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

December 22, 2010

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 09A00025
SNACK ATTACK DELI, INC. D/B/A, SUBWAY RESTAURANT # 3718 Respondent.	)	

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

This is an action arising 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 (2006), in which the United States is the complainant and Snack Attack Deli, Inc. d/b/a Subway Restaurant # 3718 (Snack Attack) is the respondent. The Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a two-count complaint alleging that Snack Attack violated 8 U.S.C. § 1324a(b) and 8 C.F.R.§ 274a.2(b) (2009). Snack Attack filed an answer denying the material allegations of the complaint and asserting affirmative defenses. Discovery and motion practice ensued.

Presently pending are the complainant's Motion for Summary Decision, in response to which the respondent filed a brief in opposition, and the complainant's Motion to Exclude Evidence/ Motion for Protective Order, and Supplemental Briefing in Support of Motion for Summary Decision, to which Snack Attack made no response. A telephonic status conference was held, after which another filing by the respondent was accepted.

II. BACKGROUND INFORMATION

Snack Attack is a Subway franchise restaurant located at 316 Eastern Boulevard, Fayetteville, North Carolina, 28301. The franchisor, Subway itself, is a national chain of casual fast food restaurants that primarily serve salads and "submarine" style deli sandwiches. The Affidavit of Maher M. El-Hatto[1] reflects that the affiant purchased his first Subway store in 1987, which was Snack Attack, and that he currently owns and operates four Subway franchises in Fayetteville.

The dispute between the parties arises over an ICE inspection conducted in early 2009 as a result of which a Notice of Intent to Fine (NIF) was served upon the respondent on July 29, 2009 alleging that Snack Attack committed 108 violations of the Immigration and Nationality Act, 8 U.S.C. § 1324a. Count I alleged that the respondent Snack Attack hired 11 named individuals from 2006 through February 2009 and failed to ensure that those individuals properly completed section 1 of form I-9 and/or failed itself to properly complete section 2 or section 3 of the form. Count II alleged that Snack Attack hired 97 named individuals between 2006 and February 2009 for whom it failed to prepare or present I-9 forms at all. Penalties were sought in the amount of $1,028.50 for each violation, or $11,313.50 for Count I and $99,764.50 for Count II for a total of $111,078.00. Snack Attack made a timely request for a hearing, and the instant complaint ensued.

III. STATUTORY AND REGULATORY PROVISIONS INVOLVED

The INA imposes an affirmative duty upon employers to prepare and retain certain forms for employees hired after November 6, 1986 and to make those forms available for inspection. 8 U.S.C. § 1324a(b) (2006). Regulations designate the I-9 form as the employment eligibility verification form to be used by employers. 8 C.F.R. § 274a.2(a)(2) (2009). Forms must be completed for each new employee within three business days of the hire, 8 C.F.R. § 274a.2(b)(1)(ii), and each failure to properly prepare, retain, or produce the forms upon request constitutes a separate violation. 8 C.F.R. § 274a.10(b)(2). The form has two parts; section 1 consists of an employee attestation, in which the employee provides information under oath about his or her status in the United States, 8 C.F.R. § 274a.2(b)(1)(i)(A), and section 2 consists of an employer attestation under penalty of perjury that specific documents were examined to establish the individual's identity and eligibility for employment. 8 C.F.R. § 274a.2(b)(1)(i)(B).

[1] The name also appears in the record with variant spellings as El Hatto, ElHatto, Elhatto, or simply Hatto. The spelling adopted here is that used in section 1 of El-Hatto's I-9 form, which he presumably completed himself.

