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

August 13, 2015

UNITED STATES OF AMERICA, Complainant, v. JERRY ESTOPY AND MANUEL BORTONI, D/B/A ESTOPY FARMS, Respondent.	)))))))))	8 U.S.C. § 1324b Proceeding OCAHO Case No. 12B00011

FINAL DECISION AND ORDER

Appearances:

For the Complainant-in-Intervention:
Richard Crespo
C. Sebastian Aloot

For the Respondent:
Jose M. Martinez

I. PROCEDURAL HISTORY

This is an action arising under the nondiscrimination provisions of the Immigration and Nationality Act, 8 U.S.C. § 1324b (2012), as amended by the Immigration Reform and Control Act of 1986 (IRCA). On June 10, 2015, I issued an order, hereby incorporated by reference, granting a partial summary decision as to the complaint-in-intervention filed by the Office of Special Counsel for Immigration-Related Unfair Employment Practices. The order found Jerry Estopy and Manuel Bortoni d/b/a Estopy Farms liable for discriminating against Enrique Romero on the basis of his citizenship in violation of 8 U.S.C. § 1324b(a)(1)(B), and set out a schedule

for supplemental filings respecting the appropriate remedies. *See United States v. Jerry Estopy and Manuel Bortoni d/b/a Estopy Farms*, 11 OCAHO no. 1252 (2015).[1] Those filings have been completed, and the matter is ripe for resolution.

II. THE POSITIONS OF THE PARTIES

A. OSC's Request

OSC asks for both civil money penalties and injunctive relief directing the respondents to cease and desist from using policies that deny, limit, or impair qualified individuals from being considered for employment based on prohibited criteria. In addition, they seek an order compelling the respondents to take affirmative steps to ensure that they do not engage in unlawful discrimination in the future. Such remedies are specifically authorized by law and regulations. *See* 8 U.S.C. § 1324b(g)(2); 28 C.F.R. § 68.52(d).[2]

The government contends that the maximum civil money penalty of $3200 is warranted because the respondents were informed but uncooperative, and committed an egregious statutory violation that resulted in significant harm. The particular violation at issue involved failure to consider a qualified U.S. citizen for employment while affording a preference to temporary foreign workers. The U.S. citizen was simply passed over, and the respondents elected to hire nonimmigrant workers through the H-2A labor certification process[3] instead. OSC says that the individual they discriminated against was unable to secure alternative employment during the entire twenty-nine week period during which respondents employed the temporary agricultural equipment operators from Mexico. OSC points out as well that the respondents resisted OSC's investigation, failed to comply with judicial orders during the proceeding, failed to make proper and timely filings, and generally displayed a cavalier attitude throughout the course of the litigation.

The government points out that while the statute itself does not set out any particular factors that must be considered in setting penalties for such violations, OCAHO case law has looked to a

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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.

[2] *See* Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2014).

[3] *See generally Sanchez v. Ocanas*, 9 OCAHO no. 1115, 3-4 (2005) (outlining the multi-step process for employing temporary or seasonal agricultural workers under 8 U.S.C. § 1101(a)(15)(H)(ii)(a)).

variety of criteria, including the egregiousness of the violations, the harm resulting from the discrimination, the employer's resistance to OSC's investigation, noncompliance with court orders, and the employer's familiarity with the law involved (citations omitted). OSC also points to cases setting penalties for violations of a companion provision, 8 U.S.C. § 1324a. The government argues that, as with violations of §1324a, the seriousness of an employer's violations should be viewed on a continuum for purposes of §1324b, and penalties at the maximum permissible should be reserved for the most serious and egregious violations (citations omitted). The government says that because this is such a case, the maximum penalty is justified.

OSC says further that detailed injunctive relief is warranted in order to ensure that the respondents do not violate the law again, and that Jerry Estopy and Manuel Bortoni d/b/a Estopy Farms should be required to take specific affirmative steps and be monitored by OSC for a period of three years to ensure compliance.

