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

May 13, 2015

UNITED STATES OF AMERICA, Complainant, v. NICHE, INC. Respondent.	))))))))	8 U.S.C. § 1324a Proceeding OCAHO Case No. 14A00035

Appearances:

For the complainant:
Gwendylan E. Tregerman, Esq.

For the respondent:
Matthew J. Maiona, Esq.

AMENDED FINAL DECISION AND ORDER

A Final Decision and Order was initially issued in the above-captioned case on April 14, 2015. Pursuant to 28 C.F.R. § 68.52(f), this Amended Final Decision and Order clarifies the decision previously issued on April 14, 2015.

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 three-count complaint against Niche, Inc. (Niche, respondent, or the company). The company filed a timely answer and the parties completed prehearing procedures.

Presently pending is the government's motion for summary decision (the motion), to which the company filed a response (the response). The motion is fully briefed and is ready for resolution. As set forth in detail below, the government's motion is granted in part, and the civil money penalties are reduced on account of significant mitigating factors presented in this case.

II. BACKGROUND INFORMATION

Niche, Inc., is a stitching services company located in New Bedford, Massachusetts, founded in 1988. Resp. at 2. Niche explains that it primarily manufactures "canvas and leather goods on contract." *Id*. In 2009, the company began supplying cargo parachutes to the U.S. military for use in operations in Afghanistan and Iraq, resulting in workforce growth from 2009 through 2011. *Id.*; Aff. Roland Letendre; Aff. Kelly Deering. However, the company has experienced a substantial reduction in workforce and profitability due to the loss of government war-related contracts. Resp. at 2-3; Aff. Roland Letendre; Aff. Kelly Deering. Niche has identified that it currently employs twenty-one individuals. Resp. at 2-3.

On May 31, 2012, ICE served a Notice of Inspection (NOI) on the company, requesting that the company produce Forms I-9 for its employees no later than June 5, 2012. Mot. at 2. Niche produced Forms I-9 for 240 employees. *Id*. ICE issued a Notice of Intent to Fine (NIF) on November 15, 2012, and the company made a timely request for hearing. *Id*. at 3-4. On January 23, 2014, ICE filed its complaint in three counts. Compl., Attach. A. Count I alleged 165 violations in that the company failed to ensure employees properly completed section 1 of the Forms I-9, and/or failed to itself properly complete section 2 or 3 of the forms for 165 employees. Count II alleged that the company failed to timely prepare Forms I-9 for eleven employees. Count III alleged that the company failed to prepare and/or present a Form I-9 for one employee. *Id*.

In its answer, Niche admitted to 153 allegations in Count I and seven allegations in Count II. Niche either denied or claimed it lacked sufficient information to admit or deny the remaining twelve allegations in Count I, five allegations in Count II, and the single allegation in Count III. Answer at 2-34.

III. POSITIONS OF THE PARTIES

A. The Government's Motion for Summary Decision

First, ICE alleges that Niche employed each employee named in the complaint, which is evidenced by the documentation provided in response to the NOI. Mot. at 8.

ICE argues that a simple visual examination of the Forms I-9 for the individuals listed in Count I establishes the existence of the violations alleged. For Counts II and III, the government claims the violations are established by a comparison between Niche's payroll records and the Forms I-9 produced. Resp't Preh'g Stmt. at 2. On the Forms I-9 for each individual named in Count I, ICE asserts that section 2 has been left blank and lacks an employer verification. Mot. at 8-9.

With regard to the penalty, ICE seeks a penalty of $888.25 for each of the 177 alleged violations, for a total penalty of $157,220.25. *Id*. at 9. The government based its penalty assessment on the company's violation rate of 72.85%, calculated by dividing 177 total violations by 240 employees. ICE assessed a "baseline" fine of $935 per violation in accordance with internal agency guidance due to a violation rate higher than fifty percent. *Id*. The formula sets a baseline penalty determined by the violation rate coupled with any history of violations by the company.

ICE considered the size of the business and the company's lack of history of violations as neutral factors in determining the penalty. *Id*. at 10-11. According to the government, Niche is not a small business because it employed over 240 employees and had more than $55 million in business contracts for the year 2011. *Id*. at 10. The government considered both the complete failure to prepare Forms I-9 and the failure to ensure completion of section 2 of the form to be serious violations. *Id*. However, the government determined that Niche generally acted in good faith, and ICE reduced the baseline penalty by five percent. *Id*. Although ICE alleged that its investigation revealed the presence of eleven unauthorized aliens, it does not seek a penalty enhancement for those violations. *Id*. at 11.