Civil money penalties are assessed for paperwork violations according to the parameters set forth in 8 C.F.R. § 274a.10(b)(2): the minimum penalty for each individual with respect to whom the violation occurred after September 29, 1999, is $110, and the maximum penalty is $1,100. The following factors must be considered in assessing the appropriate penalties: 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 by the employer. 8 U.S.C. § 1324a(e)(5). The statute does not require that equal weight be given to each factor, nor does it rule out consideration of additional factors. *United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000).[2]

IV. EVIDENCE CONSIDERED

A. Exhibits Accompanying ICE's Motion

Exhibits accompanying ICE's motion for summary decision include: A) the Declaration of ICE Forensic Auditor Aaron N. McRee dated May 25, 2010 (19 pages); B) Snack Attack Deli, Inc. Articles of Incorporation filed December 9, 1986 (2 pages); C) Notice of Inspection dated January 30, 2009 (3 pages); D) Request for Document Production dated February 13, 2009 (2 pages); E) Forms I-9, W-4, and W-2, and employee roster provided by respondent (90 pages); F) HR materials provided by Subway (37 pages); G) unsigned Corporate Tax Return for 2007 for Snack Attack Deli, Inc. (11 pages); and H) the Declaration of ICE Forensic Auditor Aaron N. McRee dated June 2, 2010 (3 pages).

B. Exhibits Accompanying Snack Attack's Response

Exhibits accompanying Snack Attack's response include: 1) the Affidavit of Maher M. El-Hatto dated June 30, 2010 (3 pages); 2) a letter dated April 23, 2010 from ICE in response to respondent's discovery requests (4 pages); 3) Alan Gordon Manual for Form I-9 Training dated January 20, 2010 (17 pages); and 4) Contract of Sale dated January 17, 2009 for Snack Attack, known as "store #3718" (2 pages).

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[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 on the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

C. Respondent's Supplemental Filing

After a telephonic prehearing conference, the respondent filed the Consolidated Report of Certified Public Accountant dated November 14, 2010 (CPA report), together with attachments consisting of 1) payroll records for Teelah, Inc.; Nour, Inc.; Rakan, Inc.; and Snack Attack Deli, Inc. (30 pages); 2) unsigned 2007 tax returns for Snack Attack Deli, Inc.; Nour, Inc.; Rakan, Inc.; and Teelah, Inc. (24 pages); 3) unsigned 2008 tax returns for Rakan, Inc.; Snack Attack Deli, Inc.; Nour, Inc.; and Teelah, Inc. (34 pages); 4) unsigned 2009 tax returns for Snack Attack Deli, Inc.; Nour, Inc.; and Rakan, Inc. (30 pages); and 5) Statement of Income (Loss) and Retained Earnings for the period ending September 30, 2010 for Nour, Inc.; Rakan, Inc.; and Teelah, Inc. (4 pages).

In addition to the materials submitted by the parties in connection with the pending motion, I have also considered the record as a whole, including pleadings, exhibits, and all other materials of record.

V. ICE's MOTION FOR SUMMARY DECISION CONSIDERED

A. The Issue of Liability

ICE's motion asserts that there is no genuine issue of material fact as to liability on either count, and that it is entitled to judgment as a matter of law. The employees' names appear both on the respondent's employee roster and on W-2 forms. That the I-9 forms for the 11 individuals named in count I contain substantive violations is evident upon visual inspection, and it is undisputed that no I-9 forms were produced for any of the 97 employees named in count II.

The first Declaration of ICE Forensic Auditor Aaron N. McRee asserts that prior to the service of the Notice of Inspection, he created a "marked" Form I-9 with three subtle marks he described. The purpose of the marks McRee made on the form was to determine later whether the forms produced had been backdated or completed after service of the Notice. McRee said he visited Snack Attack on January 30, 2009, together with Special Agent Rodney Coulston. They provided a copy of the sample form to the respondent's employee Erica Piggot, together with a copy of the Handbook for Employers. Piggot was expressly told that if new forms were prepared they should not be backdated. When the I-9s were received by ICE, however, it was determined that they had all been completed after the Notice, and that 7 of the 11 forms were backdated, including that of Maher El-Hatto. The employer attestation portion of the form, section 2, was not completed on any of the forms.

