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

UNITED STATES OF AMERICA, Complainant, v. BLISS HOSPITALITY LLC D/B/A BAYMONT INN & SUITES, Respondent.	)))))))))	8 U.S.C. § 1324a Proceeding OCAHO Case No. 2020A00075

Appearances: Bruna Walls, Esq., for Complainant[1]
Brijesh Patel, pro se, for Respondent

ORDER ON MOTION FOR SUMMARY DECISION

This case arises under the employer sanctions provisions of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324a. On June 18, 2020, Complainant, the United States Department of Homeland Security, Immigration and Customs Enforcement (ICE), filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against Respondent, Bliss Hospitality LLC d/b/a Baymont Inn & Suites, alleging violations of 8 U.S.C. § 1324a. Respondent filed an answer on August 5, 2020. On January 7, 2021, Complainant filed a motion for summary decision. Respondent filed a response to the motion for summary decision on February 10, 2021 (Resp. to Mot.).

On December 2, 2022, the Court issued an Order that permitted Respondent 14 days to submit supplemental evidence related to its claimed inability to pay the proposed fine. United States v. Bliss Hosp., LLC, 17 OCAHO no. 1463, 2 (2022);[2] *see* 28 C.F.R. § 68.40.[3] On December

[1] The Court GRANTS Complainant's June 13, 2023 Motion for Substitution of Counsel. Assistant Chief Counsel Bruna Walls is now the attorney of record for Complainant.

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

[3] OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2023).

16, 2022, Respondent filed supplemental financial evidence, including an income statement (Supp. Filing). The Court provided Complainant an opportunity to respond; Complainant declined to do so. On August 3, 2023, the Court permitted the parties to file any supplemental briefs concerning the applicability of the Chief Administrative Hearing Officer's decision in United States v. Edgemont Grp., LLC, 17 OCAHO no. 1470b (2023), to this matter. Neither party filed supplemental briefs. This matter is now ripe for decision.

I. FACTS NOT IN DISPUTE

Respondent, Bliss Hospitality LLC, d/b/a Baymont Inn and Suites, is a hotel located in Macon, Georgia.[4] Mot. Summ Dec. Ex. B, 3; Resp. to Mot. 1. Brijesh Patel is the owner of the company; he purchased the hotel on January 4, 2019. Mot. Summ. Dec. Ex. B, 5; Resp. to Mot. 1. At the time of the purchase, the hotel had two employees. Resp. to Mot. 1.

On June 24, 2019, ICE's special agent Matt DeVane served Respondent with a Notice of Inspection. Mot. Summ. Dec. Ex. B, 1. That same day, Inspector Janice Bell, a forensic auditor with Complainant's Homeland Security Investigations Unit, conducted an inspection of Respondent's business. Id. at Ex. A, 1 ¶¶ 1, 6, Ex. B, 1. The inspection sought Employment Eligibility Verification Forms (Forms I-9). Id. at Ex. A, 1 ¶ 6. Respondent produced Forms I-9 for four employees, along with payroll records. Id. at Ex. A, 1 ¶ 6, Ex. B, 1. The payroll records revealed that Respondent employed seven employees during the reporting period. Id. Respondent did not provide Forms I-9 for three of its present or former employees. Id.; Resp. to Mot. 1. Respondent represented that the original documents were accidentally lost during recent renovations. Resp. to Mot. 1.

Inspector Bell's review of the four Forms I-9 that were produced indicates that there were substantive deficiencies in the preparation of the Forms I-9, specifically "failing to ensure the employee properly completed Section 1 of the Form I-9, or . . . failing to properly complete Section 2 of the Form I-9." Mot. Summ. Dec. Ex. A, 1–2 ¶¶ 7–8. Upon review of the Forms I-9, Inspector Bell determined that Respondent should be fined due to the violations of the employment verification provisions of the INA. Id. However, Complainant's examination substantiated Respondent's claim that its employees were authorized to work in the United States. Resp. to Mot. 1–2; Mot. Summ. Dec. Ex. B, at 5.