ICE argues that a penalty assessment of $888.25 per violation, and a total penalty of $157,220.25 is objectively reasonable given the totality of the circumstances. *Id*. at 12. In support of its motion, ICE presented the following exhibits: (A) Affidavit of Auditor Brian Lynch (2 pp.); (B) Notice of Inspection and Subpoena (4 pp.); (C) Forms I-9 with attachments (253 pp.); (D) Niche, Inc. Active Employees List as of May 31, 2012 (6 pp.); (E) Respondent's Payroll (50 pp.); (F) DHS Form 6051R Receipt for Property; (G) Dun and Bradstreet Report & Commonwealth of Massachusetts Corporate Filing (15 pp.); and (H) ICE Form I-9 Inspection Overview (7 pp.).

B. The Company's Response

Niche, Inc., is a family-owned Massachusetts stitching company primarily producing canvas and leather goods on contract. Resp. at 2. Although Niche experienced significant growth from 2009 to 2011, it currently employs twenty-one employees, including two business owners and two family members. *Id*.

Niche explains that it has always employed a bookkeeper whose duties included completing Forms I-9. *Id*. at 3. In addition, Niche alleged that the company registered for E-Verify in

November 2008. Niche argued that its owners believed that between the bookkeeper and E-Verify, it had an adequate employment verification system. *Id*. The company notes that of the 177 violations alleged, the company kept legible copies of I-9 documents and E-Verify approvals for all but ten employees, which demonstrates its good faith to comply with the law. *Id*.

Due to the period of growth resulting from its government contracts during recent military operations in Afghanistan and Iraq, the company hired a controller, Kelly Deering, in October 2011. *Id*. Deering soon discovered that the bookkeeper was both stealing from the company and failing to properly complete Forms I-9 and other assignments. *Id*. at 3. The company alleges that while each new hire was processed through E-Verify, the bookkeeper failed to complete many of the Forms I-9. *Id*. at 3-4. In response, Niche hired more human resources personnel and discussed internally how to correct the Forms I-9 to ensure compliance. *Id*. at 4. During this same time period, the company received the NOI on May 31, 2012. *Id*.

The company concedes that 174 of the 177 allegations have been established as violations. *Id*. at 5. It contests only the allegations in Count I regarding the Forms I-9 for Reina Ferrera, Ana R. Palacios, and Marina Tejada.[1] *Id*. at 6. Niche says there are no substantive violations on these I-9s and that any errors on the forms are technical or procedural because "legible copies of the identity/employment documents submitted satisfy the Virtue Memo."

The company acknowledges that for violations found, some penalty must be assessed. However, Niche disputes the amount of ICE's proposed penalty. Niche asserts that of the enumerated factors considered in penalty assessments, only the seriousness of the violations weighs against the company. *Id*. at 10-11.

The company asserts that while it was a thriving business from 2009 through 2011, the loss of its government contracts caused it to reduce its workforce from its largest size of 950 employees to its current size of twenty-one employees. *Id*. at 2. In addition, it estimates that it sustained a $1 million financial loss in 2014, and that it is considering closing the business if it does not return to profitability. *Id*. at 7. The company also claims that pursuant to the Small Business Act, as amended, 15 U.S.C. § 632(a)(4)(A) (2013), the Administrative Law Judge can exclude from consideration payments made to the small business by Federal agencies for the cost of subcontracts entered into for the sole purpose of providing security services in qualified areas. *Id*. at 8. Thus, Niche seeks consideration only of its current size and post-government-contract financial status.

[1] Although the company's response includes an introduction requesting this court to "examine 16 of the 177 violations," the response does not identify which violations to examine. It specifically contests only three of the allegations by employee name, and these three named employees' Forms I-9 are addressed within this order.

Niche argues that its participation in E-Verify was within the spirit of the employment verification requirements and shows the company's good faith efforts to comply with the law. The company also notes that while many of the Forms I-9 contained violations, the company retained copies of employment authorization documents and E-Verify verifications for all but six of the Forms I-9. *Id*. at 9. Moreover, Niche claims that it did not hire any unauthorized individuals, and that it has no history of previous violations. *Id*. at 10.

The company believes that the proposed penalty is inappropriate in light of the five statutory factors and the company's current financial position. It cites OCAHO authority where penalties were reduced, and it argues that such a large penalty is not necessary to achieve the purpose of deterring future violations. Niche claims that the company's behavior both before and after the NOI suggests a high probability of future compliance independent of the assessed penalty. *Id*. at 13-14.

In support of its response, the company submitted the following exhibits: (A) 2014 Profit and Loss Statement (3 pp.); (B) Forms I-9 with attached documents and E-Verify receipts (1128 pp.); (C) Affidavit of Roland Letendre (4 pp.); (D) Affidavit of Kelly Deering (2 pp.); (E) E-Verify Enrollment Verification; and (F) Payroll Register for Final Week of 2014.

IV. DISCUSSION

A. Applicable Legal Standards

1. Summary Decision

Summary decision is appropriate where the pleadings and other materials show that there is no genuine issue as to any material fact, and that a party is entitled to summary decision. 28 C.F.R. § 68.38(c) (2012). This rule is similar to and based upon Federal Rule of Civil Procedure 56(c), which provides for summary judgment in federal cases. *See United States v. New China Buffet Rest.*, 10 OCAHO no. 1132, 2 (2010).[2] Accordingly, OCAHO jurisprudence looks to federal case law for guidance in determining when summary decision is appropriate. *Id*.