Snack Attack's response to ICE's motion did not dispute the basic facts that it produced only 11 I-9 forms for a total of 108 individuals presently or formerly employed between 2006-2009, or the fact that the 11 forms it did produce contained substantive violations. Instead, Snack Attack initially opposed the government's motion on the grounds that the motion was premature because discovery was not yet complete. However after the filing of Snack Attack's response on July 7, 2010, its motion to reopen discovery was granted on July 22, 2010 and discovery was extended until November 1, 2010, so that Snack Attack has now had a full opportunity for discovery.

Snack Attack's response next urges that the second declaration of ICE Forensic Auditor Aaron N. McRee (exhibit H) is inadmissable because it contains hearsay evidence in violation of Rule 802 of the Federal Rules of Evidence (FRE). Snack Attack is simply wrong in its assertion that hearsay is per se inadmissible; it is long and well established to the contrary that hearsay is admissible in administrative proceedings. *United States v. Mr. Z. Enters.*, 1 OCAHO no. 288, 1871, 1890 (1991) (citing cases). *See generally, Richardson v. Perales*, 402 U.S. 389, 408-09 (1971).

While 28 C.F.R. § 68.40(a)[3] provides that the FRE may be used as a general guideline "[u]nless otherwise provided by statute or these rules," the governing statute, 8 U.S.C. § 1324a(e)(3)(B), more specifically provides that hearings "shall be conducted in accordance with section 554 of Title 5." Thus it is the Administrative Procedure Act (APA), 5 U.S.C. § 554 et seq., which governs the admissibility of evidence in these proceedings. *See United States v. Dubois Farms, Inc.*, 2 OCAHO no. 376, 599, 609-11 (1991) (explaining that 5 U.S.C. § 556(d) provides that any material and relevant evidence is admissible in APA hearings). The respondent's objection to one of the complainant's proposed exhibits is not in any event sufficient to foreclose summary resolution as to liability.[4]

Snack Attack did not deny that all the forms were completed after the Notice of Inspection or that 7 of the 11 forms were backdated, but did point out that the only part of those forms that was completed was section 1, the employee's part, so it was the employees themselves and not the respondent who did the backdating.

Finally, Snack Attack contends that it is the wrong respondent because "it is not now - and neither was it then at the time the Notice of Intent to Fine was issued - the owner of the franchise currently operating Complainant (sic)." In support of this assertion, Snack Attack points to its

[3] *See* Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2010).

[4] For reasons more fully explained *infra*, the declaration Snack Attack objected to has limited bearing on this case and no effect on the outcome.

exhibit 4 without further explanation. The respondent's exhibit 4 provides no support for the contention that Maher El-Hatto is the wrong respondent; it consists of a Contract of Sale dated January 17, 2009 for Subway store #3718 in which the seller is identified as Maher El-Hatto and the buyer is identified as Imran Khan. The exhibit reflects that the contract is a contingent one, and there is no evidence that the contingency was ever satisfied. More importantly, the suggestion that any such sale actually took effect is belied by the respondent's own exhibit 1, the affidavit of Maher El-Hatto dated June 30, 2010, in which the affiant states that he is the owner and operator of Snack Attack as well as of three other Subway stores in the Fayetteville area.[5]

There is no genuine issue of material fact respecting liability for the violations alleged in either Count I or Count II, and ICE is entitled to judgment as a matter of law. The 11 I-9 forms Snack Attack belatedly and partially completed all are missing the attestation required in section 2, all were completed after the Notice of Inspection, and 7 of the 11 forms are backdated in section 1. The respondent did not dispute that no forms were completed at all for any of the 97 former employees named in Count II.

B. The Issue of Civil Money Penalties

ICE contends that summary decision is appropriate as to the penalties as well as to liability. The first Declaration of Aaron N. McRee states that he calculated the penalties in accordance with ICE internal methodology set out in the "Guide to Administrative Form I-9 Inspections and Civil Money Penalties," and the Declaration set out a grid showing his calculations. McRee said that he established the base fine by first ascertaining that the percentage of employees for whom there were violations was 100% so that the base penalty for each violation was $935.00. He then considered the five statutory factors and concluded that two of those factors warranted aggravating the penalties by 5% each, or a 10% enhancement. He treated the other three factors as neutral so the government's final figure for each violation was $1,028.50.

