

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

April 21, 2015

UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. § 1324a Proceeding
	)	OCAHO Case No. 14A00056
	)	
KENNETH MCPEEK RACING STABLES, INC.,	)	
Respondent.	)	
_____	)	

FINAL DECISION AND ORDER

Appearances:

Marvin Muller III,  
For the complainant

William Velie,  
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 complaint alleging that Kenneth McPeek Racing Stables, Inc. (McPeek, the company, or the stables) violated 8 U.S.C. § 1324a(a)(1)(B). Count I alleges that McPeek failed to prepare I-9s for sixty-two employees within three business days of their respective dates of hire and/or failed to present I-9s for them upon request by the government. Count II alleges that the company failed to ensure that thirty-seven employees properly completed section 1 of their I-9 forms, or itself failed to properly complete sections 2 or 3 of the forms. The penalties sought total \$64,795.50. McPeek filed an answer denying the material allegations and asserting affirmative defenses.

The parties subsequently filed their respective prehearing statements. McPeek's prehearing statement conceded liability for the violations alleged, but contested the amount of the proposed penalties. The parties subsequently filed cross motions for summary decision on the penalty issue. Neither party responded to the other's motion, and both motions are ripe for resolution.

## II. BACKGROUND

Kenneth McPeek Racing Stables, Inc., incorporated in 1992, is engaged in the business of training thoroughbred race horses at tracks located in New York, Kentucky, and Florida. The company is incorporated, registered, and directed by Kenneth G. McPeek, who is a horse trainer himself. ICE served McPeek with a Notice of Inspection (NOI) on September 23, 2011<sup>1</sup> at the company's Kentucky location. The government served McPeek with a Notice of Intent to Fine on December 16, 2013, and the company made a timely request for hearing on January 10, 2014. All conditions precedent to the institution of this proceeding have been satisfied.

McPeek's prehearing statement acknowledged liability for the violations alleged, and the company's motion for summary decision specifically concedes that the stables failed to present I-9s for fifty-eight named employees; failed to ensure that thirty-seven named employees properly completed section 1 of their I-9 forms or itself failed to properly complete sections 2 or 3 of their forms; and failed to prepare I-9s for four employees within three business days of their respective dates of hire. McPeek's concession accords with ICE's exhibit G-7, which lists the specific violations for each I-9, and is sufficient to establish liability for the ninety-nine violations alleged in the complaint.

## III. PENALTY ASSESSMENT

### A. 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. Potential penalties in this case range from a low of \$10,890 to a high of \$108,900. Because the

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<sup>1</sup> The NOI indicates that this is a reopened investigation. A previous NOI was issued to the company on July 30, 2010, and a Notice of Intent to Fine was issued on July 12, 2011, after which Kenneth McPeek contacted ICE's Buffalo Office and explained that he had thought he had to submit I-9s only for the company's New York employees rather than all its employees. Homeland Security Investigation (HSI) reopened its investigation as a courtesy, and revoked the previous NIF to give McPeek the opportunity to submit I-9s for its entire workforce.

government has the burden of proof with respect to the penalty, *United States v. March Construction, Inc.*, 10 OCAHO no. 1158, 4 (2012),<sup>2</sup> 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 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).

#### B. The Government's Position

ICE calculated a baseline penalty of \$770 per violation in accordance with internal agency guidelines that set this amount where the employer's error rate is more than forty, but less than fifty, percent. The government then mitigated the penalty by five percent based on McPeek's status as a small business, by another five percent based on the lack of unauthorized workers in McPeek's workforce, by an additional five percent based on the company's lack of history of previous violations, and finally by another five percent based on the lack of evidence of bad faith. ICE did, however, aggravate the penalty based on the seriousness of the violations. The adjusted penalty for each of the ninety-nine violations was \$654.50, and the total was \$64,795.50.

ICE says the stables failed to present sufficient evidence to support the company's assertion that it would have to cease operating if forced to pay the proposed penalty. The government points out that Kenneth McPeek's personal financial records are absent from the record and says that because Kenneth McPeek is the sole shareholder of this closely held business, the stables should not be allowed to argue inability to pay unless Kenneth McPeek's own financial position can be

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<sup>2</sup> 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>.

analyzed. According to the government, the totality of the circumstances indicates that the fine is justified and appropriate.

The government provided no exhibits with its motion for summary decision, but exhibits accompanying ICE's prehearing statement include: G-1) Notice of Inspection dated September 23, 2011 (2 pp.); G-2) McPeek's Employee Earnings Summary (7 pp.); G-3) letter from Chris Baur to Sandra; G-4) Notice of Suspect Documents dated August 9, 2012 (2 pp.); G-5) Notice of Technical or Procedural Failures dated August 9, 2012 (3 pp.); G-6) Notice of Intent to Fine and I-9s (43 pp.); and G-7) spreadsheet listing substantive and technical violations on employees' I-9s (13 pp.).