B. Estopy Farms' Response

Jerry Estopy and Manuel Bortoni d/b/a Estopy Farms filed a response requesting that the proposed civil money penalty not be imposed, and urging that injunctive relief is unwarranted for several reasons. First, the respondents emphasize that they cooperated with discovery and that the underlying case was ultimately settled with Romero being made whole. They point out further that this is a small family business and say that the period of employment did not actually last for the full twenty-nine weeks as stated on the labor certification, but was in fact only for twelve weeks.

The respondents state that they have never before been sued by the government, and that nothing they did was done with the intent to discriminate. They say that the alleged violations were not so serious and egregious to warrant the maximum penalty, and that their actions resulted from unfamiliarity with the process rather than any scheme to circumvent the process. The respondents assert that they would have saved time and money using domestic labor and that had the individuals referred by the Texas Workforce Commission been qualified, they would have been hired. They nevertheless oppose any injunctive relief "other than to order that the Respondents never again attempt to use the H-2A program."

III. DISCUSSION AND ANALYSIS

In considering whether the maximum civil money penalty is warranted in this case, I look to the totality of the circumstances, including the nature of the violation and the circumstances surrounding it, as well as to the conduct of the respondents during the course of this proceeding. In *United States v. Beverly Center*, 5 OCAHO no. 762, 347, 352 (1995), a similar discriminatory denial of employment was found to result in a violation that was not only particularly serious, but also significantly harmful. The same is true in this proceeding where seven temporary nonimmigrant workers were paid for at least twelve weeks of work, if not more, while Enrique Romero remained unemployed and without income for the whole period.

Unlike the employer in *United States v. Louis Padnos Iron & Metal Co.*, 3 OCAHO no. 414, 181, 193 (1992), where the company's violation resulted from the employer's unfamiliarity with the particular legal provision involved, there are no such mitigating circumstances here, notwithstanding the respondents' suggestion that they were unfamiliar with the H-2A process. I do not credit that facile and unsupported suggestion, first because the record reflects that the respondents had the assistance of counsel throughout the whole process; extensive correspondence between their counsel and representatives of the Department of Labor as well as the Texas Workforce Commission show that their counsel was involved from at least May 5, 2010 through at least mid-August, 2010. Second, the record reflects as well that the respondents had years of previous experience with the H-2A program. It is not credible that they were unaware of the requirement to first ensure that there are no qualified U.S. workers available to do the work as a precondition for employing temporary foreign workers.

The respondents' conduct in the course of this proceeding is described in the prior order, 11 OCAHO no. 1252 at 2-3, and the detailed particulars need not be repeated here. Similar behavior by the respondent in *Beverly Center* was described as being "not conducive to finding a low civil money penalty," 5 OCAHO no. 762 at 352, and that would be an understatement when applied to this case. The respondents' assertion that they were cooperative in discovery also defies credulity in light of the record in this proceeding. As explained in the prior order, the respondents' conduct was repeatedly evasive and nonresponsive, and they failed to comply with their basic discovery obligations even after I issued a second order compelling them to do so. *See Estopy Farms*, 11 OCAHO no. 1252 at 2. Accordingly, the maximum civil money penalty is well deserved and will be assessed.

When a person or entity is found to have engaged in an unfair immigration-related employment practice, the law provides that an order must issue requiring that person or entity to cease and desist from such practices. 8 U.S.C. § 1324b(g)(2)(A); *United States v. Life Generations Healthcare, LLC*, 11 OCAHO no. 1227, 31 (2014). Such an order is mandatory, not discretionary, and will be issued to the respondents in this case. Without appropriate monitoring, moreover, there is no reason to believe that these respondents will comply with the law in the future or indeed, that they will change their employment practices in any significant way. Jerry Estopy and Manuel Bortoni, individually and jointly d/b/a Estopy Farms, will accordingly be required to take affirmative remedial steps to ensure that similar violations do not occur again, and will be monitored by OSC to ensure that they do so. There is no necessity for the respondents to avoid the use of the H-2A certification program; it is only necessary that if they do elect to use the program, they will conform to its requirements and will not pass over qualified U.S. workers in favor of temporary foreign workers.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Jerry Estopy and Manuel Bortoni, individually and jointly d/b/a Estopy Farms, are engaged in the business of harvesting crops, including cotton, in Texas and Mexico.

