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

November 30, 2016

UNITED STATES OF AMERICA, Complainant, v. INTERNATIONAL PACKAGING, INC., Respondent.	))))))))	8 U.S.C. § 1324a Proceeding OCAHO Case No. 12A00005

FINAL DECISION AND ORDER

Appearances

Terry M. Louie
for the complainant

DeAnne Hilgers
for the respondent

I. PROCEDURAL HISTORY

The Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a two-count complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that International Packaging, Inc. (International Packaging, IPI, or the company) engaged in ninety-five violations of the employment eligibility verification requirements 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 April 14, 2016, Administrative Law Judge Ellen K. Thomas, who previously presided over this matter, granted in part the government's Motion for Partial Summary Decision and found IPI liable for twenty-one violations involving failure to prepare and/or present Forms I-9 and seventy-three violations involving the failure to properly complete Forms I-9, for a total of

ninety-four violations.[1] *See United States v. International Packaging, Inc.*, 12 OCAHO no. 1275 (2016).[2] Judge Thomas also gave IPI until May 16, 2016, to update and supplement its previous filings with respect to the issue of penalties. If IPI filed supplemental evidence, Judge Thomas gave the government until June 10, 2016, to file a response. IPI filed a supplemental memorandum on May 13, 2016. No response was filed by the government. The penalty issue is accordingly 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, and before November 2, 2015, is $110, and the maximum is $1100. *See also* 28 C.F.R. §§ 85.1 & 85.5. 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), 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 statutory 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) (each factor's significance is based on the specific facts in the case). 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). Although the statutory factors must be considered in every case, there is otherwise no single method mandated for calculating civil money penalties for violations of 8 U.S.C. §

[1] One alleged violation was dismissed, and IPI's Motion for Partial Summary Decision was denied.

[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.

1324a(a)(1)(B). *United States v. Senox Corp.*, 11 OCAHO no. 1219, 4 (2014); *see also United States v. Red Coach Rest., Inc.*, 10 OCAHO no. 1200, 3 (2013) (affirmance by the CAHO noting decisions using varied approaches to calculating penalties). ICE's penalty calculations are not binding in OCAHO proceedings, and penalties may be examined *de novo* by the Administrative Law Judge if appropriate. *See United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6 (2011).

III. THE POSITIONS OF THE PARTIES

A. The Government's Motion

Although the government did not file a response to IPI's supplemental memorandum, its brief in support of its earlier Motion for Partial Summary Decision asserted that baseline penalties of $935 for each violation were appropriate, that IPI's size is a mitigating factor, that the seriousness of the violations is an aggravating factor, and that the remaining statutory factors should be treated as neutral. A Memorandum to Case File, Determination of Civil Money Penalty (Ex. G-45) accompanying the government's motion sets out the procedure and rationale for the penalty sought. The exhibit reflects that ICE set a baseline penalty of $935 for each violation as called for by the government's penalty matrix based on a violation rate of 62%.[3] The mitigating factor of IPI's size canceled out the aggravating factor of the seriousness of the violations, and the government treated the remaining statutory factors as neutral; thus, the baseline assessment of $935 per violation became the final proposed penalty amount. Accordingly, the government proposed a total civil monetary penalty of $88,825.00 for the ninety-five violations alleged in the complaint.

B. International Packaging's Position

In Respondent's January 23, 2012, Opposition to Complainant's Motion for Partial Summary Decision (Respondent's Opposition), the company argued that the government's proposed fine is disproportionate and that a reduction is warranted based on a review of the statutory and non-statutory factors. Specifically, IPI asserted that it is a small company that demonstrated good faith before, during, and after ICE's audit. IPI noted that it sought counsel prior to the audit in an attempt to be fully compliant with employer verification requirements, it fully cooperated with the government's investigation, and it subsequently took several steps to ensure compliance going forward, including among others, enrolling in E-Verify. Respondent's Opposition at 15-

[3] According to the government's Memorandum, IPI timely presented 131 Forms I-9 for inspection when the total number of Forms I-9 that should have been presented was 152. The government further determined that Respondent committed 95 violations out of 152 required Forms I-9, resulting in a 62% violation rate.