Snack Attack contends in response that there are genuine issues of material fact precluding summary decision as to each of the factors to be considered in assessing civil money penalties. Snack Attack protested the fact that the penalties assessed are 93.5% of the maximum permissible penalty and took issue with ICE's contention that the government's assessment of the penalty factors was appropriate or reasonable. The response says that Snack Attack is a small business, that it acted in good faith, and points to what it believes should be other mitigating factors such as the absence of any unauthorized workers and the lack of history of previous

[5] The unsigned 2009 tax return accompanying the accountant's report suggests that Snack Attack was sold on April 30, 2009. Why El-Hatto's affidavit says in June 2010 that he still owns it is unexplained, but the affidavit must be taken as true for purposes of the motion. The contract provides in any event that El-Hatto is responsible for all of Snack Attack's debts up to the date of closing.

violations.

The government has the burden of proof with respect to the penalty as well as to liability. *See United States v. Am. Terrazzo Corp*., 6 OCAHO no. 877, 577, 581 (1996); *United States v. Skydive Acad. of Haw. Corp*., 6 OCAHO no. 848, 235, 239-40 (1996). For purposes of this motion, I must view the facts in the light most favorable to the nonmoving party, *United States v. Primera Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994), and draw all reasonable inferences in favor of that party.

1. Size of the Business

With respect to the size of the respondent's business, ICE's motion asserts that while Snack Attack is "not a large business," neither is it just a "mom and pop" operation. ICE argues that respondent's affiliation as a franchisee of Subway "significantly distinguishes it from other restaurants and businesses of its size." For this reason ICE argues that while Snack Attack itself is not large, the parent franchisor has vast HR resources, and El-Hatto had the privilege of attending the parent Subway's training center program. ICE says that the company's high turnover rate is standard for the industry, and should not be considered as a factor in assessing its size, which ICE concluded was "neither large nor small."

Snack Attack says it is a small, family-owned sandwich business that has tried to comply with all government regulations, and that the fine proposed is excessive in light of its size. The affidavit of Maher El-Hatto suggests that a fine as substantial as that requested will result in employees losing their jobs. The respondent's corporate tax return for 2007, before the recent economic downturn, showed gross receipts of $291,192.00 but taxable income of $1,125.00.

While the respondent had a total of 108 employees from 2006 to February 2009, it is also clear from the record that Snack Attack never had that many employees at any one time, and the high number is more indicative of the rapid turnover in employees in the fast food industry than it is of Snack Attack's actual size at any given time. The first Declaration of Aaron N. McRee reports that when he visited Snack Attack on January 30, 2009 Erica Piggot told him there were seven current employees, and that although twenty had worked there over the past year, thirteen of them were no longer employed. Based on the facts reflected in the record, I cannot concur with ICE's conclusion that Snack Attack is neither a large nor a small employer. The burden is on ICE to show that Snack Attack is anything other than a small business. *See United States v. Carter*, 7 OCAHO no. 931, 121, 162 (1997) and that burden was not met. The respondent is a small business. Except in rare circumstances, small size is a mitigating factor. *Skydive Acad.*, 6 OCAHO no. 848 at 241.

2. The Seriousness of the Violations

ICE points to OCAHO case law stating that failure to prepare I-9s is indicative of a "blatant disregard to the statutory and regulatory mandates of IRCA," citing *United States v. Café Camino Real, Inc.*, 2 OCAHO no. 307, 29, 46 (1991). It also characterizes the backdated forms as demonstrating a "blatant disregard for substantive compliance." Snack Attack did not address the issue of seriousness other than to allege that reaching the issue would be premature.

The seriousness of violations may be evaluated on a continuum, and not all violations are necessarily equally serious. *Carter*, 7 OCAHO no. 931 at 169 (citing *United States v. Felipe, Inc.*, 1 OCAHO no. 93, 626, 636 (1989)). Failure to prepare an I-9 at all is among the most serious of paperwork violations, and case law reflects that an employer's failure to attest in Section 2 is always a serious violation as well. *United States v. Reyes*, 4 OCAHO no. 592, 1, 10 (1994); *United States v. J.J.L.C., Inc.*, 1 OCAHO no. 154, 1089, 1098 (1990) ("failure to attest on Part 2 of Form I-9 is a serious violation, implying avoidance of liability for perjury"). All the violations involved in this case are serious in nature, and this is an aggravating factor.

