

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

June 30, 2014

UNITED STATES OF AMERICA,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324a Proceeding
)	OCAHO Case No. 13A00099
)	
CLEAN SWEEP JANITOR SERVICE,)	
Respondent.)	
_____)	

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

This is an action pursuant to 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), in which the United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a complaint alleging that Clean Sweep Janitor Service (Clean Sweep or the company) violated 8 U.S.C. § 1324a(a)(1)(B) by failing to prepare and/or present I-9 forms for fifteen employees. The total penalty sought was \$15,427.50.

Clean Sweep, by its owner, Darlene S. Rolf, filed an answer by letter-pleading in which Rolf stated that the company lost or misplaced most of its I-9s, so it had the current employees complete new ones. The letter requested that the penalty be reduced to the minimum permissible amount. The parties subsequently filed their respective prehearing statements in which they stipulated that Clean Sweep was liable for the fifteen violations at issue. The stipulation is sufficient to establish liability for the fifteen violations alleged in the complaint. The parties have filed their respective statements addressing the issue of penalties, and that issue is ripe for resolution.

II. BACKGROUND INFORMATION

Clean Sweep is a janitorial service company located in Alpine, California. Rolfe said she has owned the business since 1999, when she bought it from her father who originally started it in 1970. The company has ten part-time employees. ICE served Clean Sweep with a Notice of Inspection (NOI) on or about November 8, 2011. The government thereafter served Clean Sweep with a Notice of Intent to Fine on April 4, 2013, after which the company made a timely request for hearing on April 17, 2013. ICE filed a complaint with this office on August 26, 2013 and all conditions precedent to the institution of this proceeding have been satisfied.

The parties stipulated that Clean Sweep hired Alma Cabrera, Alfonso Din, Josefina Naungayan, Martha Palomares, Marjorie Roberts, William/Lee Roberts, Josefina Rolf, Manuel Rubio, Roxana Rubio, Mario Tapia, Ignacio Taroma, Steve Taroma, Maria Gonzalez/Flores Preciado, Xavier G. Licon, and Jose Velasco, Jr., and failed to prepare and/or present I-9s for them. Clean Sweep therefore acknowledged liability for these fifteen violations.

III. PENALTY ASSESSMENT

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, is \$110, and the maximum is \$1100. The penalties in this case range from a low of \$1650 to a high of \$16,500. 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),¹ 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).

In assessing an appropriate penalty, the following factors must be considered: 1) the employer's size business, 2) the employer's good faith, 3) the seriousness of the violations, 4) whether or not

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 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>.

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).

A. The Government's Position

ICE calculated a baseline penalty of \$935 in accordance with internal agency guidelines based on Clean Sweep's error-rate of ninety-three percent. The government mitigated the penalty by five percent based on Clean Sweep's status as a small business, by five percent based on the lack of unauthorized aliens in Clean Sweep's workforce, and by an additional five percent based on the company's lack of history of previous violations.² ICE did, however, aggravate the penalty based on the seriousness of the violations because failure to prepare and/or present Forms I-9 is a very serious violation. ICE treated the remaining factor of good faith as neutral. The total adjusted penalty the government seeks is \$12,623.

B. Clean Sweep's Position

Clean Sweep says that it has always maintained I-9s on file and never hired undocumented workers, but it somehow misplaced or lost the file containing most of the I-9s. The company says that it has learned a "hard lesson," and that a fine of the magnitude proposed would be a "devastating financial blow." Clean Sweep says that its business income has decreased drastically over the years and that the company simply cannot afford to pay the proposed penalty. The company requests that the minimum penalty of \$110 be imposed for each violation in light of the company's financial hardship. Clean Sweep says that it respects the law and points out that this is the company's first violation.

Clean Sweep also points out that it has worked for the U.S. government servicing facilities in Imperial, California, and that it serviced ICE and EOIR offices for over ten years before losing the contract to an unlicensed contractor that pays employees under the table. Rolf says the contractor underbid her by forty percent. When she reported to the government that the new janitorial service had no insurance and didn't pay payroll taxes, the building owners told her that if she contacted the government any more, they would withhold her final payment. Rolf says most of Clean Sweep's other clients are county, state, and federal government agencies, including IRS, SSA, and DEA.