On December 10, 2019, ICE's special agent Jermaine Lee served Respondent with a Notice of Intent to Fine (NIF). Mot. Summ. Dec. Ex. A, 2 ¶ 10; *see* Compl. Ex. A (NIF). The Government assessed a fine of $13,636, calculated from a "base fine" of $1,948 multiplied by seven infractions. Mot. Summ. Dec. Ex. B, 6–8. Complainant advises that the infractions are as follows: Count I, three failures to prepare Forms I-9, and Count II, four "substantive violations" which it further describes as failures to properly complete Section 2 of the Form I-9 within three days of hire. Compl. 2–3.

[4] Accordingly, Respondent is an entity within the meaning of 8 U.S.C. § 1324a(a)(1).

For the seven months ending on July 31, 2022, Respondent reported total sales of $272,440.33; income from operations as $50,644.67; and net income as a loss of $32,598.28. Supp. Filing 2–3.

II. SUMMARY DECISION STANDARD

Under OCAHO's rules, the administrative law judge (ALJ) "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . 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). "An issue of material fact is genuine only if it has a real basis in the record" and a "genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit." Sepahpour v. Unisys, Inc., 3 OCAHO no. 500, 1012, 1014 (1993) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586–87 (1986), and then citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)).

"Once the moving party satisfies its initial burden of demonstrating both the absence of a material factual issue and that the party is entitled to judgment as a matter of law, the nonmoving party must come forward with contravening evidence to avoid summary resolution." United States v. Four Seasons Earthworks, Inc., 10 OCAHO no. 1150, 3 (2012) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). "[T]he party opposing the motion for summary decision 'may not rest upon the mere allegations or denials' of its pleadings, but must 'set forth specific facts showing that there is a genuine issue of fact for the hearing.'" United States v. 3679 Commerce Place, Inc., 12 OCAHO no. 1296, 4 (2017) (quoting 28 C.F.R. § 68.38(b)). Further, if the Government meets its burden of proof, "the burden of production shifts to the respondent to introduce evidence . . . to controvert the [G]overnment's evidence. If the respondent fails to introduce any such evidence, the unrebutted evidence introduced by the [G]overnment may be sufficient to satisfy its burden[.]" United States v. Durable, Inc., 11 OCAHO no. 1231, 5 (2014) (affirmance by the CAHO) (citations omitted). All facts and reasonable inferences are viewed "in the light most favorable to the non-moving party." United States v. Primera Enters., Inc., 4 OCAHO no. 615, 259, 261 (1994) (citations omitted).

III. LEGAL STANDARD FOR ESTABLISHING LIABILITY UNDER SECTION 1324a

"In cases arising under 8 U.S.C. § 1324a, the [G]overnment has the burden of proving by a preponderance of the evidence that the respondent is liable for committing a violation of the employment eligibility verification requirements." United States v. Metro. Enters., Inc., 12 OCAHO no. 1297, 7 (2017) (citations omitted).

"Employers must prepare and retain Forms I-9 for employees hired after November 6, 1986, and employers must produce the I-9s for [G]overnment inspection upon three days' notice." Id. at 7 (citing in part 8 C.F.R. § 274a.2(b)(2)(ii)). An employer must ensure that an employee properly completes Section 1 of the I-9 on the date of hire and the employer must complete Section 2 of the I-9 within three days of hire. United States v. A&J Kyoto Japanese Rest., 10 OCAHO no.

1186, 5 (2013) (citing 8 C.F.R. §§ 274a.2(b)(1)(A), (ii)(B)). Accordingly, an employer who fails to properly complete Sections 1 or 2 of the Form I-9 is subject to civil penalties.