3. Whether the Individuals Involved Were Unauthorized Aliens

ICE acknowledges that there is no way of determining whether any of the 97 individuals for whom there were no I-9s were unauthorized for employment, but says it is clear that respondent's practices could lead to the hiring of unauthorized workers and that it is known historically that they did do so. In support of the claim of historical knowledge, the motion references the second declaration of Aaron N. McRee. The declaration sets out the details of an interview McRee says he conducted of Iyad and Kefah Qutaishat about the circumstances surrounding their moving to the United States with the assistance of Hany El-Hatto, and their employment at various Subway stores from 2001-2003, including at Snack Attack. ICE does not use this information to advocate for aggravating the penalty, only for not mitigating it.[6]

The declaration reflects that Iyad and Kefah Qutaishat told McRee they were living in Jordan when they were persuaded by Hany El-Hatto to come to the United States in 2000 and learn the restaurant business. They were told by Hany El-Hatto that he had many brothers and many

[6] Under OCAHO case law, aggravation of a civil penalty due to an alien's unauthorized status is appropriate only as to a paperwork violation relating to that particular unauthorized individual; the unauthorized status of one individual is not broadly applicable to aggravate the penalty for other violations involving different individuals. *Hernandez*, 8 OCAHO no. 1043 at 673; *United States v. Aid Maint. Co., Inc.*, 8 OCAHO no. 1023, 321, 357 (1999); *Carter*, 7 OCAHO no. 931 at 163-64.

Subway stores. After Iyad and Kefah Qutaishat came to the United States on tourist visas they were picked up at the airport by Said Hito, who managed the Subway store on Eastern Boulevard [Snack Attack], and taken to a motel. They said they worked at that Subway for a two week training period for no pay, after which they were paid in cash. They told McRee that other illegal workers from Morocco and Egypt also worked there.

Snack Attack points out that none of the individuals involved in this proceeding is alleged to be unauthorized for employment in the United States and there is no evidence that any was unauthorized. The affidavit of Maher El-Hatto acknowledged hiring Iyad and Kefah Qutaishat to help them learn to operate and manage their own business. He said he hired them as a favor to his cousin and had no knowledge that they were unauthorized to work. El-Hatto denied knowledge of employing anyone that was unauthorized to work, and said he always requested a driver's license and social security card of all employees.

The statements of Iyad and Kefah Qutaishat reported in the McRee declaration clearly implicate Hany El-Hatto in recruiting two unauthorized workers, but Maher El-Hatto is mentioned only to identify him as one of Hany El-Hatto's four brothers. Consisting as it does of uncorroborated double hearsay without any specific information about Maher El-Hatto, this declaration is not considered further. Our case law does not in any event normally consider uncharged prior events in setting penalties, *United States v. Chef Rayko, Inc*., 5 OCAHO no. 794, 586, 593-95 (1995), and I decline to do so here. I nevertheless consider this factor as neutral; compliance with the law is the expectation, not the exception.

4. Any History of Previous Violations

The parties agree that the respondent has no history of previous violations. ICE argues that any reduction from the maximum for this fact should be minor because other factors are more compelling. The respondent contends that mitigation is appropriate based on this factor.

5. The Good Faith of the Employer

The principal dispute between the parties is over the issue of good faith. ICE argues that there are several factors showing that Snack Attack engaged in culpable behavior beyond a mere failure of compliance and that the respondent acted in bad faith. It points to the backdated I-9 forms after the respondent was specifically instructed not to backdate the forms, and it also argues that notwithstanding the respondent's claim of ignorance of the law, there is a "high likelihood" that respondent was actually aware of the I-9 requirement because of El-Hatto's attendance at the parent franchisor's training program where I-9 compliance must have been addressed.