17. Further, IPI stated that the company's ability to pay the fine should be considered as a mitigating non-statutory factor due to the company's difficult financial situation. *Id.* at 18.

On May 13, 2016, Respondent filed a supplemental memorandum regarding the status of penalty (hereinafter "Supplemental Memo"). The supplemental memorandum contains several enclosures, including affidavits from Mary Jo Morales, IPI's owner and Chief Financial Officer (CFO), and Richard Breitman, an immigration attorney who has advised Ms. Morales since 1984. The supplemental memorandum also contained documents regarding the company's financial situation from 2012 to early 2016. IPI reiterated its position in its supplemental memorandum that the proposed penalty should be substantially reduced for three, principal reasons: (1) good faith; (2) OCAHO precedent; and (3) ability to pay.

1. Good Faith

IPI contends that it made good faith efforts to comply with the employment eligibility verification requirements, noting in particular that several years prior to the government's investigation it sought legal advice from an attorney, Richard Breitman, to ensure compliance. *See* Supplemental Memo, Breitman Aff. at 4-5. IPI states that despite ultimately being found liable for ninety-four violations, the fact that it sought legal advice and reasonably interpreted that which was given, demonstrates "its good-faith attempts to do what it believed was the right thing to do," which warrants a reduction in penalty. Supplemental Memo at 2.

2. OCAHO Precedent

Respondent cites to OCAHO precedent to support a reduction in the proposed penalty. Specifically, IPI contends that its situation is similar to that of the respondent in *United States v. Platinum Builders of Central Florida, Inc.*, 10 OCAHO no. 1199 (2013), in which the respondent's penalty was reduced from $1,028.50 per violation to $500 per violation for violations involving failure to prepare and/or present Forms I-9 and to $300 per violation for less serious paperwork violations. IPI asserts that if it were treated the same way as the respondent in *Platinum Builders*, then its total penalty would be $32,400. It further asserts that it should be treated more leniently than the respondent in Platinum Builders because of its pre-inspection efforts and its inability to pay the proposed penalty amount. Supplemental Memo at 2-3.

3. Ability To Pay

Respondent's Supplemental Memo states that "[t]here is simply no possibility that IPI can pay the amounts that ICE seeks and stay in business." Supplemental Memo at 3. Enclosed with the Supplemental Memo is an affidavit from Mary Jo Morales, the company's owner and Chief Financial Officer that reiterates, "[b]ased on its current financial status, IPI is unable to pay the proposed penalty in this case." *Id.*, Morales Aff. at 10. Respondent also submitted accounting

information about its financial health, including Balance Sheets and Profit & Loss Statements, from fiscal year 2012 through part of fiscal year 2016.

Based on the abovementioned factors, IPI requests that the penalty be set at $350 for the twenty-one violations involving failure to prepare and/or present Forms I-9, and $200 for the seventy-three remaining substantive paperwork violations, for a total penalty of $21,950.

IV. DISCUSSION

International Packaging was ultimately found liable for twenty-one violations involving failure to prepare and/or present Forms I-9 and seventy-three violations of failure to properly complete Forms I-9, for a total of ninety-four violations. The permissible penalties for these violations range from a minimum of $10,340 to a maximum of $103,400. The goal in calculating civil penalties is to set a sufficiently meaningful fine to promote future compliance without being unduly punitive. *See United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013).

The seriousness of International Packaging's violations may be evaluated on a continuum because not all violations are equally serious. *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 8 (2010). Failure to prepare an I-9 at all generally warrants a higher penalty than do errors or omissions in completing the form. *See United States v. MEMF LLC*, 10 OCAHO no. 1170, 5 (2013); *see also United States v. Buffalo Transportation, Inc.*, 11 OCAHO no. 1263, 12 (2015). OCAHO case law has consistently viewed failure to prepare an I-9 at all as being among the most serious of possible violations because it frustrates the national policy intended to ensure that unauthorized aliens are excluded from the workplace. *See United States v. Super 8 Motel*, 10 OCAHO no. 1191, 14 (2013).

A. Five Statutory Factors

I have considered the five statutory factors in evaluating the appropriateness of ICE's proposed penalty against International Packaging: 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).