[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

A party seeking summary decision bears the initial burden of demonstrating the absence of a genuine issue of material fact. *United States v. DJ Drywall, Inc.*, 10 OCAHO no. 1136, 2 (2010) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The party opposing the motion must set forth specific facts showing that there is a genuine issue of fact for a hearing. 28 C.F.R. § 68.38(b). All facts and reasonable inferences therefrom are viewed in the light most favorable to the non-moving party. *United States v. Primera Enters.*, 4 OCAHO No. 615, 259, 261 (1994).

2. Employer Obligations

Employers must complete Forms I-9 for each new employee hired after November 6, 1986, in order to document that the employer verified the employee's identity and employment authorization status. *United States v. Keegan Variety, LLC*, 11 OCAHO no. 1238, 2 (2014). Pertinent regulations at 8 C.F.R. § 274a.2(b) establish that employers "must ensure" that Forms I-9 are completed by employees at the time of hire and completed by the employers within three business days of hire for those employees who are employed a duration of three business days or more. According to the parameters set forth at 8 C.F.R. § 274a.10(b)(2), civil money penalties are assessed for Form I-9 paperwork violations when an employer fails to properly prepare, retain, or produce the forms upon request.

3. 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 government has the burden of proof with respect to the penalty, *United States v. March Construction, Inc.*, 10 OCAHO no. 1158, 4 (2012), and 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).

The following factors must be considered when assessing civil money penalties for paperwork violations: (1) the size of the employer's business; (2) the employer's good faith; (3) the seriousness of the violations; (4) whether the individual was an unauthorized alien; and (5) the employer's history of previous violations. 8 U.S.C. § 1324a(e)(5). The statute does not require that equal weight be given to each factor, and it does not rule out consideration of other factors as may be appropriate in particular circumstances. *See United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000). Although not an exhaustive list, additional factors that may be

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

considered include economic information, such as a company's ability to pay the proposed penalty, and policies of leniency established by statute. *See Keegan Variety, LLC*, 11 OCAHO no. 1238 at 6-7.

B. Liability Determination for the Alleged Violations

The company concedes liability for the single violation in Count III. In addition, Niche concedes liability for the eleven violations in Count II. However, Niche concedes liability for only 162 of the 165 violations listed in Count I.

Niche denies the allegations in Count I that it failed to ensure that employees Reina Ferrera, Ana R. Palacios, and Marina Tejada properly completed their Forms I-9. Niche argues that any errors on the form are technical or procedural violations because the company attached legible copies of the employees' identity and employment documents to the Forms I-9. This argument fails for several reasons.

OCAHO case law has long held that attaching a copy of a document is not a substitute for proper completion of the Form I-9 itself. 8 C.F.R. § 274a.2(b)(3) ("[c]opying or electronic imaging of any such document and retention of the copy or electronic image does not relieve the employer from the requirement to fully complete section 2 of the Form 1-9."); *see United States v. Platinum Builders of Cent. Fla., Inc.*, 10 OCAHO no. 1199, 7 (2013). More important, Niche's argument does not address the facially apparent violations, which reflect that the company did not re-verify the employees' work authorization on or before the date the employees' work authorization expired.

A visual examination of the three forms reveals substantive deficiencies and violations. Although each employee in section 1 of her Form I-9 identified that she is "[a]n alien authorized to work" in the United States, each of the three employees failed to identify the date "until" which she is authorized to work. Resp., Ex. B at 369, 760, 1001. *See generally Form I-9 Instructions* at 2 (Mar. 8, 2013), http://www.uscis.gov/sites/default/files/files/form/i-9.pdf ("Record the date that your employment authorization expires, if any. Aliens whose employment authorization does not expire, such as refugees, asylees, and certain citizens of the Federated States of Micronesia, the Republic of the Marshall Islands, or Palau, may write 'N/A' on this line").

In section 2 of the three employee's Forms I-9, the employer Niche listed "Emp Auth Card" under the "List A" documents and included a document number and expiration date for each employee's employment authorization card. Resp., Ex. B at 369, 760, 1001. Niche also attached copies of the employment authorization cards. The expiration date of the authorization card for

Reina Ferrera[3] was February 5, 2010. The employment authorization cards of both Ana R. Palacios[4] and Marina Tejada[5] expired on September 9, 2010. There is no evidence of record to support a finding that these three employees were not subject to reverification requirements. Accordingly, the evidence supports that the employment authorization for these three employees expired in 2010.

