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

February 4, 2015

UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 14A00010
	)	
SPEEDY GONZALEZ CONSTRUCTION, INC.,	)	
Respondent.	)	
	)	

FINAL DECISION AND ORDER

Appearances:

Victoria Levin
For the complainant

Trysta M. Puntenney
For the respondent

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 six-count complaint alleging that Speedy Gonzalez Construction, Inc. (SGC or the company) engaged in 185 violations of 8 U.S.C. § 1324a(a)(1)(B).

Prehearing procedures have been completed. A partial summary decision was previously issued finding SGC liable for 179 violations and setting a schedule for further proceedings to resolve the sole remaining issue, which is the question of penalties. *See United States v. Speedy Gonzalez Construction, Inc.*, 11 OCAHO no. 1228, 13 (2014).[1] The parties have made their respective filings and that issue is 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, is $110, and the maximum is $1100. 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 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). 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 official method mandated for calculating civil money penalties. *United States v. Senox Corp.*, 11 OCAHO no. 1219, 4 (2014). ICE's penalty calculations have no

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[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.

binding effect in OCAHO proceedings, and penalties may be examined by the administrative law judge *de novo*. *See United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6 (2011).

III. THE PARTIES' POSITIONS

A. The Government's Penalty Request

The government originally sought $192,843.75 for the 185 violations alleged, but modified its request in light of the fact that six of its allegations were not proved. ICE now seeks $186,859.75 for the 179 violations actually found. These include seventy-eight paperwork violations and 101 failures to prepare or present. ICE says that based on the company's payroll records SGC should have presented 252 I-9s but presented only 156. Of the forms the company did produce, eighty-four had substantive violations. The government accordingly found that SGC's violation rate was 73.4%. Pursuant to internal ICE guidance, the base fine for each violation where the violation rate exceeds fifty percent is $935. ICE says it considers the percentage of inaccurate, incomplete, or missing I-9 forms to be the most objective measure of the extent of the employer's failure to comply with verification requirements. Penalties at the higher end are warranted, ICE says, because SGC knew how to properly complete I-9 forms and did not provide a sufficient explanation for its failure to do so.

ICE says it treated SGC's size and lack of previous violations as neutral factors. The government says the fact that some of the I-9 forms were completed after the NOI shows that the company acted in bad faith. The government says it aggravated the penalties for the violations in Count II[2] by five percent based either on the seriousness of the violation or on the individual's unauthorized status. For the violations in Count III,[3] ICE imposed a ten percent aggravation based on the seriousness of the violations and the lack of good faith and/or the determination that the individual was unauthorized for employment. For the thirty-five violations in Count IV ICE added a fifteen percent aggravation based on the seriousness of the violation, the lack of good faith, and the determination that the individuals were unauthorized for employment. For the sixty violations in Count V a ten percent enhancement was applied based on the seriousness of the violations and a lack of good faith; and for the forty-one violations in Count VI a fifteen

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[2] Count II originally named nineteen employees, but no violations were found for Christopher Nelson or Jose Pena, so only seventeen violations were proved.

[3] Twenty-nine violations were originally alleged in Count III, but no violations were found for Mary Gonzalez, Salvador Gonzalez, or Manuel Rodriguez, so only twenty-six violations were proved.

percent aggravation was added based on the seriousness of the violations, the lack of good faith, and the determination that the individuals were unauthorized for employment. The penalty amounts thus vary from $935 to$1075.25 depending upon the percentage of aggravation. For the violation in Count I, the penalty is $935.[4] For the violations in Count II the penalties are $981.75 each; for Counts II and V the penalties assessed are $1028.50 each; and for the violations in Counts IV and VI the penalties are $1075.25 each.

ICE says that although SGC claims the fine will cause financial hardship, the company did not produce any financial evidence and the proposed penalty should therefore be adjusted only to eliminate the six allegations that were not proved, to an amount of $186,859.75.

B. SGC's Position

SGC says its HR personnel were trained in I-9 preparation and retention, and it was not until ICE's audit that the company found out that many of its previously prepared I-9s were simply missing for reasons unknown. The affidavit of Christian Diaz, the company's office manager, states in pertinent part that ICE's audit revealed that some of SGC's I-9s were missing from the employee files, and that replacement forms were then completed for the individuals who were still employed using information and documentation supplied by the employees. Diaz says the company put the information on the 2009 version of the form, but dated each form with the employee's actual hire date. No replacement forms were prepared, however, for former employees. Diaz says the reason the employee information was put on the 2009 version of the form was "in order to not give the impression that they were the original Forms I-9, but replacements." SGC contends that there was no intent to mislead or confuse anyone, and there was no bad faith on the part of the company.

The company says further that the penalties proposed are disproportionate to SGC's degree of culpability and that ICE's internal guidance giving determinative weight to the percentage of violations to determine a baseline penalty is unsupported by statute, regulation, or case law. The company points out in addition that all the penalties are close to the maximum permissible, and case law holds that penalties at this level are reserved for more egregious violations (citing *United States v. Fowler Equip. Co*., 10 OCAHO no. 1169, 6 (2013)). SGC says such severe penalties are unduly harsh for the violations in counts II and III, and are disproportionate to those in Counts V and VI as well. SGC maintains that it never engaged in culpable behavior beyond the failure to maintain original I-9 forms.