Snack Attack took vigorous issue with ICE's assertion that it acted in bad faith, and specifically denied that it backdated any I-9 form, pointing out that any backdating appears only in section 1, the section of the form completed by the employee. It says that it acted at all times in good faith, and that it simply had no awareness of the requirement to complete I-9 forms.

The affidavit of Maher M. El-Hatto states that he was not aware of the Form I-9 rules until the ICE officials came, that he did know enough not to hire unathorized workers and didn't do so, but that he was not "educated" about the I-9 form. El-Hatto said he attended Subway training in 1989 but did not recall any discussion of Form I-9 at that training. Finally, Snack Attack pointed to the affirmative steps it took to rehabilitate its practices. The El-Hatto affidavit said that after ICE's visit he hired the Alan Gordon law firm to provide I-9 training to the store managers on January 20, 2010, and he attended an on-line seminar for E-Verify presented by U.S. Citizenship and Immigration Services.

The restaurant's professed ignorance of the law's requirements does not amount to a showing of good faith. *See, e.g., Felipe,* 1 OCAHO no. 93 at 634 ("ignorance and mistake" do not suffice to show good faith where reasonable care and diligence are required). OCAHO precedent reflects that the principal focus in assessing good faith must be on what steps the employer took before the investigation to ascertain what the law is and to follow it. The question is whether the employer reasonably tried to ascertain what the law requires and to conform its conduct to it. *United States v. Riverboat Delta King, Inc.*, 5 OCAHO no. 738, 126, 130 (1995).

Any analysis of an employer's good faith must accordingly focus first on whether or not the employer reasonably attempted to comply with its obligations under § 1324a prior to issuance of the Notice of Inspection. *United States v. Great Bend Packing Co.*, 6 OCAHO no. 835, 129, 136 (1996); *Chef Rayko*, 5 OCAHO no. 794 at 592. Here there is not a scintilla of evidence that suggests the respondent made any effort whatsoever to ascertain the requirements of the law. The government's theory that El-Hatto probably had I-9 instruction at the training in 1989 is speculative at best, but nevertheless, for all that the record discloses, Snack Attack made no effort at all to ascertain what the law required and lacked the reasonable diligence required: there was simply no attempt at compliance prior to the Notice of Inspection. Snack Attack's subsequent attempts at compliance have minimal bearing on an analysis of its good faith because conduct occurring after the investigation is over is ordinarily outside the permissible scope of consideration. *Great Bend Packing*, 6 OCAHO no. 835 at 136; *Chef Rayko*, 5 OCAHO no. 794 at 592 (observing that employer's prospective compliance with IRCA is irrelevant to good faith).

A poor rate of compliance is not, in and of itself, a reason to find that a respondent acted in bad faith. *Hernandez*, 8 OCAHO no. 1043 at 670 (citing *United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 477, 480 (1995) (modification by the Chief Administrative Hearing Officer)). But here a finding of Snack Attack's bad faith is supported first by its total failure to take any pre-notice steps to ascertain what the law required, and second, by its cynical attempt to disclaim responsibility for the backdated I-9 forms because it never completed section 2, the

employer attestation. Snack Attack seeks to blame its employees for backdating section 1, but the employer is held responsible for the errors in section 1 too: in addition to the employer's duty to complete section 2, the employer is also obligated by the regulation to ensure that the employee properly completes section 1. 8 C.F.R. § 274a.2(b)(1)(i)(A). Snack Attack not only made no effort at all to ascertain what the law requires or to conform its conduct to it, it also attempted deception by permitting employees to backdate I-9 forms, and this is sufficient to support an assessment of bad faith.