Employers have a duty to reverify the employment eligibility of an employee if his or her employment authorization expires. 8 C.F.R. § 274a.2(b)(vii). The employer must document the re-verification in section 3 on the Form I-9 no later than the date the employment authorization expires. *See United States v. Occupational Resource Management Staffing, Inc.*, 10 OCAHO no. 1166, 31 (2013); *United States v. Aid Maintenance Company, Inc.*, 6 OCAHO no. 893, 810, 832 (1996). The employee must present a document that either shows continuing employment eligibility or a new grant of work authorization. 8 C.F.R. § 274a.2(b)(vii). The employer is required to review the document and reverify by noting the identification number and expiration date, if any, on the Form I-9. *Id*.

The original Forms I-9 for these three employees reflect that Niche did not complete any portion of section 3, the updating and reverification section. Resp., Ex. B at 369, 760, 1001. However, the company's exhibits include second Forms I-9 for these three employees that were completed in June 2012 after the employees' original employment authorization date had expired. Resp., Ex. B at 375, 763, 1004. Copies of these new employment authorization documents are also included in the record.

While the exhibits do make clear that all three employees were authorized to work at the time of the inspection, it is also evident that the employees' work authorization was not reverified until after the government's service of the NOI. The NOI was served on May 31, 2012, and the new Forms I-9 were completed on June 1, 2012 (Palacios and Tejada) and June 5, 2012 (Ferrera). At the time of the NOI in 2012, the company had not reverified the authorization for the three employees before their work authorization had expired in 2010. In fact, nothing in the record suggests that the employees' eligibility was ever reverified from the varying 2010 document expiration dates until after the NOI in 2012.

Because Reina Ferrera, Ana R. Palacios, and Marina Tejada worked from 2010 to 2012 without verified work authorization, Niche is liable for Form I-9 violations for these three employees.

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[3] Resp., Ex. B at 369-377.

[4] Resp., Ex. B at 760-764.

[5] Resp., Ex. B at 1001-1005.

Accordingly, Niche is liable for the 165 violations listed in Count I. Niche is liable for a total of 177 Form I-9 paperwork violations.

C. Review of Penalty Assessment

1. ICE's Proposed Penalty

The government's penalty assessment reflects that ICE used its internal guidelines in setting the penalty. Initially, ICE set a baseline penalty of $935 per violation, which is an assessment that is recommended for employers who are first-time offenders and whose violation rate represents more than fifty percent of the total number of employees. Specifically, ICE considered Niche to have 177 violations and 240 employees, which represents more than a fifty percent violation rate. Next, ICE assessed the statutory factors and found that a five percent penalty mitigation was warranted due to Niche's good faith. As a result, ICE assessed the penalty amount for each violation at $888.25. ICE deemed all other factors neutral, having no mitigating or aggravating impact on the penalty assessment.

While the statute gives the government broad discretion in setting penalties for violations, *United States v. Aid Maint. Co., Inc.*, 8 OCAHO no. 1023, 321, 343 (1999), ICE's penalty methodology has no binding effect in this forum and the penalty assessment may be examined de novo. *United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6 (2011).

2. Good Faith of the Employer, History of Violations, and Presence of Unauthorized Employees

The parties agree that the company demonstrated good faith and that there is no history of previous violations. Though the parties acknowledge that there may have been one or more unauthorized workers present, the government did not identify any unauthorized individual and does not seek an enhanced penalty related to hiring unauthorized workers.

3. Seriousness of the Violations

"Paperwork violations are always potentially serious." *United States v. Skydive Acad. of Haw. Corp.*, 6 OCAHO no. 848, 235, 245 (1996). "[T]he seriousness of the violations should be determined by examining the specific failure in each case." *Id*. at 246. Therefore, the seriousness of violations is "evaluated on a continuum since not all violations are necessarily equally serious." *United States v. Siam Thai Sushi Rest*., 10 OCAHO no. 1174, 4 (2013).

The failure to prepare a Form I-9, as found in Count III, is among the most serious of paperwork violations because it "completely subverts the purpose of the employment verification

requirements." *United States v. Golf Int'l*, 11 OCAHO no. 1222, 4 (2014). Similarly, failures to prepare Forms I-9 within three days of hire, as found in Count II, are also serious violations "because an employee could potentially be unauthorized for employment during the entire time his or her eligibility remains unverified." *United States v. Anodizing Indus., Inc.*, 10 OCAHO no. 1184, 4 (2013). Therefore, the twelve violations found in Counts II and III are more serious than the 165 paperwork violations found in Count I, and "the difference may be reflected in the final penalty." *United States v. Two for Seven, LLC*, 10 OCAHO no. 1208, 9 (2014).

4. Size of the Business

The parties disagree about the size of the respondent's business. The government argues that Niche is not a small business because it had more than 240 employees during the audit period and because it enjoyed over $55 million in business contracts in 2011. However, the company explains why it should be considered a small business.

