Published 3/11/16 12 OCAHO no. 1270

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

March 10, 2016

UNITED STATES OF AMERICA, Complainant, v. SAFE-AIR OF ILLINOIS, INC., Respondent.	))))))))	8 U.S.C. § 1324a Proceeding OCAHO Case No. 15A00023

FINAL DECISION AND ORDER

Appearances:

Joseph M. Yeung
for the complainant

Joshua D. Holleb
for the respondent

I. PROCEDURAL HISTORY

The U.S. Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a complaint in three counts with the Office of the Chief Administrative Hearing Officer (OCAHO) on January 14, 2015, alleging that Safe-Air of Illinois (Safe-Air or the company) engaged in thirty-nine violations of the employment eligibility verification provisions of 8 U.S.C. § 1324a(b) and 8 C.F.R. § 274a.2(b). The government seeks civil money penalties of $34,969. The matter arises under 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).

Count I asserts that the company failed to prepare or present I-9 forms for Francisco (Frank) Ruiz and Judith Magnus. Count II asserts that Safe-Air failed to properly complete section 2 of Form I-9 for thirty named employees, and Count III asserts that Safe-Air failed to properly complete section 2 of Form I-9 for Fernando Alvarez, Jose Esquivel, Juan Gonzalez, Francisco Huerta, Rosemary Jimenez, Amando Lara, and Matias Vibanco.[1]

Safe-Air filed an answer denying that it failed to prepare an I-9 for Francisco (Frank) Ruiz, but admitting the remaining factual allegations and contesting the amount of the penalties sought to be imposed. The parties subsequently agreed upon twelve stipulations, which are adopted herein as findings of fact. These stipulations were sufficient to establish liability for Counts II and III, but not for the allegation in Count I with respect to the I-9 for Francisco (Frank) Ruiz. At a prehearing conference conducted on August 25, 2015, however, Safe-Air acknowledged facts sufficient to find liability as to this allegation as well.

ICE's penalty request is explained in documents accompanying the government's prehearing statement. Safe-Air agreed to produce updated financial information to ICE, and the parties were given a period of time thereafter to engage in settlement discussions. A schedule was established for the company to file its updated documents or materials in the event that settlement was not achieved, and for ICE to file a response. No settlement resulted, the scheduled filings have been completed, and the matter is ripe for adjudication.

II. BACKGROUND INFORMATION

Safe-Air specializes in sheet metal work and manufacturing, and has been doing business in Cicero, Illinois since 1987. At the time of the ICE inspection the company employed about forty-two workers. The owner of the company is Michael Friedman and the office manager is Judith Magnus. ICE issued a Notice of Inspection (NOI) to Safe-Air on March 28, 2014, followed by a Notice of Suspect Documents (NSD) and a simultaneous Notice of Technical and Procedural Failures (NTPF) on May 28, 2014. A Notice of Intent to Fine (NIF) was served on the company on July 30, 2014. Safe-Air filed a timely request for hearing and all conditions precedent to the institution of this proceeding have been satisfied.

[1] Although the factual allegations in Counts II and III involve similar violations, Count III was evidently set out separately because the government found the seven individuals named in that count to be unauthorized for employment in the United States. Safe-Air terminated each of these seven employees and does not contest their unauthorized status.

III. THE POSITIONS OF THE PARTIES

A. The Vasquez Memorandum and Declaration

ICE's initial penalty calculation is predicated on a memorandum from Special Agent Susan K. Vasquez dated June 25, 2014 (Ex. G-16 with ICE's prehearing statement), and the Declaration of Special Agent Susan K. Vasquez dated April 24, 2015 (Ex. G-21 with ICE's prehearing statement). The documents reflect in pertinent part that in setting the penalties, Vasquez determined that the company's violation rate was ninety-five percent inasmuch as thirty-nine out of Safe-Air's forty required I-9s had substantive violations. Based on agency guidance, this resulted in a baseline penalty of $935 for each violation.

