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

December 19, 2014

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 14A00023
KEEGAN VARIETY, LLC, Respondent.	)	

Appearances:

Mario J. Sturla
For complainant

William J. Smith
For respondent

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

This is an action pursuant to the employer sanction 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). On December 23, 2013, the United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a complaint, alleging that Keegan Variety, LLC (Keegan or the company), violated 8 U.S.C. § 1324a(a)(1)(B). The complaint's single count alleges that the company hired two individuals for whom it failed to prepare timely Employment Eligibility Verification Forms (Forms I-9).

Keegan filed a timely answer on January 27, 2014, in which it denied failing to prepare timely Forms I-9 for its two employees. However, Keegan's answer also set forth several affirmative defenses, one of which contains an admission that it operated "without knowledge of the I-9

requirements" and that it "completed the forms within three (3) days of notice of the requirements."

The parties completed prehearing procedures, after which ICE filed a motion for summary decision. Keegan filed a response in which it admitted liability for the two Forms I-9 violations. Summary decision will be entered as to liability for the two violations alleged, and the motion is ripe for resolution as to the penalties to be imposed.

II. FACTUAL BACKGROUND

Keegan Variety is a convenience store located in Van Buren, Maine. Karl and Tammy Searles own and operate Keegan, which is a small business employing two of Ms. Searles' family members: (1) Ms. Searles' mother, Gertrude Brown, who was hired in 2006 and works full-time; and (2) Ms. Searles' cousin, John Ayotte, who was hired in 2010 and works part-time. ICE served the company with a Notice of Inspection (NOI) and subpoena on April 22, 2013, requesting the production of Forms I-9 for all employees. ICE's audit revealed that the Forms I-9 for the company's two employees had not been prepared contemporaneous with their hiring, but that the Forms I-9 were prepared after service of the NOI in 2013. ICE served a Notice of Intent to Fine on August 19, 2013, and Keegan filed a timely request for a hearing. All conditions precedent to the institution of this proceeding are satisfied.

III. APPLICABLE LAW

Employers must complete Forms I-9 for each new employee hired after November 6, 1986, in order to document that the employer verified the employee's identity and employment authorization status. Pertinent regulations at 8 C.F.R. § 274a.2(b) establish that employers "must ensure" that Forms I-9 are completed either at the time of hire or within three days of hiring an employee. According to the parameters set forth at 8 C.F.R. § 274a.10(b)(2), civil money penalties are assessed for Form I-9 paperwork violations when an employer fails to properly prepare, retain, or produce the forms upon request.

The minimum penalty is $110 and the maximum penalty is $1,100 for each individual with respect to whom a paperwork violation occurs after September 29, 1999. In assessing an appropriate penalty, I must consider the following factors: 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). 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).

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). While the government bears the burden of proof with respect to the statutory factors, a party seeking consideration of a non-statutory factor, such as ability to pay the penalty, bears the burden of showing that the factor should be considered as a matter of equity and that the facts support a favorable exercise of discretion. *Cf. United States v. M & D Masonry, Inc.*, 10 OCAHO no. 1211, 11 (2014).

I have considered both statutory and non-statutory factors when evaluating the penalty assessed against Keegan and the arguments by ICE and Keegan related to the motion for summary decision. I grant in part ICE's motion for summary decision pursuant to 28 C.F.R. § 68.38. As set forth below, I find a reduced penalty assessment against Keegan appropriate in the exercise of discretion.

IV. DISCUSSION

ICE's motion seeks summary decision on the issues of liability and recovery of the penalty assessed against Keegan in the amount of $1,776.50. Because the company was 100 percent noncompliant by failing to complete any Forms I-9 on a timely basis for its two employees, ICE assessed a penalty at the maximum baseline first offense violation rate, less five percent for mitigation due to the small size of the business. Keegan filed an opposition to ICE's motion, and Keegan requests a hearing, a waiver of the entire penalty, and an award of attorney's fees.