Niche argues that although it once had 950 employees when it was completing government contracts to manufacture parachutes during the military operations in Iraq and Afghanistan between 2009 and 2011, it now employs only 21 individuals and should be considered a small business. As a result of the loss of government contracts, Niche also claims that it operated in 2014 at an estimated loss of $1 million, and that continued losses could result in business closure. *See* Aff. Roland Letendre; Aff. Kelly Deering. Finally, due to its small size and loss of profitability, Niche argues that it warrants a favorable exercise of discretion and its penalty assessment should be mitigated due to being a small business.

As set forth in relevant OCAHO precedent, the "size of the business" is determined based on the current business size at the time the Administrative Law Judge assesses the penalty. Business size is not assessed during any former period of time in the business' history as it would be difficult to account for fluctuations in the economy, business contracts, employee numbers, and revenues. *United States v. Ketchikan Drywall Servs., Inc.*, 10 OCAHO no. 1139, 26 (2011); *United States v. Occupational Res. Mgmt., Inc.*, 10 OCAHO no. 1166, 26-27 (2013); *Carter*, 7 OCAHO no. 931 at 160-61.

Therefore, the government has failed to meet its burden of proving that the size of the business should be assessed in 2011 when Niche's revenues were high due to military contracts or during the 2012 audit period when Niche had more than 240 employees. Accordingly, whether Niche is a "small" business is determined at the time of the penalty adjudication by an Administrative Law Judge, not based on any prior time period.

OCAHO case law generally considers businesses with fewer than 100 employees to be small businesses. *See Carter*, 7 OCAHO no. 931 at 162. In addition, OCAHO case precedent has

relied on the United States Small Business Administration's definitions of whether a business is considered "small." *See United States v. Pegasus*, 10 OCAHO no. 1143, 6 (2012) (citing *United States v. Tom & Yu, Inc.*, 3 OCAHO no. 445, 521, 524 (1992); *United States v. Widow Brown's Inn, Inc.*, 3 OCAHO no. 399, 1, 44 (1992)).

The Small Business Administration uses industry classification system codes that deem a business "small" pursuant to either "the average annual receipts in millions of dollars" or the number of employees. *See Table of Small Business Size Standards Matched to North American Industry Classification System Codes*, United States Small Business Administration (July 14, 2014), https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf. The Small Business Administration's "Table" relies on classifications by industry developed by the Census Bureau. *See North American Industry Classification System*, United States Census Bureau (May 13, 2013), http://www.census.gov/cgi-bin/sssd/naics/naicsrch?chart=2012 (identifying: "canvas products made from purchased canvas or canvas substitutes" under classification number 314910; "all other leather goods and allied product manufacturing" under classification number 316998; and parachute manufacturing in the category of "[a]ll Other Miscellaneous Textile Product Mills" under classification number 314999). Pursuant to the Small Business Administration Table, Niche is considered a small business in all related industry classifications because it currently has twenty-one employees. Because respondent is a small business, the penalty should be further mitigated in the exercise of discretion.

5. Other Factors Considered

Respondent argues that the penalty assessed should be significantly reduced in light of mitigating factors, including the company's 2014 losses in excess of $1 million, the Small Business Act's leniency policy, and the Small Business Act's special considerations of business growth related to supporting the war effort. "[A] party seeking consideration of a nonstatutory factor . . . bears the burden of showing that the factor should be considered as a matter of equity and that the facts support a favorable exercise of discretion." *United States v. Century Hotels Corp.*, 11 OCAHO no. 1218, 4 (2014).

OCAHO case law sets forth that a "respondent's ability to pay a proposed fine may be an appropriate factor to be weighted in assessing the amount of the penalty." *United States v. Mr. Mike's Pizza, Inc.*, 10 OCAHO no. 1196, 3 (2013), *cited in Keegan Variety*, 11 OCAHO no. 1238 at 6 (internal citations omitted). The affidavits of the company's president, Roland Letendre, and controller, Kelly Deering, support the company's assertion that the company is no longer profitable and would have difficulty paying the proposed penalty. Resp. at 7; Aff. Roland Letendre; Aff. Kelly Deering. The company's 2014 Profit and Loss Statement confirms its loss of more than $1 million for the year 2014. Resp't Profit and Loss Stmt. In addition, Mr. Letendre states in his affidavit that the company could possibly close if it does not "return to

profitability." Aff. Roland Letendre. I consider the company's current financial situation to be a mitigating factor, which warrants a favorable exercise of discretion when assessing the penalty amounts.

As discussed previously, respondent is considered a small business in its industry because it currently has twenty-one employees. The Small Business Act establishes a policy of leniency toward small business entities. *See Keegan Variety*, 11 OCAHO no. 1238 at 6 (citing 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, Pub. L. No. 104-121, 110 Stat. 864 (1996)). I find that respondent warrants a favorable exercise of discretion with respect to the penalty assessment in light of the Small Business Act's policy of leniency and its status as a small business.