"Employers are required to retain an employee's Form I-9 for three years after the date of the employee's hire or one year after the date of the employee's termination, whichever is later." United States v. Lazy Days South, Inc., 13 OCAHO no. 1322c, 4 (2019) (modification by the CAHO) (citing 8 C.F.R. § 274a.2(b)(2)(i)(A), and then citing 8 U.S.C. § 1324a(b)(3)). Employers must present the Forms I-9 within three days of demand by an authorized agent of the United States Government. *See* 8 C.F.R. § 274a.2(b)(2)(ii). "Any refusal or delay in presentation of the Forms I-9 for inspection is a violation of the retention requirements [of] [8 U.S.C. § 1324a(b)(3)]." Id. Accordingly, an employer who fails to present their Forms I-9 for inspection may be subject to a "failure to present" charge. *E.g.*, United States v. El Paso Paper Box, Inc., 17 OCAHO no. 1451a, 3 (2022) (citing 8 C.F.R. § 274a.2(b)(2)(ii)), *CAHO declined to modify, vacate, or remand the ALJ Order*, 17 OCAHO no. 1451b, 1 (2023).

"Failures to satisfy the requirements of the employment verification system are known as 'paperwork violations,' which are either 'substantive' or 'technical or procedural.'" Metro. Enters., Inc., 12 OCAHO no. 1297, at 7 (citing Memorandum from Paul W. Virtue, INS Acting Exec. Comm'r of Programs, Interim Guidelines: Section 274A(b)(6) of the Immigration & Nationality Act Added by Section 411 of the Illegal Immigration Reform & Immigrant Responsibility Act of 1996 (Mar. 6, 1997) (Virtue Memo)). While an employer must be given at least ten business days to correct technical or procedural violations, no such allowance is given for a substantive violation. *See* United States v. New China Buffet, 10 OCAHO no. 1132, 3 (2010) (citations omitted).

"Dissemination of the [Virtue Memo] to the public may be viewed as an invitation for the public to rely upon them as representing agency policy[,]" and the Government's "failure to follow its own guidance is grounds for dismissal of those claims." United States v. Eriksmoen Cottages, Ltd., 14 OCAHO no. 1355, 2 (2020). However, OCAHO is not bound by the Virtue Memo. United States v. R&SL, Inc., 13 OCAHO no. 1333a, 3 (2020) (citing United States v. WSC Plumbing, Inc., 9 OCAHO no. 1071, 11 (2001)).

IV. LEGAL ANALYSIS OF CLAIMS FOR LIABILITY

In this case, Respondent does not dispute the factual allegations which Complainant argues establish liability. *See generally* Ans. Complainant inspected Respondent's Forms I-9, finding that, with respect to the four Forms I-9 Respondent presented to ICE, each Form I-9 contained substantive violations of Sections 1, 2, and/or 3. Mot. Summ. Dec. Ex. A, 1 ¶¶ 6–7.[5] A review

[5] The Complaint, NIF, and exhibits attached to Complainant's Motion for Summary Decision contain conflicting accounts of the specific violations present in the Forms I-9 at issue in Count II. *Compare* Compl. 3 (alleging failure to properly complete Section 1 in the heading and failure to properly complete Section 2 in paragraph C), *with* NIF (alleging failure to timely complete Section 1 and/or failure to properly complete Section 2 or 3), *and* Motion Summ. Dec. Ex. A, at ¶ 7 (attesting that the audit revealed substantive violations due to failure to properly complete Sections 1 or 2), *and* id. Ex. B, at 1–2 (alleging each of the Forms I-9 contained "one or more" of a list of substantive violations, and that Respondent failed to ensure timely completion of Section 1 and/or failed to timely complete Sections 2 or 3). Complainant has not submitted the Forms I-9 into the record for inspection.

of the payroll revealed three missing Forms I-9. Id. at Ex. A, 1 ¶ 7. Complainant brought this action for the seven alleged violations of 8 U.S.C. § 1324a; four related to the improper completion of the Forms I-9, and three for the failure to present the Forms I-9. *See generally* Compl.

Respondent did not challenge that ICE failed to provide at least three business days' notice prior to its inspection, as required by 8 C.F.R. § 274a.2(b)(2)(ii). United States v. Golden Emp't Grp., Inc., 12 OCAHO no. 1274, 6 (2016) ("Regulations impose an affirmative duty upon employers to prepare and retain I-9 forms . . . and to make those forms available for inspection on three days' notice. 8 C.F.R. § 274a.2(b)(2)(ii)."); *see also* United States v. Capital Fireproof Door, 2020A00001 (Order on Motion for Summary Decision) (Jan. 28, 2022). Generally, the failure to timely raise an affirmative defense results in waiver. Latimer v. Roaring Toyz, Inc., 601 F.3d 1224, 1240 (11th Cir. 2010) ("As previously noted, failure to plead an affirmative defense generally results in a waiver of that defense."); Keybank Nat'l Ass'n. v. Hamrick, 576 F. App'x 884, 888 (11th Cir. 2014) (same).