2. Manuel Bortoni is Jerry Estopy's stepson; individually and jointly while doing business as Estopy Farms, Estopy and Bortoni own at least eight cotton harvesting machines.

3. At all times pertinent, Jerry Estopy and Manuel Bortoni, individually and jointly d/b/a Estopy Farms, planted, cultivated, and harvested their own crops in Edinburg, Texas, and also used their cotton harvesting machines to harvest cotton for other farmers near Corpus Christi, Texas.

4. On or about May 18, 2010, Jerry Estopy and Manuel Bortoni, individually and jointly d/b/a Estopy Farms, submitted two Agricultural and Food Processing Clearance Order requests to the Texas Workforce Commission Foreign Labor Certification Unit seeking to hire seven H-2A workers from July 25, 2010, to March 25, 2011, to work as cotton machine operators at Whatley Farms in cotton and grain sorghum, and seven H-2A workers to work as cotton machine operators in cotton and grain sorghum at Estopy Farms in Edinburg, Texas.

5. The job specifications in the Agricultural and Food Processing Clearance Order requests that Jerry Estopy and Manuel Bortoni filed on or about May 18, 2010, stated: "Cotton Machine Operator will drive and operate a John Deere Cotton Picker Machine; will drive farm machine from farm to field to harvest cotton; will prepare cotton machine by adjusting speeds and levels; and will refuel engine and lubricate machine parts;" both ETA-790s contained the statement that "[t]raining will be provided for 2 days and workers will be allowed 2 days to reach the production standards of the activity."

6. Jerry Estopy testified in his deposition that if a man is familiar with farm equipment such as combines or tractors, he could be trained in three to four hours to operate a cotton picker harvester machine; Jerry Estopy said he himself had trained several people to do this work, including his stepson Manuel Bortoni.

7. Neither of the Agricultural and Food Processing Clearance Order requests that Jerry Estopy and Manuel Bortoni filed on or about May 18, 2010, reflected any requirement that the applicants have previous experience operating a cotton harvester machine; in July, however, when Estopy Farms filed its application for certification to apply for visas for seven H-2A workers (Form 9142), Estopy Farms included a statement that one month of experience as a cotton picker operator was required.

8. Enrique Romero is a citizen of the United States who was referred to Estopy Farms by the Texas Workforce Commission and was interviewed in June 2010 by both Estopy and Bortoni for a job as a seasonal agricultural equipment operator.

9. At the time of the events in question, Enrique Romero had fourteen years' experience in operating agricultural equipment, including combines and tractors, but not including cotton harvesters.

10. Jerry Estopy told Enrique Romero that the job would begin in a few weeks, and that Romero would be notified of the date he could start work.

11. During the next several weeks, Enrique Romero telephoned Manuel Bortoni several times, and on one occasion Bortoni answered the phone and told Romero that the job had been delayed by bad weather but that Bortoni would inform him of the start date.

12. No one from Estopy Farms ever called Enrique Romero back and Romero later learned from the Texas Workforce Commission that all the individuals Estopy Farms subsequently hired for the jobs at issue were H-2A workers who came from Mexico with visas authorizing them to enter the United States to work for Estopy Farms.

13. Estopy Farms provided a series of shifting, inconsistent, and mutually contradictory explanations over the course of this proceeding for failing to hire Enrique Romero.

14. Jerry Estopy and Manuel Bortoni, individually and jointly d/b/a Estopy Farms, passed over a qualified U.S. citizen applicant for employment in favor of hiring temporary H-2A workers from Mexico.

15. No evidence was presented that Rogelio Gallegos Palacio or Carlos Eluid Esparza Buzaldua had any experience operating agricultural equipment such as combines, tractors, or cotton harvesters.