In addition, the Small Business Act provides for additional considerations of leniency toward small businesses that undertake contracts in support of the war effort. In relevant part, the Small Business Act calls on the Small Business Administration's Administrator to consider:

> whether it would be fair and appropriate to exclude from consideration in the average annual gross receipts of such small business concerns any payments made to such small business concerns by Federal agencies to reimburse such small business concerns for the cost of subcontracts entered for the sole purpose of providing security services in a qualified area.

15 U.S.C. § 632(a)(4)(A) (2013). Consistent with this policy, it may be appropriate to consider the source of the company's revenues and whether the revenues were generated from contracts for security services in qualified areas. Therefore, in addition to applying a general policy of leniency toward small businesses, a general policy of lenience may be adopted toward businesses that support the war effort.

Respondent explains that its workforce and profitability grew from 2009 to 2011 as a result of its military contracts for cargo parachutes, which directly supported the war efforts in Afghanistan and Iraq. Resp. at 2-3, 7; Aff. Roland Letendre. A review of the Form I-9s and their attachments, including E-Verify documentation, demonstrates that the majority of Form I-9 violations resulted from this period of growth due to the military contracts supporting the war effort.

It is not disputed that Niche was awarded a contract from 2009 through 2011 to provide cargo parachutes to the U.S. military. Moreover, Iraq and Afghanistan are "qualified areas" pursuant to the Small Business Act. at 15 U.S.C. § 632(a)(4)(C)(i)-(ii). Because it appears that the majority

of Form I-9 violations stem from Niche's growth to support the war effort and because the Small Business Act's policy of leniency extends to those small business concerns supporting the war effort, a favorable exercise of discretion is warranted that mitigates the assessed penalty amount in light of these factors.

6. Recalculation of Penalty

The government has proposed a civil penalty of $888.25 for each violation. This penalty amount represents a fine in the upper-range of assessments for first-time offenses. The government's penalty guidelines are not binding in this forum, and Administrative Law Judges may review penalty assessments de novo. *Keegan Variety, LLC*, 11 OCAHO no. 1238 at 4 (citing *Aid Maint. Co.*, 8 OCAHO no.1023 at 344; *United States v. Sunshine Bldg & Maint., Inc.*, 7 OCAHO no 997, 1122, 1175 (1998)). Although the government bears the burden of proof with respect to the statutory factors, respondent bears the burden of showing that any non-statutory factors should be considered as a matter of equity and that the facts support a favorable exercise of discretion. *Keegan Variety, LLC*, 11 OCAHO no. 1238 at 3 (referencing *United States v. M & D Masonry, Inc.*, 10 OCAHO no. 1211, 11 (2014)).

Penalties assessed at the upper-range to the maximum penalty amount should be reserved for the most serious and egregious violations. *United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013) (discussing that OCAHO case law instructs that penalties near the maximum permissible penalty "should be reserved for the most egregious violations"). The purposes of the penalty are to serve as a sufficient deterrent against future violations by the employer, and to encourage other employers to comply with employment verification procedures. *United States v. Empl'r Solutions Staffing Grp. II, LLC*, 11 OCAHO no. 1242, 11 (2015). However, the penalty should not be unduly punitive in light of the respondent's resources. *See United States v. Minaco Fashions, Inc.*, 3 OCAHO no. 587, 1900, 1909 (1993).

After considering the totality of evidence, the five statutory factors, and the other factors raised by respondent, the undersigned finds that the penalties proposed by ICE are disproportionate to the Form I-9 violations and mitigating factors in this case. Furthermore, ICE's proposed penalty assessment fails to distinguish between the differing Form I-9 infractions found in this case: (1) one violation for failure to prepare a Form I-9, (2) eleven violations for delayed completion of Forms I-9, and (3) 165 substantive paperwork violations for omitting to complete varying portions of Forms I-9. Each of these three types of paperwork violations constitutes differing degrees of seriousness, with failure to complete a Form I-9 and the delay in completing Forms I-9 being the most 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." *United States v. Clean Sweep Janitor Serv.*, 11 OCAHO no. 1226, 4 (2014) *cited in Keegan Variety*, 11 OCAHO no. 1238 at 5 (internal citations omitted). Because 165 of the violations in this case do not represent the most serious of violations, it is necessary to adjust the penalties to amounts nearer the mid-range of possible penalties. Proportionality is critical in setting civil money penalties. *United States v. Pegasus Rest., Inc.*, 10 OCAHO no. 1143, 7 (2012).

The government has not met its burden of proving that all violations in this case are of equal seriousness. It has also failed to demonstrate that a penalty assessment in the upper-range for each penalty is appropriate for all violations in light of the nature of the violations and mitigating factors raised by respondent. Accordingly, ICE's motion for summary decision is granted in part pursuant to 28 C.F.R. § 68.38, and respondent's penalty assessment is reduced based on the presence of less severe violations and mitigating factors present in this case.