² The government says it learned during the audit that there had been a previous audit of the company under a different owner. Evidently the record of the earlier audit could not be located, and it has no effect on this proceeding.

Clean Sweep provided copies of its 2011 and 2012 Schedule C Profit or Loss statements. The company points out that in 2011 its business net profit was \$64,655, and in 2012 it was \$47,559. The company estimates that its net profit for 2013 is \$39,970. Clean Sweep says these figures demonstrate that the adjusted fine amount would be approximately twenty-seven percent of its 2012 business income or thirty-two percent of its 2013 business income.

C. Discussion and Analysis

The parties do not dispute that Clean Sweep is a small business with no history of previous violations, and that the company did not hire unauthorized workers or lack good faith. The record supports ICE's assertion that the violations were serious. 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. *See United States v. M & D Masonry, Inc.*, 10 OCAHO no. 1211, 11 (2014); *see also United States v. Skydive Acad. of Haw.*, 6 OCAHO no. 848, 235, 248-49 (1996).

The penalties proposed, however, are excessive in light of the record as a whole. Other than the seriousness of the violations, most of the statutory factors weigh in Clean Sweep's favor, and penalties close to the maximum permissible should ordinarily be reserved for more egregious violations than are demonstrated here. *See United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013). A penalty should also 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 revenues, *United States v. Minaco Fashions, Inc.*, 3 OCAHO no. 587, 1900, 1909 (1993). This small family business, moreover, like that in *United States v. Mr. Mike's Pizza, Inc.*, 10 OCAHO no. 1196, 4 (2013), is precisely the type of enterprise that should benefit from the general public policy of leniency to small entities 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).

Based on the record as a whole and the statutory factors in particular, the penalties will be adjusted to an amount closer to the midrange of permissible penalties, and assessed at the rate of \$450 for each violation, totaling \$6750.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Clean Sweep Janitor Service is a janitorial service company located in Alpine, California that was founded in 1970.
2. Darlene S. Rolf is the owner and operator of Clean Sweep Janitor Service.
3. Department of Homeland Security, Immigration and Customs Enforcement served Clean Sweep Janitor Service with a Notice of Inspection (NOI) on November 8, 2011.
4. Department of Homeland Security, Immigration and Customs Enforcement served Clean Sweep Janitor Service with a Notice of Intent to Fine on April 4, 2013.
5. Clean Sweep Janitor Service made a timely request for hearing on April 17, 2013.
6. Department of Homeland Security, Immigration and Customs Enforcement filed a complaint with this office on August 26, 2013.
7. Clean Sweep Janitor Service hired Alma Cabrera, Alfonso Din, Josefina Naungayan, Martha Palomares, Marjorie Roberts, William/Lee Roberts, Josefina Rolf, Manuel Rubio, Roxana Rubio, Mario Tapia, Ignacio Taroma, Steve Taroma, Maria Gonzalez/Flores Preciado, Xavier G. Licon, and Jose Velasco, Jr., and failed to prepare and/or present I-9s for them.
8. Clean Sweep Janitor Service is a small business that had no unauthorized employees and no history of previous violations.

B. Conclusions of Law

1. Clean Sweep Janitor Service 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. Clean Sweep Janitor Service committed fifteen violations of 8 U.S.C. § 1324a(a)(1)(B).
4. 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).

5. Failure to prepare an I-9 at all is one of the most serious violations because it completely subverts the purpose of the employment verification requirements. *See United States v. M & D Masonry, Inc.*, 10 OCAHO no. 1211, 11 (2014); *see also United States v. Skydive Acad. of Haw.*, 6 OCAHO no. 848, 235, 248-49 (1996).
6. Penalties close to the maximum permissible should be reserved for the most egregious violations. *See United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013).
7. A penalty should also 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. 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), sets out a general public policy calling for leniency to small entities in setting civil money penalties.

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

Clean Sweep Janitor Service is liable for fifteen violations of 8 U.S.C. § 1324a(a)(1)(B) and is ordered to pay a civil money penalty of \$6750. The parties are free to set up a payment schedule that will minimize the impact of the penalty on the company’s business.

SO ORDERED.

Dated and entered this 30th day of June, 2014.

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) (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.