16. During the course of this litigation, Jerry Estopy and Manuel Bortoni, individually and jointly d/b/a Estopy Farms, failed to comply with discovery obligations, ignored judicial orders, engaged in stonewalling and needless delay, and made frivolous and dilatory filings.

B. Conclusions of Law

1. The Office of Special Counsel for Immigration-Related Unfair Employment Practices is entitled to pursue a complaint-in-intervention on its own, even in the absence of a charging party. *See United States v. McDonnell Douglas Corp.*, 3 OCAHO no. 507, 1053, 1061-62 (1993).

2. The burden shifting paradigm in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) provides the framework for analysis in a disparate treatment case.

3. A prima facie case of discrimination in hiring is shown when a complainant demonstrates that he belongs to a protected class, that he applied and was qualified for a job for which the employer was seeking applicants, that despite his qualifications he was rejected, and that after his rejection the position remained open and the employer continued to seek applicants with similar qualifications. *Hammoudah v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 8 OCAHO no. 1050, 751, 768 (2000).

4. Under the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) paradigm, once the employee presents a prima facie case, the burden shifts to the employer to present a legitimate, nondiscriminatory reason for the employment decision. *Haire v. Bd. of Supervisors of La. State Univ. Agric. & Mech. Coll.*, 719 F.3d 356, 362-63 (5th Cir. 2013).

5. The employer's burden to present a legitimate, nondiscriminatory reason for an employment decision is a burden of production only, not of persuasion. *See Russell v. McKinney Hosp. Venture*, 235 F.3d 219, 222 (5th Cir. 2000).

6. An employer's nondiscriminatory explanation for an employment decision dispels any inference of discrimination, after which the employee must show that the proffered explanation is a pretext and was not the real reason for the decision. The complainant retains the ultimate burden of persuasion throughout. *Ameristar Airways, Inc. v. DOL*, 650 F.3d 562, 567 (5th Cir. 2011).

7. An employee can overcome an employer's proffered reason by showing that the explanation the employer provided is not the real reason, and is a pretext for discrimination. *See Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 658-59 (5th Cir. 2012).

8. An employee may establish pretext by showing that a discriminatory motive is more likely to have motivated the adverse employment decision. *Haire v. Bd. of Supervisors of La. State Univ. Agric. & Mech. Coll.*, 719 F.3d 356, 363 (5th Cir. 2013).

9. An employee may establish that an explanation is pretextual by pointing to evidence that similarly situated individuals not in the protected class were more favorably treated, or by any other evidence demonstrating that the employer's explanation is unworthy of credence. *Medina v. Ramsey Steel Co., Inc.*, 238 F.3d 674, 685 (5th Cir. 2001).

10. The explanation that Jerry Estopy and Manuel Bortoni, individually and jointly d/b/a Estopy Farms, proffered for failing to hire Enrique Romero, that he lacked the requisite experience, was shown to be a pretext for concealing the fact that the respondents preferred to employ temporary agricultural workers from Mexico.

11. Regulations provide that employers must consider a U.S. worker qualified if the individual meets the minimum requirements specified in the labor certification application, pursuant to 20 C.F.R. §§ 655.103(a), 655.121(e)(2), and 655.135; the employer may not reject such an individual based on criteria not listed in the job order. 20 C.F.R. § 655.121(e)(2).

12. Statutory and regulatory provisions authorizing remedies for violations of 8 U.S.C. § 1324b(a)(1) do not set out any particular factors that must be considered in setting civil money penalties for such violations. 8 U.S.C. § 1324b(g)(2); 28 C.F.R. § 68.52(d) (2014).

13. The purpose of the labor certification process is to protect, not to disadvantage, domestic workers. *Alfred L. Snapp & Son, Inc. v. P. R. ex rel. Barez*, 458 U.S. 592, 596 (1982).