The 165 paperwork violations set forth in Count I are less serious than the delayed verifications established in Count II and the complete failure to verify established in Count III. Regarding the paperwork violations in Count I, Niche retained copies of authorization documentation for most of its workers and utilized the E-Verify program in its hiring processes. While Niche acknowledges that participation in E-Verify does not excuse Form I-9 failures, the company's participation in the program and retention of document copies does, in this particular case, bolster the company's argument that it intended to engage in good faith efforts to comply with employment authorization verification requirements. Niche's intentions to comply in good faith, coupled with the fact that most of the verification failures resulted from growth related to its contracts to support the U.S. military operations, warrant the reduction of ICE's proposed penalty in the exercise of discretion.

Niche's contracts with the U.S. military were responsible for its rapid financial growth, which also appears to serve as the catalyst for its employee growth and resulting Form I-9 infractions. The evidence in this case also shows that the company became less profitable and was forced to lay off most of its employees when the military contracts were completed or lost. As such, the Small Business Act's policy of leniency toward small entities, especially those providing security services in combat areas, applies to respondent Niche. Importantly, Niche has met its burden of proving that it warrants a favorable exercise of discretion with respect to penalty mitigation. Pursuant to the Small Business Act's leniency policies, the penalty assessments will be further reduced based on these non-statutory factors.

In the exercise of judicial discretion, the penalty assessed for the failure to prepare a Form I-9 for the individual named in Count III is adjusted to $600, as it is the most serious violation. For the

eleven violations in Count II for the failure to timely prepare Forms I-9, the penalty is adjusted to $500 per violation. Finally, the penalty for the 165 paperwork violations established in Count I is reduced to $350 per violation. Accordingly, the total civil money penalty is $63,850.00.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Niche, Inc., is a registered Massachusetts corporation located at 57 Cove Street, New Bedford, Massachusetts.

2. The Department of Homeland Security, Immigration and Customs Enforcement, served Niche, Inc., with a Notice of Inspection on May 31, 2012.

3. The Department of Homeland Security, Immigration and Customs Enforcement, served Niche, Inc., with a Notice of Intent to Fine on November 15, 2012.

4. Niche, Inc., filed a request for hearing on November 28, 2012.

5. Niche, Inc., acted in good faith and has no history of prior employment verification violations.

6. Niche, Inc., hired Angel Gomez and failed to prepare and/or present a Form I-9 for him upon request (per Count III).

7. Niche, Inc., hired Altagracia M. Castillo, Raimundo De Andrade, Luisa Garcia De Ventura, Nelson E. Henriquez, Roger Moniz, Ivandro M. Pires, Valencio Salas E. Rivera, Arielle Roderick, Kaylie Rutkowski, Mario Lopez Vaz, and Ricky Vogt, and failed to prepare Forms I-9 for each within three days of his or her hire (per Count II).

8. Niche, Inc., hired the following people and either failed to ensure each individual properly completed section 1 of the Form I-9, or failed itself to properly complete section 2 or 3 of the Form I-9 for each individual (per Count I): Jair Almeida, Gloria Alvarez, Edna Alves, Adilson Andrade, Ana Lima Andrade, Joao Andrade, Manuel Andrade, Andre Antunes, Francisco Arruda, Maria F. Arruda, Sindy Ayala, Francisco Bachiller, Luz M. Baez, Maly Barboza, Edgardo Barrios Cruz, Hernan Benjamin, Rita Brito, Elizabeth Buten Cambero, Joan Buten Cambero, Rufino Caban, Maria Cambero De Aza, Sonia Candida Correia, Denise Cardoso, Veronica E. Carranza Rivas, Maria Carreiro, Antonio J. Carvalho, Beatriz E. Castro, Stephanie E. Cavanagh, Yolanda Chamorro, Alyssa Chaneco, Sandra L. Clark, Marizia Conceicao, Rebecca Coplin, Ramona Cordero, Maria D. Correia, Dennis Cotto Alvarado, Jonathan Crespo, Gladys