A. I deny Keegan's request for an in-person hearing

Although Keegan, through counsel, requests a hearing, a hearing is not necessary in this case as there is no genuine issue of material fact in dispute. "Parties should not be put to the burden and expense of a hearing in the absence of any genuine issue of material fact." *United States v. Nebeker*, 10 OCAHO no. 1165, 2 (2013) (referencing *United States v. Aid Maint. Co.*, 7 OCAHO no. 951, 475, 478 (1997).[1]

[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 claimant has admitted liability for failure to complete Forms I-9 in a timely manner. Specifically, the evidence reveals Keegan's admissions that its full-time employee was hired in 2006, its part-time employee was hired in 2010, and it failed to complete Forms I-9 for these employees until 2013. *See* Forms I-9 completed April 2013. Because Keegan failed to complete Forms I-9 within three days of hiring the two employees, Keegan violated 8 C.F.R. § 274a.2(b). As such, there is no genuine issue of material fact with respect to liability for the paperwork violation.

Therefore, I find it appropriate to decide this case pursuant to ICE's motion for summary decision. As such, ICE is entitled to summary decision as to respondent's liability for two violations of 8 U.S.C. § 1324a(b). Because I find that mitigating factors are present in this case, I have further reduced Keegan's penalty in the exercise of discretion as explained in detail below.

B. Penalty Assessment

ICE has broad authority and discretion in assessing penalty amounts. *See United States v. Aid Maintenance Co.*, 8 OCAHO no. 1023, 321, 343 (1999) (citing *United States v. Ricardo Calderon, Inc.*, 6 OCAHO no. 832, 102, 109 (1996)). When ICE's penalty assessment is appropriate, the penalty amount need not be disturbed. *See United States v. Jonel, Inc.*, 8 OCAHO no. 1008, 175, 200 (1998) (approving proposed penalties after finding them within the statutory parameters and warranted by the evidence). However, when the proposed penalty assessment appears "disproportionate, and ICE was able to verify that the respondent did ensure that all the employees were work-authorized, the result can be adjusted." *United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6 (2011).

The government's guidelines for assessing penalty amounts have no binding effect in this forum. *See United States v. Sunshine Building & Maintenance, Inc.*, 7 OCAHO no. 997, 1122, 1175 (1998); *United States v. Fortune East Fashion, Inc.*, 7 OCAHO no. 992, 1075, 1078 (1998). Therefore, Administrative Law Judges may review the penalty question de novo. *United States v. Aid Maintenance Co.*, 8 OCAHO no. 1023, 321, 344 (1999).

1. The Five Statutory Factors

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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.

I have considered the five statutory factors in evaluating ICE's penalty levied against Keegan: 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). ICE determined that only one of the five factors served to mitigate the penalty. As set forth below, I find that reduction of the penalty against Keegan is warranted in the exercise of discretion based on several factors.

ICE assessed a penalty of $1,776.50, which represents a fine in the amount of $888.25 per violation for failure to prepare timely Forms I-9 for both of Keegan's employees. Pursuant to ICE's "baseline" penalty matrix and internal guidance, ICE reduced the initial standard penalty amount of $935 per violation by five percent to mitigate for the small business size. Keegan explains that it has only two employees: (1) Keegan's only full-time employee is the owner's mother, who works forty hours weekly; and (2) Keegan's part-time employee is the owner's cousin. I note that Keegan is one of the smallest employers to have requested a hearing before OCAHO. I find that due to the very small size of Keegan's family business, mitigation of the penalty is appropriate and adjustment of the penalty amount is warranted in the exercise of discretion.

ICE determined that the remaining four factors were "neutral" and that further adjustment of the penalty was not appropriate. In support of mitigating the "good faith" factor, Keegan argues that it acted in good faith because it was unaware of the Form I-9 requirements and because it cooperated with ICE. Although I find that the respondent did not act in bad faith, ignorance of the law is not an affirmative defense. I agree with ICE that this factor remains neutral.

I find that the paperwork violations in this case are serious because the respondent failed to complete any Forms I-9. "OCAHO case law has long held that failure to prepare an I-9 is one of the most serious violations because it completely subverts the purpose of the employment verification requirements." *United States v. Clean Sweep Janitor Serv.*, 11 OCAHO no. 1226, 4 (2014) (referencing *United States v. M & D Masonry, Inc.*, 10 OCAHO no. 1211, 11 (2014); *United States v. Skydive Acad. of Haw.*, 6 OCAHO no. 848, 235, 248-49 (1996)). In its motion for summary decision, ICE argued that this is a "neutral factor when the respondent claims to have had no knowledge of the Form I-9 requirements." Keegan argues that these violations are not serious because the employees were family members and there was no risk of hiring unauthorized aliens. Based on OCAHO precedent, I concur with ICE that Keegan's violations are serious and that this factor remains neutral. As such, I find that mitigation of this factor is not appropriate.

