay as a matter of equity. *See, e.g., United States v. March Constr., Inc.* 10 OCAHO no. 1158, 5-6 (2012); *United States v. New China Buffet Rest.*, 10 OCAHO no. 1133, 6-7 (2010); *United States v. Sunshine Bldg. Maint., Inc.*, 7 OCAHO no. 997, 1122, 1184-85 (1998). The ALJ noted in her final decision and order that Romans Racing Stables sought consideration of its ability to pay in addition to the five statutory factors. Final Decision and Order, at 5. In her discussion of respondent's ability to pay, the ALJ noted that respondent's owner, Dale Romans, evidently had other businesses in addition to Romans Racing Stables. Indeed, as the ALJ references, respondent submitted copies of W-2 forms for Dale Romans, as well as profit and loss statements for both Romans Racing Stables *and* various other businesses owned by Dale Romans. The ALJ concluded that "[i]t is difficult to form a clear picture of the company's real current financial status from these documents." *Id.*

Although the government bears the burden of proof on both liability and the existence of an aggravating factor, *see March Constr., Inc.*, 10 OCAHO no. 1158, at 4; *United States v. Carter*, 7 OCAHO no. 931, 121, 139, 159 (1997), the burden is different for the non-statutory factor of ability to pay, *see United States v. Century Hotels Corp.*, 11 OCAHO no. 1218, 4 (2014). Since the ability to pay is not one of statutory factors that must be given due consideration, but rather may be considered as a matter of equity, the party seeking favorable consideration of this equitable factor bears the burden of presenting sufficient (and sufficiently clear) evidence to support it. *See id.* The ALJ's statement that it was difficult to form a clear picture of the company's current financial status from the documents presented implies that respondent did not meet this burden. Nothing in respondent's request for review lends additional clarity or support to respondent's apparent argument that it lacks the ability to pay the penalty assessed.

Furthermore, respondent's contention that the ALJ's reference to the other businesses owned by Dale Romans was somehow improper ignores the fact that it was *the respondent itself* (and the respondent alone) that submitted profit and loss statements for the other businesses owned by Dale Romans. These documents were attached as exhibits accompanying both respondent's prehearing statement and respondent's motion for summary decision. Having offered these documents to the ALJ for consideration, respondent cannot then turn around and object to the ALJ taking them into consideration. Nevertheless, the ALJ did not use this information about the other businesses owned by Dale Romans to aggravate the penalty in any way. Rather, she merely noted that the documents submitted did not present a clear enough picture of respondent's financial position to justify further mitigation based on the equitable factor of ability to pay. This is evidenced by the fact that the ALJ expressly referenced "**the company's** real current financial status" (emphasis added), as opposed to using the plural companies' or Dale Romans' financial status. Final Decision and Order, at 5. This belies respondent's argument that the ALJ factored in Dale Romans' other businesses in considering the respondent's ability to pay the fine at issue.

In any event, the ALJ ultimately noted that "with or without consideration of the company's ability to pay," ICE's proposed penalties were too close to the maximum for the violations and the employer at issue here, and reduced the penalties significantly (indeed, almost in half) to an amount closer to the mid-range of permissible penalties. *Id.* The arguments and documentation presented by respondent as to its ability to pay do not clearly support a further reduction of the penalty assessed.

E. History of Previous Violations; Employment of Unauthorized Aliens; and Good Faith of the Employer

Respondent also contends that the ALJ's final decision and order failed to properly consider the "other statutory mitigating factors"—namely, the employer's history of previous violations, whether or not the individual who was the subject of the Form I-9 violation was an unauthorized alien, and the good faith of the employer.

With regard to the good faith of the employer, ICE previously mitigated the initial penalty assessment on the basis of good faith, and the ALJ concluded that nothing in the record reflected that Romans Racing Stables acted in bad faith. Clearly, the good faith of the employer was properly considered, and was treated as a mitigating factor.