The government's memorandum reflects that penalties were then mitigated by five percent because Safe-Air is a small business, but the factors of good faith, seriousness of the violations, and the absence of any past history of violations were treated as neutral, warranting neither aggravation nor mitigation. The memorandum states finally that while ten individuals were initially identified as having suspect documents, three were able to provide valid documentation and continue their employment. The remaining seven, Fernando Alvarez, Jose Esquivel, Juan Gonzalez, Francisco Huerta, Rosemary Jimenez, Amando Lara, and Matias Vibanco, were terminated and the penalties for the violations involving their I-9s were enhanced by five percent.

The government's calculations resulted in an assessment of $888.25 for each of thirty-two violations in Counts I and II, and $935 for each of seven violations in Count III, and a total of $34,969.00.

B. Safe-Air's Filing

Safe-Air filed a brief accompanied by the Declaration of Michael Friedman and the following exhibits: 1) 2012 Tax Return; 2) 2013 Tax Return; 3) 2014 Tax Return, 4) Summary of Statement of Income for the Month Ended June 30, 2015, and 5) Notice of Tax Sale for Safe-Air's building and property Located at 1855 South 54th Avenue, Chicago, IL 60804.

Safe-Air says it is a small manufacturer of louvers and vents used in construction, and has struggled for years to survive in what is a highly competitive industry. The company says it was particularly affected by the global recession starting in 2007, and that a steep slide occurred in 2013 as well. Safe-Air says its circumstances have changed since the inspection inasmuch as it is now down to twenty-seven employees, "teeters on the edge of bankruptcy," and has had its business premises sold for delinquent taxes. Respondent's Brief at 2. The company says in addition that it is indebted to the Internal Revenue Service for more than $40,000, and also owes unpaid real estate taxes, so it cannot obtain credit from most of its suppliers. Safe-Air also

reports that notes for $307,000 and $170,000 owing to J.P. Morgan Chase were called in April 2015, and that its ability to pay any fine is severely restricted.

In addition, Safe-Air argues that most of the statutory factors weigh in its favor, and should not have been treated as neutral, but should have resulted in greater mitigation of the penalty. In particular, Safe-Air says its good faith and prior history should have resulted in a significantly lower assessment. The company also says that because it completed I-9s for all the employees, it was substantially in compliance with the law.

C. ICE's Response

ICE questions the accuracy and reliability of Safe-Air's exhibits, pointing out that the financial statements and tax returns the company recently submitted had not been audited or certified. The government characterizes Safe-Air's indebtedness to IRS and for property taxes as evidence of "a pattern of consistent disdain and disregard for its legal and financial obligations to the local and federal government." Complainant's Response at 3. It notes, moreover, that while Safe-Air says the fine should have been mitigated for its good faith cooperation with the investigation, good faith is not measured by the employer's conduct during the inspection, but by its conduct prior to the inspection, citing *United States v. Durable, Inc*., 11 OCAHO no. 1229, 14 (2014).[2] The government also argues that there is no legal basis for a claim of substantial compliance where almost 100% of the employer's I-9 forms contain substantive violations, citing *United States v. Hartmann Studios, Inc*., 11 OCAHO no. 1255, 14 (2015).

ICE's response was accompanied by exhibits G-22) the Declaration of Auditor Jeffrey Sanford and G-23) Review of Assets and Liabilities. The Sanford Declaration points out that the proposed fine represents less than one percent of Safe-Air's total sales in 2014, and that the company's own financial information from 2012, 2013, and 2014 was used because the figures provided for 2015 included only data through June and no balance sheet was included. Sanford says he used the company's current ratio, net working capital, and net assets, or shareholder's equity, to prepare a table for the three years in question. While the declaration acknowledged that the calculations from 2013 to 2014 began to trend in a negative direction, Sanford said the information from the first half of 2015 might even indicate some improvement over 2014.

[2] 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.

IV. DISCUSSION AND ANALYSIS

Civil money penalties are assessed for paperwork violations according to the parameters set forth in 8 C.F.R. § 274a.10(b)(2) (2013): 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. 8 C.F.R. § 274a.10(b)(2). For the thirty-nine violations in this case, potential penalties range from $4290 to $42,900. In assessing the appropriate amounts of civil money penalties for violations of 8 U.S.C. §1324a(b), the law requires consideration of the following factors: 1) the size of the business of the employer, 2) the good faith of the employer, 3) the seriousness of the violation(s), 4) whether or not the individuals involved were unauthorized aliens, and 5) any history of previous violations. 8 U.S.C. § 1324a(e)(5).