In this case, there is no involvement of unauthorized aliens. Moreover, Keegan has hired only two employees since 2006 and both of these employees are family members known to be citizens of the United States. Keegan argues that these facts support mitigation. Although ICE found this

to be a neutral factor, I agree with Keegan and find that these facts warrant mitigation of the penalty in the exercise of discretion. *See United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6 (2011).

There is no history of prior violations. OCAHO case law supports treating this factor as neutral where there are no prior violations. *See United States v. New China Buffet Rest.*, 10 OCAHO no. 1133 (2010). Although Keegan argues for mitigation of this factor, I find this factor to be neutral and find that mitigation is not appropriate.

2. Non-Statutory Factors: Keegan's ability to pay and leniency under the SBREFA

Keegan business owner Tammy Searles filed an affidavit dated July 28, 2014. In the affidavit, Ms. Searles explains her alleged inability to pay the assessed penalty due to Keegan's operational losses in the amount of $43,977 during 2012 and in the amount of $10,043 during 2013. OCAHO case law establishes that a "respondent's ability to pay a proposed fine may be an appropriate factor to be weighed in assessing the amount of the penalty." *United States v. Mr. Mike's Pizza, Inc.*, 10 OCAHO no. 1196, 3 (2013) (referencing *United States v. Pegasus Rest. Inc.*, 10 OCAHO 1143, 7 (2012)). In the exercise of discretion, I have considered these facts when weighing the assessed penalty amount.

Moreover, Keegan is a very small business, with only one full-time employee and one part-time employee, both of whom are family members known to be citizens of the United States. In *United States v. Red Bowl of Cary, LLC, Inc., d/b/a Red Bowl Asian Bistro*, 10 OCAHO no. 1206, 4-5 (2013), the Administrative Law Judge exercised discretion and found it appropriate to reduce the penalties for the Form I-9 violations to the "midrange of permissible penalties" in light 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)." Additionally, in *United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 7 (2011), the Administrative Law Judge assessed a penalty in "the lower midrange" at $250 per violation primarily on account of "the size and nature of the business, the efforts it undertook to avoid hiring any unauthorized workers, and its ability to pay."

Similar to the analysis in *Ice Castles* and *Red Bowl* and consistent with the SBREFA, I find that the penalty in the instant case should be reduced in the exercise of discretion. Penalty adjustment to the lower midrange of permissible penalties is warranted due to the small size of the business, the fact that no unauthorized aliens have been hired, the fact that since 2006 Keegan has hired only two employees who are relatives known to be citizens of the United States, the general public policy toward leniency to small business entities, and Keegan's reduced ability to pay the

proposed fine on account of operating losses suffered in 2012 and 2013. Accordingly, I find that in the exercise of discretion, the proposed penalty in this case should be reduced to the lower midrange of permissible penalties from a total penalty originally assessed at $1,776.50 to a total penalty of $500, which equates to $250 per violation. Consistent with the findings in *Ice Castles*, *Red Bowl* and *Mr. Mike's Pizza*, Keegan's small family business with two employees is precisely the type of enterprise that should benefit from penalty mitigation and the general public policy of leniency to small entities set out in the SBREFA.

3. I deny Keegan's request for waiver of penalty

In its opposition to ICE's motion for summary decision, Keegan argues that the penalties assessed in this case should be "waived." However, the regulations at 8 C.F.R. § 274a.10(b)(2) set forth that "[a] respondent determined . . . to have failed to comply with the employment verification requirements . . . *shall* be subject to a civil penalty . . ." (emphasis added). Because I find that Keegan failed to comply with the employment verification requirements, assessment of a penalty is required by regulation. Moreover, OCAHO precedent case law establishes that "IRCA does not provide the option of waiving the penalty or of imposing a fine of less than $100.00 per violation found. IRCA does not state a range of between $0.00 and $1,000 for penalty amounts." *United States v. Applied Computer Tech.*, 2 OCAHO no. 367, 524, 529 (1991) (modification by CAHO). Accordingly, I deny Keegan's request for waiver of the penalty.