M. Cruz, Joao Da Luz, Paul Davila, Hilda M. De Ascencio, Maria De Barros, Maria S. De Garcia, Herculano De Pina, Vitorino De Pina, Jose R. Diaz, Helis Do Canto, Dianela L. Duarte Barbosa, Dominga Duran, Veronica G. Elias, Laura E. Escalera, Lidia Escobar, Roy Esteves, Edgardo Feliberty, Reina Ferrera, Cesar M. Figueiredo, Jessica Florez, Joao Vieira Fortes, Jesus Fuentes, Jose Garcia-Correa, Adilson Gomes, Bartolomeu Gomes, Reinaldo Gomes, Maria Gonsalves, Ana Gonzalez, Christian E. Gonzalez, Oscar Gonzalez, Viena Grilo, Carlos Gutierrez, Lizbeth M. Gutierrez, Ana M. Hernandez, Jessica Hernandez, Ruth P. Hernandez, Sara Hemandez, Calvin Hughes, Marisela Inestroza, Leonardo Kelly, Sandra Leal, Ivanda Lima, Ana Lobo, Maria Londono, Carlos A. Lopes, Isabel F. Lopes, Jose Lopes, Malaquiades S. Lopes, Jacqueline Lopez, Lucialina A. Lopez, Delmy Lopez Gonzalez, Russell A. Macedo, Isolina Mane, Jessica M. Martinez, Luis D. Martinez Suarez, Celeste Matthews, Adriana Medina Rodriguez, Dianela L. Meireles, Fortunato D. Monteiro, Jose N. Monteiro, Reina Montoya, Tomas Morales-Otero, Jeronimo Moreira, David N. Negron Torres, Carlos Neris, Jacline Neves, Nancy I. Nieves Santiago, Valter A. Nunes, Jesus M. Nunez, Mirza Nunez, Angel L. Nunez Castillo, Eduardo A. Nunez Figaro, Dariana Ocasio, Jose Pagan Melendez, Ana R. Palacios, Mileni Palacios, Edson H. Pereira, Angel L. Perez, Juan Perez, Xavier Perez, Richard Petit Francois, Manuel G. Pina, Sofia Pineda, Elizabeth Ramirez, Jorge Luis Ramon, Firmino A. Ramos, Kenneth Ramos, Berta Rivas, Floridalma Rivas, Gilma A. Rivas, Juana Rivas, Maria M. Rivas, Maria M. Rivas, Rosa Maria Rivas, Albertino M. Rodrigues, Kevin Rodrigues, Jacquelin Roman, Ramon L. Rosario Santiago, Carmen I. Ruiz, Jeremy T. Rushby, Carla J. Salas Solano, Diego Salas Solano, Jonathan Santana-Ocasio, Johanna Santiago Rodriguez, Edna I. Santiago-Luna, Angel R. Santos, Rafael E. Santos, Nataneiela Sequeira, Lilian B. Serrano, Jose Silva, Roberto Soares, Maria Sousa, Maria Suriel, Charles C. Taylor, Matthew Taylor, Marina Tejada, Paula Trinidad, Franklin T. Valladares, Juan Vasquez Escobar, Andreza C. Vaz, Hector L. Vazquez Rodriguez, Hector M. Vazquez-Candelaria, Lily Y. Ventura Garcia, Evelyn Viana, Francisco Vieira, Marisol Yac, Maria Zapata, and Juan Carlos Zelaya-Corcio.

B. Conclusions of Law

1. Niche, 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. Niche, Inc., is liable for 177 violations of 8 U.S.C. § 1324a(a)(1)(B).

4. In considering a motion for summary decision, the facts must be viewed in the light most favorable to the nonmoving party, *United States v. Primera Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994).

5. In assessing the appropriate penalty, an Administrative Law Judge must consider the following factors: (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).

6. 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).

7. Failure to prepare a Form 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).

8. The failure to prepare a Form I-9 within three days of hire is a serious violation because an employee could potentially be unauthorized for employment during the entire time his or her eligibility remains unverified. *United States v. Anodizing Indus., Inc.*, 10 OCAHO no. 1184, 4 (2013).

9. Employers have a duty to reverify the employment eligibility of an employee if his or her employment authorization expires. 8 C.F.R. § 274a.2(b)(vii).

10. Employers must document the re-verification in section 3 on the Form I-9 no later than the date the employment authorization expires. *See United States v. Occupational Resource Management Staffing, Inc.*, 10 OCAHO no. 1166, 31 (2013); *United States v. Aid Maintenance Company, Inc.*, 6 OCAHO no. 893, 810, 832 (1996).

11. The "size of the business" is determined based on the current business size at the time the Administrative Law Judge assesses the penalty. *United States v. Ketchikan Drywall Servs., Inc.*, 10 OCAHO no. 1139, 26 (2011); *United States v. Occupational Res. Mgmt., Inc.*, 10 OCAHO no. 1166, 26-27 (2013); *Carter*, 7 OCAHO no. 931 at 160-61.

12. A party seeking consideration of a non-statutory factor, such as ability to pay the penalty, bears the burden of showing that the factor should be considered as a matter of equity and that the facts support a favorable exercise of discretion. *United States v. Century Hotels Corp.*, 11 OCAHO no. 1218, 4 (2014).

13. The Small Business Act's policy of leniency toward small business entities, including small businesses that undertake contracts in support of the war effort, may be an appropriate factor to consider when assessing penalty mitigation in the exercise of discretion. *See Keegan Variety*, 11 OCAHO no. 1238 at 6 (citing 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, Pub. L. No. 104-121, 110 Stat. 864 (1996)); 15 U.S.C. § 632(a)(4)(A) (2013).

14. A penalty should 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).

ORDER

ICE's motion for summary decision is granted in part. Niche, Inc., is liable for 177 violations of 8 U.S.C. § 1324a(a)(1)(B) and is directed to pay civil penalties in the total amount of $63,850. 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 on May 13, 2015.

Stacy S. Paddack
Administrative Law Judge