The government has the burden of proof with respect to the penalty, *United States v. March Construction, Inc.*, 10 OCAHO no. 1158, 4 (2012), and 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 does not require that equal weight be given to each of the mandatory factors, nor does it rule out consideration of additional factors, such as a company's ability to pay the proposed penalty. *See United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000).

OCAHO case law has often observed that proportionality is the key to assessing penalties. *See, e.g., United States v. Monadnock Mountain Spring Water, Inc.*, 10 OCAHO no. 1193, 4 (2013); *United States v. A&J Kyoto Japanese Rest.*, 10 OCAHO no. 1186, 8 (2013) (rejecting proposed penalty as out of proportion to the nature of the business and the degree of culpability). There should be a rational relationship between the magnitude of an offense and the penalty assessed. *See United States v. New Sun Transit, Inc*., 10 OCAHO no. 1194, 3-4 (2013) (in determining a penalty, one guideline is the relationship between the fine and the nature of the offense). 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), while at the same time not being unduly punitive in light of the particular respondent's resources, *United States v. Minaco Fashions, Inc.*, 3 OCAHO no. 587, 1900, 1909 (1993).

Our case law has also emphasized that penalties at or near the maximum permissible should be reserved for the most egregious violations. *See, e.g., United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013). While the violations here are serious, they cannot be characterized as egregious. Seriousness, moreover, may be evaluated on a continuum, because not all violations are equally serious. *New Sun Transit*, 10 OCAHO no. 1194 at 4. Failure to prepare an I-9 at all is among the most serious of paperwork violations, *United States v. MEMF LLC*, 10 OCAHO no. 1170, 5 (2013), and generally warrants a higher penalty than do errors or omissions in completing the form.

Here, the company is small, there is no suggestion of bad faith, nor is there any history of previous violations. These factors weigh in favor of leniency. I consider as well the company's financial situation, and conclude in light of the record as a whole and the statutory factors in particular, that the proposed assessment is unduly harsh. It will accordingly be adjusted as a matter of discretion to a result closer to the mid-range of permissible penalties. For the two violations in Count I involving failure to prepare I-9s, the penalties will be set at $550 for each violation. For the thirty violations in Count II, the penalties will be $450 for each violation. Because the seven violations in Count III involved unauthorized workers, the penalties for those violations will be $550 each. The overall total is $18,450.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Stipulations

1. At all times relevant to this matter, Respondent was and is duly authorized and registered to do business in the State of Illinois.

2. All individuals listed in Counts I, II, and III of the Complaint were employees of Respondent during the relevant period.

3. All employees of Respondent named in the Complaint were hired on or after November 6, 1986.

4. On March 28, 2014, ICE served a Notice of Inspection (NOI) and Subpoena on Judith Magnus, Office Manager for Safe-Air of Illinois, Inc. [See Exhibits G-1 and G-2].

5. On or about April 7, 2014, ICE received the following information for Safe-Air of Illinois, Inc. in response to ICE's NOI and request for information:

(a) Original Forms I-9 and copies of documents presented by employees at the time of hire and thereby incorporated into the Forms I-9; [See Exhibit G-3].
(b) A list of 43 Safe-Air of Illinois, Inc. current employees and corporate officers with dates of hire; [See Exhibit G-4].
(c) A copy of current payroll reports dated April 4, 2014 [See Exhibit G-5]; and
(d) A copy of the State of Illinois Corporate Annual Report and Articles of Incorporation for Safe-Air of Illinois, Inc., and the Corporate Annual Report and Articles of Amendment to the Articles of Incorporation for Safe-Air of Illinois, Inc.

6. On May 28, 2014, ICE served a Notice of Technical or Procedural Failures on Safe-Air of Illinois, Inc. [See Exhibit G-6]. The Notice of Technical or Procedural Failures indicated that one (1) Form I-9 was found to have technical or procedural failures and included copies of the Form I-9 with the technical or procedural failures highlighted or circled in ink. ICE provided

Safe-Air of Illinois, Inc. until June 9, 2014 to make the necessary corrections to the Form I-9 and/or acknowledge the technical or procedural failures that could not be corrected.