As both ICE and IPI have noted, mitigation of the penalty is warranted given that International Packaging is a small, family-owned business, with approximately sixty-five employees. *See United States v. Carter*, 7 OCAHO no. 931, 121, 162 (1997) (noting that OCAHO case law generally considers businesses with fewer than 100 employees to be small businesses).

ICE indicated that the company's violations, particularly failing to prepare and/or present Forms I-9, evinced some lack of good faith, but it nevertheless elected to treat that factor as neutral. The evidence shows, however, that some mitigation is warranted. "[T]he primary focus of a

good faith analysis is on the respondent's compliance *before* the investigation." *United States v. New China Buffet Rest.*, 10 OCAHO no. 1133, 5 (2010) (citing *United States v. Great Bend Packing Co.*, 6 OCAHO no. 835, 136 (1996)); *United States v. Chef Rayko, Inc.*, 5 OCAHO no. 794, 582, 592 (1995) (modification by the CAHO)). Prior to 2003, Respondent sought the advice of an immigration attorney regarding its Form I-9 completion and retention practices, and it utilized an attorney who had advised its owner and CFO on immigration matters for several years. Breitman Aff. at 1-2. Although Respondent's reliance on that advice may have inadvertently caused some subsequent confusion during ICE's investigation, which, in turn, may have contributed to some of the violations at issue in the present case, Respondent's willingness to seek legal advice regarding its Forms I-9 from an immigration attorney several years prior to ICE's investigation nevertheless suggests a good-faith effort at compliance which, concomitantly, warrants some mitigation of its penalty on the particular facts of its case.

With regard to seriousness of the violations, as noted above, "[p]aperwork violations are always potentially serious," and, therefore, aggravation of the penalty is warranted. *United States v. Skydive Acad. of Haw. Corp.*, 6 OCAHO no. 848, 235, 245 (1996). ICE has shown that Respondent failed to prepare and/or present Forms I-9 for the twenty-one individuals named in Count I. As this is the most serious of paperwork violations, a higher penalty will be assessed for these twenty-one violations. On a continuum of seriousness, the seventy-three violations in Count II for which Respondent was found liable are slightly less serious than the complete failure to prepare Forms I-9 altogether. Thus, while aggravation of the penalty is warranted for the seriousness of those violations, it is warranted to a lesser degree than for the violations found in Count I.

Although the government states that nineteen of Respondent's employees were identified as suspected unauthorized aliens and that all nineteen were eventually terminated from employment by the Respondent, the evidence of record does not sufficiently establish the presence of unauthorized aliens to warrant aggravation of the penalty for that reason. *See Platinum Builders*, 10 OCAHO no. 1199 at 9 (noting that "suspicion alone" does not warrant aggravation of the statutory factor considering whether an individual was an unauthorized alien). The government bears the burden of proof with respect to the penalty, *March Construction, Inc.*, 10 OCAHO no. 1158 at 4, and must prove the existence of any aggravating factor by a preponderance of the evidence, *Carter*, 7 OCAHO no. 931 at 159; however, nothing in 8 U.S.C. § 1324a(e)(5) requires the five statutory factors to be considered solely on a binary scale, and it does not ineluctably follow in every case that a factor found not to be aggravating must, therefore, necessarily and automatically be found to be mitigating. The government treated the presence of unauthorized aliens as a neutral factor in the instant case, and the record as a whole supports finding this factor to be neutral.

The record does not reveal any history of previous violations by IPI; however, "a finding that respondent does not have a history of previous violations does not automatically entitle the respondent to mitigation of the civil penalty based on this factor." *Red Coach Rest.*, 10 OCAHO

no. 1200 at 4. As OCAHO case law instructs, "never having violated the law before does not necessarily warrant additional leniency, and it is still appropriate to treat this factor as a neutral one." *United States v. New China Buffet Rest.*, 10 OCAHO no. 1133, 6 (2010). Consequently, I find that this factor is properly treated as neutral.