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[4] No violation was found involving the I-9 for Garcia Arturo, the only individual named in Count I.

The company says its small size and lack of previous violations should have been treated as mitigating factors, and that while 257 individuals may have been employed at some point during the three year inspection period, far fewer individuals were employed at any given time. SGC says it is "struggling to survive in a difficult construction economy" and that the proposed fines could close the business and leave its employees out of work. SGC prepared its own alternative penalty calculations. For the violations in Count II, SGC's proposed penalties range from $110 to $490.87. The range for the violations Count III is from $110 to $537.62. SGC proposes penalties for the violations in Count IV at the rate of $537.62, and for those in Counts V and VI at the rate of $600. The company's proposed total penalty amount is $96,851.20 ($5512.35 for Count II; $11,922.15 for Count III; $18,816.70 for Count IV; $36,000 for Count V; and $24,600 for Count VI).

SGC's response to the government's motion for summary decision was accompanied by exhibit A, the affidavit of Christian Diaz, the company's office manager. The company's response to ICE's penalty memorandum was accompanied by exhibits consisting of 1) SGC's Violation Analysis (44 pp.); and 2) SGC's Proposed Fine Spreadsheet (6 pp.).

IV. DISCUSSION

The previous order found SGC liable for seventy-eight violations involving failure to ensure proper completion of I-9 forms, and for 101 violations for failure to prepare and/or present I-9 forms. The permissible penalties for these violations range from a minimum of $19,690 to a maximum of $196,900. The penalty ICE seeks is more than ninety-four percent of the maximum permissible and as SGC points out, OCAHO case law provides that penalties approaching the maximum should be reserved for the most egregious violations. *Fowler Equip.*, 10 OCAHO no. 1169 at 6. The goal in calculating civil penalties is to set a sufficiently meaningful fine to promote future compliance without being unduly punitive. *Id.*

SGC is a construction company located in Glendale, Arizona owned by Salvador and Mary Gonzalez, the company's only shareholders and officers. While not a large business, neither is it the prototypical "mom and pop" business or start-up company. The seriousness of SGC'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). The violations involving failure to ensure proper completion of I-9 forms are serious, but somewhat less so than are the 101 violations involving failure to present the forms upon request by the government. *See United States v. Romans Racing Stables*, 11 OCAHO no. 1230, 5 (2014). Failure to prepare or present an I-9 is one of the most serious violations because it completely subverts the purpose of

the employment verification requirements. *United States v. Clean Sweep Janitor Serv.*, 11 OCAHO no. 1226, 4 (2014). While SGC maintains that it did complete I-9 forms and lost them, and that it completed replacement forms for missing originals, the failure to present the forms is still a serious violation. *See United States v. Metro. Warehouse, Inc.*, 10 OCAHO 1207, 7 (2013).

The government aggravated some of the penalties based on what it characterized as the company's lack of good faith, pointing out that the company back-dated fifty-seven of the forms. The company admits that these forms were prepared after the NOI, but maintains it completed new versions of those forms as replacements for lost forms. OCAHO case law provides that backdating alone, without more, is insufficient to support a finding by a preponderance of the evidence that good faith was lacking. *See United States v. Pharaoh's Gentleman's Club, Inc.*, 10 OCAHO no. 1189, 4-5 (2013). Absent any information about the surrounding facts and circumstances, for example, what instructions were given to the company at the time of the NOI, a variety of competing inferences could arise.

The government says it aggravated the penalty for eighty-four individuals that were unauthorized to work, but did not specifically name the individuals it contends were unauthorized. The affidavit of Auditor Keith Campton asserts as to the employees named in Count II that the penalties were aggravated by five percent based *either* on the seriousness of the violation or the unauthorized status of the employee. For Count III, Campion explains that the penalty was aggravated for seriousness, lack of good faith, *and/or* unauthorized status. It is impossible to ascertain with specificity which of the individuals named in Counts II and III the government contends are unauthorized. All the violations in Counts IV (35) and VI (41), however, involved unauthorized individuals, and no employee named in Count V was unauthorized.

In addition to the record as a whole and the statutory factors in particular, I have also considered the general public policy of leniency reflected in the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq. as amended by the Small Business Regulatory Enforcement Act of 1996 (SBREFA), Pub. L. No. 104-122, 110 Stat. 864 (1996). The penalties in this case will be reduced to amounts closer to the mid-range of possible penalties. For the forty-three paperwork violations in Counts II and III the penalties will be $450 each. For the thirty-five paperwork violations in Count IV involving unauthorized workers the penalties will be $600 each. For the violations involving failure to prepare or present I-9 forms, the penalties will be $500 each for those involving sixty authorized workers and $650 each for those involving the forty-one unauthorized workers.

ORDER

Speedy Gonzalez Construction, Inc. is liable for 179 violations of 8 U.S.C. § 1324a(a)(1)(B) and is directed to pay civil penalties in the total amount of $97,000. 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 4th day of February, 2015.

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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.