### C. McPeek's Position

McPeek agrees that summary resolution is appropriate as to liability, but says the penalties proposed are excessive and should be reduced. The company cites a number of OCAHO cases involving small employers under similar circumstances, and notes that the proposed fines are more than a quarter of the stables' net income for 2013. McPeek points out that the horse racing industry, like the restaurant industry, is of a transient nature and experiences high staff turnover, and that apart from the seriousness of the violations, all of the statutory factors favor the company. The company points out, in addition, that it is spread over multiple states at race tracks in New York, Kentucky, and Florida, which only increases the difficulties inherent in small business operations.

The company also says that it had no training on I-9 compliance prior to the inspection, but that it is currently instituting a plan to ensure that I-9s are properly completed for all new hires, and will also be advocating for adoption of comprehensive I-9 compliance practices throughout the horse racing industry. Kenneth McPeek is working on a plan with a prominent trainer in the industry, and will use his position on the Board of Trustees for the Thoroughbred Owners and Breeders Association as a platform to distribute the plan to educate employers on proper I-9 procedures. A letter from Martin Maline, Executive Director of the Kentucky Horsemen's Benevolent and Protective Association, states that McPeek has worked with Dale Romans<sup>3</sup> on efforts to educate trainers and horse industry owners on the importance of I-9 compliance and related best practices. McPeek says these actions should weigh heavily in favor of reducing the penalty.

As to the seriousness of the violations, McPeek says that the nature of the horse racing industry requires Kenneth McPeek to travel a significant portion of the year, but he acted promptly in response to agency requests. The company says it understands that I-9 compliance is a serious

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<sup>3</sup> See *United States v. Romans Racing Stable*, 11 OCAHO no. 1230, 5-6 (2014), *aff'd by CAHO*, 11 OCAHO no. 1232 (2014).

matter and has taken steps to ensure that the I-9s are properly completed for all new hires. The company's exhibit R-2<sup>4</sup> is a document titled, "I-9 Compliance Policy and Procedures" that contains instructions for filling out an I-9 form and reflects that the company will periodically conduct internal I-9 audits. The company also says it goes to great lengths to hire only authorized workers.

McPeek says that ICE's proposed penalty would have a devastating impact from which the stables would be unlikely to recover, and that the penalty would virtually ensure that the company would have to cease operating. The stables' corporate tax return for 2013 reflects gross receipts of \$5,873,408 and ordinary business income of \$248,383. McPeek points out that ICE's proposed penalty is more than twenty-five percent of the company's net income for 2013. McPeek says that horse trainers typically operate at a loss on horses under their care and only see profits from horses that win, and that the penalties ICE proposes would hurt the stables' ability to move horses to other tracks, hire staff, and compete at the highest levels of the industry.

McPeek's motion was accompanied by exhibits including: R-1) McPeek's 2013 S corporation tax return (22 pp.); R-2) memorandum regarding McPeek's I-9 procedures dated June 1, 2014 (2 pp.); and R-3) letter from Martin Maline dated March 15, 2014.

#### D. Discussion and Analysis

The parties agree that McPeek is a small business with no history of previous violations, that it acted in good faith, and that no unauthorized workers were found. They disagree, however, about the proper weight to be given to each of the statutory factors and about the seriousness of the violations. McPeek raises the additional nonstatutory factor of the company's ability to pay the fine proposed.

The record supports ICE's findings as to the seriousness of the violations. OCAHO case law has long held that 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. Corp.*, 6 OCAHO no. 848, 235, 248-49 (1996). Failure to ensure that an employee properly completes section 1 of the I-9 and failure to properly complete section 2 are also very serious violations. *See United States v. Emp'r Solutions Staffing Grp. II, LLC*, 11 OCAHO no. 1242, 11, 15 (2015) (describing section 2 as "the very heart" of the verification process); *United States v. Ketchikan Drywall Servs., Inc.*, 10 OCAHO no. 1139, 10 (2011) (explaining that failure to ensure that employees properly complete section 1 defeats the whole purpose of the employment verification process). Failure to timely prepare an I-9 is likewise a serious violation. *See United States v. Anodizing Indus., Inc.*, 10 OCAHO no. 1184, 14 (2013).

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<sup>4</sup> For clarity, the letter "R" is added before the respondent's numerical designations.

Apart from the seriousness of the violations, however, all the remaining statutory factors strongly incline in McPeek's favor. While the stables' 2013 tax return shows a modest ordinary business income, it nevertheless also reflects that the company has substantial assets, inasmuch as the return reflects a deduction of almost three million dollars for buildings and other depreciable assets. One tax return is not in any event sufficient to provide a very clear picture of McPeek's ability to absorb the penalty proposed, but consideration of the record as a whole and the statutory factors in particular, suggests that a modest reduction to the proposed penalties is appropriate in this case.

Given the transient nature of the industry, and in light of the general public policy of leniency toward small entities as set out in § 223(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, 110 Stat. 864 (1996), 5 U.S.C. § 601 note (2006), the penalties for this small employer will be adjusted as a matter of discretion to an amount closer to the low end of the midrange of potential penalties. The sixty-two violations in Count I will be assessed at \$400 each, totaling \$24,800. The thirty-seven violations in Count II will be assessed at \$300 each, totaling \$11,100. The total penalty is \$35,900.

#### IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

##### A. Findings of Fact

1. Kenneth McPeek Racing Stables, Inc., incorporated in 1992, is engaged in the business of training thoroughbred race horses.
2. The company is incorporated, registered, and directed by Kenneth G. McPeek, who is himself a horse trainer.
3. Department of Homeland Security, Immigration and Customs Enforcement served Kenneth McPeek Racing Stables, Inc. with a Notice of Inspection (NOI) on September 23, 2011.
4. Department of Homeland Security, Immigration and Customs Enforcement served Kenneth McPeek Racing Stables, Inc. with a Notice of Intent to Fine on December 16, 2013.
5. Kenneth McPeek Racing Stables, Inc. made a timely request for hearing on January 10, 2014.
6. Department of Homeland Security, Immigration and Customs Enforcement filed a complaint with this office on April 15, 2014.
7. Kenneth McPeek Racing Stables, Inc. hired Marvin Abrego, Marcos Abril, Maria Almanza, Williams Blair, Ashley Blum, Diago Brabo, William Campbell, Feliz Candia, Ricardo Candia, Victor Cano, Gerber Chajon, Angel Chavira, Arnoldo Chincilla, Michelle de Villiers-Brookfield,

Jesus Dominguez, Daniel Engel, Julio Garcia-Quevedo, Juan Gomez, Luis Gonzalez, Natanael Gonzalez, Irene Guerra, Jordan Guillen, Adrian Gusman, Rafael Hernandez, Margarita Herrera, Rodolfo Herrera, Peter Hutton, Jeff Ishmael, Miguel Jaime, Johnny Kazee, Rigoberto Lopez, Scott Miller, John Mitchener, Omar Morales, Carlos Navas, Encarnacion Navas, Juan Orantes, Octavio Orantes, Martha Orantes, Maximo Ortiz, Leonel Quevedo, Selvin Quevedo, Juan Quinteros, Paulino Ramos, Eugene Ratliff, Heriberto Rivera, Jerry Roberts, Kim Roberts, Rodolfo Roblero-Perez, Leobaldo Rodriguez, Rusty Shaw, Barry Silver, Jordan Springer, Patrick Stewart, Amanda Tamburello, Amy Vasko, Cher Villalobos, and Ronnie Warren, named in Count I, and failed to present I-9 forms for them upon request by the government.

8. Kenneth McPeek Racing Stables, Inc. hired Jose Lopez, Anthony Britton, Esther Carenas, and Migueal Fujarte, named in Count I, and failed to prepare I-9s for them within three business days of their respective dates of hire.

9. Kenneth McPeek Racing Stables, Inc. hired Mynor Aleman, Janson Alvarez, Juan Alvarez Lopez, Roberto Ambriz, Cordell Anderson, Jorge Chavez, Dario Coronel, Glenda Florian, Walter Garcia, Jesus Guerrero, Raymond Handal, Scotty Leleux, Lorena Lopez, Ventura Lopez, Donal McCabe, Pedro Perez, Rosa Ramos, Israel Reyes, Celestino Rivas, Mario Rodriguez, Roberto Soto, Melanie Zaniewski, Martin Jaime, Walter Blum, Juan Delgado, Arturo Salazar, Jose Mendez, Alveraz Salvador, Jose Andrade, Tomas Calderoro, Javier Copantitla, Melvin Perez, Hector Rojas Vergara, Leiva Dante, Jose Martin, Jose Botello, and Arturo S. Barrera, all of whom are named in Count II, and failed to ensure that they properly completed section 1 of their I-9 forms and/or itself failed to properly complete sections 2 or 3 of their forms.

10. Kenneth McPeek Racing Stables, Inc. is a small business that acted in good faith and had no history of previous violations and no unauthorized workers during the period examined.

11. Kenneth McPeek is helping to promote compliance with the employment eligibility verification requirements across the horse racing industry.

#### B. Conclusions of Law

1. Kenneth McPeek Racing Stables, Inc. 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. Kenneth McPeek Racing Stables, Inc. is liable for ninety-nine 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. Corp.*, 6 OCAHO no. 848, 235, 248-49 (1996).

6. Failure to ensure that an employee properly completes section 1 of the I-9 and failure to properly complete section 2 are also very serious violations. *See United States v. Emp'r Solutions Staffing Grp. II, LLC*, 11 OCAHO no. 1242, 11, 15 (2015) (describing section 2 as "the very heart" of the verification process); *United States v. Ketchikan Drywall Servs., Inc.*, 10 OCAHO no. 1139, 10 (2011) (explaining that failure to ensure that employees properly complete section 1 defeats the whole purpose of the employment verification process).

7. Failure to timely prepare an I-9 is a serious violation. *See United States v. Anodizing Indus., Inc.*, 10 OCAHO no. 1184, 14 (2013).

8. 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).

9. A general public policy of leniency in setting penalties for small entities is set out in § 223(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, 110 Stat. 864 (1996), 5 U.S.C. § 601 note (2006).

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

Kenneth McPeck Racing Stables, Inc. is liable for ninety-nine violations of 8 U.S.C. § 1324a(a)(1)(B) and is ordered to pay a civil money penalty of \$35,900. The parties are encouraged 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 21st day of April, 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) (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.