7. ICE also served a Notice of Suspect Documents on Safe-Air of Illinois. [See Exhibit G-7]. The Notice of Suspect Documents listed the names of the 10 employees who did not appear to be authorized to work in the United States based on documentation submitted with and listed on the I-9. ICE informed Safe-Air of Illinois, Inc. that any employee that wished to dispute their inclusion on the notice of Suspect Documents could present new or additional documentation to show their employment authorization during an interview with ICE. Three of the 10 employees were later able to provide valid documentation.

8. On June 9, 2014, ICE collected a Termination Letter from Safe-Air of Illinois, Inc. which listed the names and termination dates of the seven unauthorized employees [See Exhibit G-8]. On the same date, A Change to Notice of Inspection Results was served to Safe-Air of Illinois, Inc. which listed the three employees that were able to provide valid documentation [See Exhibit G-9]. The corrected I-9 which contained technical failures was verified as corrected at that time.

9. The documents provided by Respondent to ICE in response and subsequent to the NOI and adminstrative subpoena were the original documents and/or true and accurate copies thereof as directed in the administrative subpoena.

10. On or about July 30, 2014, ICE served Safe-Air of Illinois, Inc., with the NIF totaling $34,969.00 [See Exhibit G-10], which consisted of the following counts:

> Count I - Failed to Prepare and/or Present the Employment Eligibility Form (Form I-9).
> Count II - Failed to Properly Complete Section 2 of the Employment Eligibility Verification Form (Form I-9).
> Count III - Failed to Properly Complete Section 2 of the Employment Eligibility Verification Form (Form I-9) - Unauthorized Employees.

ICE provided Safe-Air of Illinois, Inc. with copies of the Charging Document [See Exhibit G-11], which identified the Forms I-9 associated with each count, and a document explaining the calculation of the NIF amount. [See Exhibits G-19 and 20]. ICE also provided the Respondent with copies of the Forms I-9 associated with each count [See Exhibit G-12 through 15] and explained that the substantive violations were highlighted in pink.

11. On or about August 15, 2014, ICE received a letter via email and Federal Express from Safe-Air's attorney, Joshua Holleb, Klein Dub & Holleb, Ltd. In his letter, Holleb disagreed with and objected to the Notice of Intent to Fine and requested a hearing. [See Exhibit G-18]

12. In its Answer to the Complaint, Respondent admitted to have failed to comply with the requirements of 8 U.S.C. § 1324(a)(b) in violation of 8 U.S.C. § 1324a(a)(1)(B) as alleged in the Complaint, except for the Form I-9 relating to Francisco Ruiz in Count I.

B. Additional Factual Findings

13. At a prehearing conference conducted on August 25, 2015, Safe-Air acknowledged facts sufficient to find liability for failure to present an I-9 form for Francisco (Frank) Ruiz.

14. The parties were given an opportunity to present evidence and argument respecting the question of appropriate penalties.

C. Conclusions of Law

1. Safe-Air of Illinois is an entity within the meaning of 8 U.S.C. § 1324a(a)(1) (2014).

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

3. Safe-Air of Illinois is liable for thirty-nine violations of 8 U.S.C. § 1324a(a)(1)(B) (2014).

4. The government has the burden of proof with respect to the penalty, *United States v. March Construction, Inc.*, 10 OCAHO no. 1158, 4 (2012), and 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).

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).

6. The governing statute, 8 U.S.C. § 1324a(e)(5), neither requires that equal weight be given to each statutory factor, nor rules out consideration of additional factors, such as a company's ability to pay the proposed penalty. *United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000).

7. 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).

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

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

Safe-Air of Illinois is liable for thirty-nine violations and is directed to pay civil money penalties totaling $18,450. The parties are encouraged to enter a schedule for installment payments to minimize the impact on Safe-Air's business.

SO ORDERED.

Dated and entered this 10th day of March, 2016.

_____
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).

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.