With regard to the history of previous violations, ICE treated this factor as neutral, though the ALJ notes that "[t]he government could have viewed the lack of history of prior violations as an additional mitigating factor." *Id.* at 4. The ALJ noted among her findings of fact that respondent had no history of previous violations. *Id.* at 7. Although she did not explicitly reference this particular finding in the paragraph of the decision in which she ultimately set the penalty levels, such specificity has never been required in OCAHO's cases. *See Red Coach Rest.*, 10 OCAHO no. 1200, at 4-5; *Chef Rayko, Inc.*, 5 OCAHO no. 803, at 652. Furthermore, numerous OCAHO cases have held that it is appropriate to treat the lack of history of previous violations as a neutral factor. *See, e.g., Red Coach Rest.*, 10 OCAHO no. 1200, at 3-4; *United States v. Alyn Indus., Inc.*, 10 OCAHO no. 1141, 9 (2011); *United States v. Ketchikan Drywall Servs., Inc.*, 10 OCAHO no. 1139, 29-30 (2011), *petition for review denied, Ketchikan Drywall Servs., Inc. v. ICE*, 725 F.3d 1103 (9th Cir. 2013); *New China Buffet Rest.*, 10 OCAHO no. 1133, at 6. Accordingly, the final decision and order did not fail to properly consider the history of previous violations in setting the final penalty.

Finally, ICE sought aggravation of the penalty based on the presence of unauthorized workers in respondent's workforce. However, the ALJ found that ICE had not carried its burden of showing that any particular individual was unauthorized for employment in the United States. Thus, she concluded that the penalties could not be enhanced on this basis. Final Decision and Order, at 5. Respondent perhaps seeks further mitigation on the basis of this factor, but as with the history of previous violations, ICE's failure to affirmatively show that particular individuals were unauthorized for employment does not require that the factor be treated as a mitigating factor. It may be treated as neutral, under the rationale that "compliance with the law is the expectation, not the exception." *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 9 (2010). The ALJ's analysis and consideration of this factor in the instant case was proper.

F. Comparison to Other OCAHO Cases

Finally, in its request for review, respondent lists five previous OCAHO cases that it argues had "similar mitigating factors," but involved lower penalties than the ones ultimately assessed in this case.[4] However, the final penalty in each case will depend upon the totality of the facts and circumstances of that particular case, so strict comparisons to other non-identical cases do not mandate assessment of an identical penalty in another case. As mentioned previously, although the ALJ must give due consideration to all five statutory factors, the statute does not mandate that each factor be weighed equally, nor does it rule out consideration of other factors. *Hernandez*, 8 OCAHO no. 1043, at 664. Thus, the ALJ may find certain mitigating or aggravating factors more compelling in the fact-specific context of one case than she would in another factually-distinguishable case. *See, e.g., March Constr., Inc.*, 10 OCAHO no. 1158, at 6 (finding that the original penalty amounts appeared "disproportionate to the current status and resources of the employer" and adjusting the penalties accordingly); *Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, at 12 ("[D]eterminative weight is given to the small size of the respondent and to other nonstatutory factors such as the depressed economy and the difficulty any displaced employee would have in finding other work.").

In any event, a multitude of more recent OCAHO decisions than those cited by respondent have assessed civil penalties consistent with those assessed against respondent here. *See, e.g.*, *United States v. Crescent City Meat Co.*, 11 OCAHO no. 1223 (2014) ($450 per violation); *United States v. Golf Int'l*, 11 OCAHO no. 1222 (2014) ($400-$500 per violation); *United States v. Senox Corp.*, 11 OCAHO no. 1219 ($500-$700 per violation); *Century Hotels Corp.*, 11 OCAHO no. 1218 ($400-$500 per violation); *United States v. New Outlook Homecare, LLC*, 10 OCAHO no. 1210 (2014) ($450 per violation). The penalty assessed against respondent in this case is not excessive, and appears just and reasonable based on a consideration of the record as a whole and the statutory factors in particular.

IV. CONCLUSION

In this case, the ALJ gave due consideration to each of the statutory factors, including the size of the business, the history of previous violations, the seriousness of the violations, whether the individuals involved were unauthorized aliens, and the good faith of the employer. In considering each of the statutory factors and the record as a whole, the ALJ substantially mitigated the penalty by almost half to an amount closer to the mid-range of permissible penalties, which was just, reasonable, and consistent with past OCAHO case law. Accordingly, the final decision and order of the ALJ is AFFIRMED.

[4] *See supra* note 3.

Under OCAHO regulations, the ALJ's order becomes the final agency order 60 days after the date of the ALJ's final decision and order, unless the CAHO modifies, vacates, or remands the order. 28 C.F.R. § 68.52(g). Because I have affirmed the ALJ's order, the ALJ's final decision and order will become the final agency order 60 days after its issuance by the ALJ. A person or entity adversely affected by a final agency order may file a petition for review of the final agency order in the appropriate United States Circuit Court of Appeals within 45 days after the date of the final agency order. 8 U.S.C. § 1324a(e)(8); 28 C.F.R. § 68.56.

It is SO ORDERED, dated and entered this 23rd day of October, 2014.

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Robin M. Stutman
Chief Administrative Hearing Officer