B. Non-statutory Factors

A party seeking consideration of a non-statutory factor, such as ability to pay the penalty, bears the burden of proof in showing that the factor should be considered as a matter of equity, and that the facts support a favorable exercise of discretion. *See United States v. Buffalo Transp., Inc.*, 11 OCAHO no. 1263, 11 (2015) (citing *United States v. Century Hotels Corp.*, 11 OCAHO no. 1218, 4 (2014)).

Respondent argues that imposition of the fine will cause the company to go out of business, which is an appropriate factor to consider in setting a civil monetary penalty. *See United States v. Niche, Inc.*, 11 OCAHO no. 1250, 11 (2015). The financial evidence provided by Respondent is somewhat equivocal and reflects both positive and negative fluctuations over the past few years. Moreover, the affidavit from IPI's CFO, Ms. Morales, is conclusory and sheds little light on the company's overall financial health other than to state that IPI could not pay ICE's proposed penalty. The record does show a decline in IPI's financial condition from late 2015 through early 2016, but compared to records from prior years, it is unclear whether this recent decline is simply a temporary poor business cycle or indicative of a more sustained negative trend. Nevertheless, the goal in calculating civil penalties is to establish a sufficiently meaningful penalty in order to enhance the probability of future compliance; it is not to force employers out of business. *United States v. Kobe Sapporo Japanese, Inc*., 10 OCAHO no. 1204, 6 (2013). Based on the record as a whole, it is appropriate to consider Respondent's financial situation in mitigation of the overall civil monetary penalty warranted.

In addition to the statutory factor regarding business size discussed above, a public policy of leniency toward small businesses, as embodied through various federal laws and prior OCAHO decisions, is also a non-statutory factor appropriate for consideration in this penalty assessment. *See Keegan Variety*, 11 OCAHO no. 1238 at 6 (citing 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, Pub. L. No. 104-121, 110 Stat. 864 (1996)); *see also United States v. Red Bowl of Cary, LLC, Inc.*, 10 OCAHO no. 1206, 4-5 (2013); *Ice Castles Daycare Too*, 10 OCAHO no. 1142 at 7. Thus, as Respondent is a small business, it is also appropriate to mitigate the penalty assessment modestly in accordance with the public policy of leniency toward small businesses.

As a non-statutory equitable argument, Respondent also argues that its situation is similar to—if not also more compelling—than the one of the respondent in *Platinum Builders*. Although the two cases may share some superficial similarities to a limited degree, they are not identical. In fact, IPI was found liable for a greater number of violations than the respondent in *Platinum*

Builders, both for failing to prepare or present Forms I-9 and for failing to properly complete Forms I-9. Moreover, even if the cases were more similar, "it is well-settled that prior OCAHO ALJ decisions do not necessarily bind a different ALJ in a future case." *Red Coach Rest.*, 10 OCAHO no. 1200 at 4 n.3. Accordingly, although I have fully considered Respondent's arguments regarding *Platinum Builders*, I find that further mitigation is not warranted.

V. CONCLUSION

The undersigned has given due consideration to all of the statutory factors in 8 U.S.C. § 1324a(e)(5), as well as to several non-statutory factors. I find that the penalty in the instant case should be reduced in the exercise of discretion. *See Ice Castles Daycare Too*, 10 OCAHO no. 1142 at 6. The penalty requested here, $935.00 for each violation, is only $165.00 short of the maximum permissible penalty per violation. OCAHO case law makes clear that penalties approaching the maximum permissible fine amount should be reserved for the most egregious violations. *See Fowler Equipment*, 10 OCAHO no. 1169 at 6. Penalty adjustment to the mid to lower range of permissible penalties is warranted due to the small size of Respondent's business, its good faith, its ability to pay, and the overall public policy regarding treatment of small businesses.

Accordingly, I find that in the exercise of discretion, the proposed penalty in this case should be reduced to $500 for each of the twenty-one violations involving the failure to prepare and/or present Forms I-9, and $350 for each of the seventy-three substantive paperwork violations. Thus, the penalty for Count I is $10,500, and Count II is $25,550. The total civil money penalty for all ninety-four violations for which Respondent is liable is assessed at $36,050.

ORDER

International Packaging, Inc. is directed to pay civil penalties in the total amount of $36,050. 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 30th day of November, 2016.

_____

James R. McHenry, III
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.