6. Other Considerations

OCAHO precedent reflects that a company's ability to pay the proposed fine may be an appropriate factor to be weighed in assessing the amount of the penalty. *See, e.g.*, *United States v. Raygoza*, 5 OCAHO no. 729, 48, 52 (1995); *United States v. Minaco Fashions, Inc.*, 3 OCAHO no. 587, 1900, 1909 (1993). The purpose of imposing penalties is to induce compliance through a reasonably proportioned fine. Any penalty will of course have some negative impact on a respondent; a penalty must, however, be sufficiently meaningful to accomplish its purpose of deterring future violations and enhancing the probability of future compliance. *See United States v. Jonel, Inc.*, 8 OCAHO no. 1008, 175, 201 (1998). At the same time, a penalty should not be so onerous that employees have to lose their jobs or employers are forced out of business. I take administrative notice, moreover, of the fact that the health of our economy at the present time is poor and that unemployment is already unacceptably high. The CPA report asserts that the respondent had minimal profit in 2007, and losses in 2008 and 2009, though there was a capital gain in 2009 from sale of the store.

Considering those facts together with the statutory factors, I conclude that the penalties requested, a total of $111,078.00, are disproportionate to the company's size and resources, and must be reduced. *Cf. Minaco Fashions*, 3 OCAHO no. 587 at 1909 (reducing penalty found to be "unduly punitive").

C. Conclusion and Summary

A difference of opinion as to the proper weight to be given to a particular statutory factor in assessing penalties does not constitute a factual controversy. Thus contrary to Snack Attack's assertion, I find that there is no genuine issue of material fact. While I concur with ICE's conclusions that the violations are serious and that the employer lacked good faith, I find the facts do not support ICE's conclusion that Snack Attack is other than a small employer. Snack Attack has no unauthorized workers and no previous violations, so three of the statutory factors point to mitigation and two to aggravation.

I am not required to allocate equal weight to each factor, and do not do so in this case. Instead, the determinative 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. The penalties will therefore be revised to fall in the lower end of the permissible range. It appears from the record that even the reduced penalties are still sufficiently substantial in light of the respondent's resources to motivate future compliance.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Snack Attack Deli, Inc. is a Subway franchise restaurant located at 316 Eastern Boulevard, Fayetteville, North Carolina 28301.

2. The owner and manager of Snack Attack Deli, Inc. is Maher El-Hatto.

3. The respondent hired Hassan El-Hatto, Maher El-Hatto, Anthony Fann, Debra Florez, Ala Hito, Said Hito, Anthony Jewett, Richard J. Johnson, Robert Lett, Erica Pigott, and Mhamed Tallis for employment in the United States between 2006 and February 2009 and did not prepare I-9 forms for them until after a Notice of Inspection was served on January 30, 2009.

4. Between 2006 and February 2009 the respondent hired an additional 97 other named individuals for employment in the United States and failed altogether to prepare I-9 forms for them.

5. A Notice of Inspection was served on Snack Attack Deli, Inc. on January 30, 2009.

6. Section 1 of each of the I-9 forms for Hassan El-Hatto, Maher El-Hatto, Debra Florez, Ala Hito, Said Hito, Richard J. Johnson, and Robert Lett, was completed after the Notice of Inspection was served January 30, 2009 and was backdated.

7. Section 1 of each of the I-9 forms for Erica Pigott, Anthony Jewett, Mhamed Tallis, and Anthony Fann was completed after the Notice of Inspection was served on January 30, 2010, but was not backdated.

8. Section 2 of each of the I-9 forms for Hassan El-Hatto, Maher El-Hatto, Anthony Fann, Debra Florz, Ala Hito, Said Hito, Anthony Jewett, Richard J. Johnson, Robert Lett, Erica Pigott, and Mhamed Tallis was not completed at all.

9. On July 29, 2009, The Department of Homeland Security, Immigration and Customs Enforcement served a Notice of Intent to Fine (NIF) on Snack Attack at its registered address alleging that Snack Attack committed 108 violations of the Immigration and Nationality Act, 8 U.S.C. § 1324a.

10. On or about August 24, 2009, Snack Attack filed a request for hearing.

11. The Department of Homeland Security, Immigration and Customs Enforcement filed a two-count complaint and Snack Attack filed an answer denying the material allegations of the complaint and asserting affirmative defenses.