14. The governing statute, 8 U.S.C. § 1324b(a)(4), does not require that a U.S. citizen be afforded any preference over an equally qualified alien individual, but it does require that a U.S. citizen or other protected individual not be discriminated against on the basis of his or her citizenship. 8 U.S.C. § 1324b(a)(1)(B).

15. When a person or entity is found to have engaged in an unfair immigration-related employment practice, it is mandatory that an order issue requiring that person or entity to cease and desist from such practices. 8 U.S.C. § 1324b(g)(2)(A); *United States v. Life Generations Healthcare, LLC*, 11 OCAHO no. 1227, 31 (2014).

ORDER

Jerry Estopy and Manuel Bortoni, individually and jointly d/b/a Estopy Farms, are liable for discriminating against Enrique Romero on the basis of his citizenship in violation of 8 U.S.C. § 1324b(a)(1)(B) and are directed to pay a civil money penalty of $3200 to the United States.

Jerry Estopy and Manuel Bortoni, individually and jointly d/b/a Estopy Farms, are hereby directed to cease and desist from using any recruitment or hiring policy, practice, or procedure that denies, limits, or impairs a qualified U.S. worker from being considered for employment or hired due to his or her citizenship status.

Jerry Estopy and Manuel Bortoni, individually and jointly d/b/a Estopy Farms, are further directed to take remedial actions as follows:

1) Within ninety days of the date of this order, respondents and any of their existing employees or officials responsible for recruitment, hiring, or employment eligibility verification (including utilization of the E-Verify program) shall complete a training on the nondiscrimination provisions of the INA. This requirement may be satisfied by enrollment and viewing of the free webinars offered monthly by the Office of Special Counsel for Immigration-Related Unfair Employment Practices.

2) For a period of three years following the date of this order, any new employees hired by the respondents who are to be responsible for recruitment, hiring, or employment eligibility verification (including utilization of the E-Verify program) shall, within thirty days of their respective dates of hire, complete a training on the nondiscrimination provisions of the INA. This requirement may be satisfied by enrollment and viewing of the free webinars offered monthly by the Office of Special Counsel for Immigration-Related Unfair Employment Practices.

3) For a period of three years following the date of this order, respondents shall make semiannual reports to the Office of Special Counsel for Immigration-Related Unfair Employment Practices reflecting the names, contact information, application materials, and position description for any individual who applies to the respondents for employment, and provide a copy of the I-9 form for any individual actually hired. The first such report will be due six months from the date of this order.

4) Within ten days of the date of this order, respondents shall post the English and Spanish versions of the poster, "If You Have a Right to Work," available in electronic format in both languages at the website for the Office of Special Counsel for Immigration-Related Unfair Employment Practices. The posters are to be affixed at all places where notices to employees

and job applicants are normally posted by the respondents and are to remain posted for a period of three years. The posters are not to be altered, defaced, or covered by other materials.

5) For a period of three years following the date of this order, the respondents will notify the Office of Special Counsel for Immigration-Related Unfair Employment Practices by U.S. mail within five business days of its filing of any Labor Certification Application with the Department of Labor seeking approval for the employment of foreign workers under the H-2A or H-2B program, and provide copies of the Labor Certification Applications and any attachments thereto.

6) Within thirty days of this order, respondents will revise their office policies, manuals, and procedures to clarify in writing that they do not discriminate in hiring on the basis of citizenship in violation of 8 U.S.C. § 1324b.

SO ORDERED.

Dated and entered this 13th day of August, 2015.

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Ellen K. Thomas
Administrative Law Judge

Appeal Information

In accordance with the provisions of 8 U.S.C. § 1324b(g)(1), this Order shall become final upon issuance and service upon the parties, unless, as provided for under the provisions of 8 U.S.C. § 1324b(i), any person aggrieved by such Order files a timely petition for review of that Order in the United States Court of Appeals for the circuit in which the violation is alleged to have occurred or in which the employer resides or transacts business, and does so no later than 60 days after the entry of such Order. Such a petition must conform to the requirements of Rule 15 of the Federal Rules of Appellate Procedure.