C. I deny Keegan's request for Attorney's Fees

Keegan argues that because ICE has made "an excessive demand," Keegan should be awarded attorneys' fees pursuant to section 224 of the SBREFA. However, awards of attorneys' fees in this forum are governed by 28 C.F.R. § 68.52(c)(9), which states in pertinent part that a "prevailing respondent may receive an award of attorney's fees," but that "an award of attorney's fees will not be made if the Administrative Law Judge determines that the complainant's position was substantially justified." Moreover, the Equal Access to Justice Act provides the authority and standard for awarding attorney's fees to a prevailing party, other than the United States, in federal administrative proceedings pursuant to 5 U.S.C. § 504.

Despite Keegan's argument that it should be awarded attorneys' fees, the evidence of record demonstrates that ICE was substantially justified in its position. Moreover, Keegan is not a prevailing party who is entitled to attorneys' fees, especially in light of its liability for committing serious violations of the INA. 5 U.S.C. § 504; 28 C.F.R. § 68.52(c)(9). Accordingly, an award of attorneys' fees is not appropriate in this matter, and I deny the request for attorneys' fees.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Keegan Variety, LLC, is a domestic business incorporated, registered, owned, and directed by Karl and/or Tammy Searles.

2. The United States Department of Homeland Security, Immigration and Customs Enforcement, served Keegan Variety, LLC, with a Notice of Inspection on April 22, 2013.

3. The Department of Homeland Security, Immigration and Customs Enforcement, served Keegan Variety, LLC, with a Notice of Intent to Fine on August 19, 2013.

4. Keegan Variety, LLC, filed a request for hearing on August 28, 2013.

5. Keegan Variety, LLC, hired Gertrude Brown in 2006 and John Ayotte in 2010 but failed to prepare and/or present Forms I-9 for these employees until 2013.

6. Keegan Variety, LLC, is a small business with no history of previous violations .

7. The United States Department of Homeland Security, Immigration and Customs Enforcement, did not suggest and the record does not reflect that Keegan Variety, LLC, acted in bad faith at any time relevant to this matter.

8. No specific individual employed by Keegan Variety, LLC, was shown to be an alien not authorized for employment in the United States.

B. Conclusions of Law

1. Keegan Variety, LLC, 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. "Parties should not be put to the burden and expense of a hearing in the absence of any genuine issue of material fact." *United States v. Nebeker*, 10 OCAHO no. 1165, 2 (2013) (referencing *United States v. Aid Maint. Co.*, 7 OCAHO no. 951, 475, 478 (1997)).

4. Keegan Variety, LLC, is liable for two violations of 8 U.S.C. § 1324a(a)(1)(B).

5. In assessing the appropriate penalty, an Administrative Law Judge must consider the following factors: 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 prepare a Form I-9 is one of the most serious violations because it completely subverts the purpose of the employment verification requirements. *United States v. Clean Sweep Janitor Serv.*, 11 OCAHO no. 1226, 4 (2014).

7. A respondent's ability to pay a proposed fine may be an appropriate factor to be weighed in assessing the amount of the penalty. *United States v. Mr. Mike's Pizza, Inc.*, 10 OCAHO no. 1196, 3 (2013).

8. When weighing factors to assesses the penalty amount, an Administrative Law Judge may exercise discretion and consider 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)." *United States v. Red Bowl of Cary, LLC, Inc.*, 10 OCAHO no. 1206, 4-5 (2013).

9. Assessment of a penalty is required by 8 C.F.R. § 274a10(b)(2), which sets forth that "[a] respondent determined . . . to have failed to comply with the employment verification requirements . . . shall be subject to a civil penalty . . . . " *See United States v. Applied Computer Tech.*, 2 OCAHO no. 367, 524, 529 (1991) (modification by CAHO).

10. An award of attorney's fees is unavailable to a respondent who is not the prevailing party, and attorney's fees will not be awarded if the Administrative Law Judge determines that ICE's position was substantially justified. 5 U.S.C. § 504; 28 C.F.R. § 68.52(c)(9).

ORDER

ICE's motion for summary decision is granted in part. Keegan Variety, LLC, is liable for two violations of 8 U.S.C. § 1324a(a)(1)(B) and is directed to pay civil penalties in the total amount of $500. The parties are free to establish a payment schedule in order to minimize the impact of the penalty on the operations of the company.

SO ORDERED.

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

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Stacy S. Paddack
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).
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.