B. Conclusions of Law

1. Snack Attack Deli, Inc. is an entity within the meaning of 8 U.S.C. § 1324a(a)(1) (2006).

2. All jurisdictional prerequisites to this action have been satisfied.

3. Snack Attack Deli, Inc. engaged in 108 separate violations of 8 U.S.C. § 1324a(b) (2006).

4. 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 of the employer. 8 U.S.C. § 1324a(e)(5) (2006).

5. The statute does not require that equal weight be given to each factor, nor does it rule out consideration of additional factors. *United States v. Hernandez,* 8 OCAHO no. 1043, 660, 664 (2000).

6. Based on the factual record in this case Snack Attack Deli, Inc. is a small business.

7. Maher El-Hatto's professed ignorance of the law does not constitute good faith. *See, e.g.*, *United States v. Felipe, Inc.*, 1 OCAHO no. 93, 626, 634 (1989); *United States v. Hernandez,* 8 OCAHO no. 1043, 660, 670 (2000) (citing *United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 477, 480 (1995) (modification by the Chief Administrative Hearing Officer)).

8. Snack Attack Deli, Inc.'s current compliance efforts have no bearing on a determination of good faith. *United States v. Great Bend Packing Co.*, 6 OCAHO no. 835, 129, 136 (1996).

9. The evidence in the record provides no support for a conclusion that the company made any effort at any time before the Notice of Inspection to ascertain what the law requires or to conform its conduct to it. *United States v. Riverboat Delta King, Inc.*, 5 OCAHO no. 738, 126, 130 (1995).

10. The record reflects that Snack Attack Deli, Inc. made no reasonable attempt to comply with its obligations under § 1324a prior to issuance of the Notice of Inspection. *United States v. Great Bend Packing Co.*, 6 OCAHO no. 835, 129, 136 (1996).

11. Snack Attack Deli, Inc. has no history of previous violations of 8 U.S.C. § 1324a.

12. Snack Attack Deli, Inc.'s violations of § 1324a were all serious. *United States v. Reyes*, 4 OCAHO no. 592, 1, 10 (1994); *United States v. J.J.L.C., Inc.*, 1 OCAHO no. 154, 1089, 1098 (1990).

13. The seriousness of violations may be evaluated on a continuum, and not all violations are necessarily equally serious. *United States v. Carter*, 7 OCAHO no. 931, 121, 169 (1997) (citing *United States v. Felipe, Inc*., 1 OCAHO no. 93, 626, 636 (1989).

14. None of the individuals whose I-9s were involved was an unauthorized alien.

15. In addition to the employer's duty to complete section 2 of form I-9 for each employee, the employer is also obligated to ensure that the employee properly completes section 1. 8 C.F.R. § 274a.2(b)(1)(i)(A).

16. The penalty ICE proposed would have such a significant impact on Snack Attack's business that a reduction in the penalty amount is merited. *Cf. United States v. Raygoza*, 5 OCAHO no. 729, 48, 52 (1995).

17. There is no genuine issue of material fact and ICE is entitled to judgment as a matter of law with respect to both liability and the amount of civil monetary penalties assessed as modified.

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

The complainant's motion for summary decision is granted as to liability, and granted as modified with respect to penalties. In Count I, the penalty for the defective forms of Erica Pigott, Anthony Jewett, Mhamed Tallis, and Anthony Fann is assessed at $200.00 for each violation, or a total of $800.00. In Count I, the penalty for the defective and backdated I-9 forms of Hassan

El-Hatto, Maher El-Hatto, Debra Florez, Ala Hito, Said Hito, Richard J. Johnson, and Robert Lett forms is assessed at $300.00 for each violation, for a total of $2,100.00. The total for Count I is $2,900.00. The penalty for the violations in Count II is assessed at $250.00 for each of the 97 named individuals, or $24,250.00. For both counts, the total is $27,150.00.

Snack Attack Deli, Inc. is directed to pay a total of $27,150.00. in civil money penalties.

All other pending motions are denied.

SO ORDERED.

Dated and entered this 22nd day of December, 2010.

_____

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. Part 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. Part 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.