While the Respondent did not raise an objection related to the timing of the inspection, Respondent's pleadings did raise several other defenses, including good faith compliance, impossibility, and selective prosecution. The Court addresses each below.

Respondent asserts that it complied with the employment eligibility verification requirements in good faith. Ans. 1–2; Resp. to Mot. 3. 8 U.S.C. § 1324a(a)(3) provides that an entity is considered to have complied with the employment eligibility verification requirements despite a technical or procedural failure if the employer made a good faith attempt to comply. *See* WSC Plumbing, 9 OCAHO no. 1071, at 2. However, the good faith defense has no application with substantive violations. United States v. Int'l Packaging, Inc., 12 OCAHO no. 1275, 4 (2016). The Virtue Memo categorizes failure to prepare or present a Form I-9 as a substantive violation. Eriksmoen Cottages, Ltd., 14 OCAHO no. 1355, at 4 (citing Virtue Memo. 2–4). The Virtue Memo also categorizes a failure to sign Section 2 within three days of an employee's hire as a substantive violation. United States v. Imacuclean Cleaning Servs., LLC, 13 OCAHO no. 1327, 3 (2017) (citing Virtue Memo. 2–4). The Court finds that Respondent's I-9 failures are substantive in nature; therefore, the good faith defense set forth at 8 U.S.C. § 1324a(a)(3) is unavailable.

While this argument is not made in significant detail, Respondent states that the Forms I-9 could not be produced because they were mislaid during renovations. *See* Ans. 1; Resp. to Mot. 1. "OCAHO case law recognizes that impossibility may provide a valid affirmative defense to the failure to present Forms I-9 where the forms were actually completed, but later became unavailable through no fault of the employer." United States v. Ideal Transp. Co., 12 OCAHO no. 1290, 7 (2016) (citations omitted); *e.g.*, United States v. Noel Plastering and Stucco, Inc., 2 OCAHO no.

"[T]he Court is under no obligation to grant a motion for summary decision simply because it is unopposed. Courts must remain mindful of their obligation to hold a moving party to its burden and must evaluate motions based on the sufficiency of the moving papers." Contreras v. Cavco Indus., Inc., 16 OCAHO no. 1440a, 2 (2023) (citations omitted); *see also* Brown v. Pilgrim's Pride Corp., 14 OCAHO no. 1379a, 3 (2022). In this circumstance, despite these ambiguities, the Court finds that the attached declaration from the Forensic Auditor and the attached Memorandum to Case File meet Complainant's burden to demonstrate liability under Count II for substantive violations of § 1324a due to failure to properly complete Sections 1 and/or 2, given that Respondent has not challenged liability.

396, 763, 768 (1991) (finding that an impossibility defense could potentially succeed if a respondent could prove that fire destroyed the offices where I-9 forms were kept); United States v. Alvand, Inc., 2 OCAHO no. 352, 378, 383 (1991) (modification by the CAHO) (finding that impossibility could be a valid defense if evidence established that the I-9 forms had been completed, but were then lost or destroyed in the course of a burglary).

Impossibility is not available as an affirmative defense when the loss of the document is attributable to the company's own actions or inactions. Ideal Transp. Co., 12 OCAHO no. 1290, at 7 (citations omitted); *e.g.*, United States v. Barnett Taylor, LLC, 10 OCAHO no. 1155, 8–9 (2012) (stating that where an employer's own employee voluntarily destroys its I-9 forms, the defense is unavailable). Here, Respondent did not present any evidence supporting the assertion that it completed the Forms I-9 at the time of hiring. *See* United States v. Jalisco's Bar and Grill, Inc., 11 OCAHO no. 1224, 6 (2014) (finding that impossibility defense is not applicable where the business "fail[s] to present any evidence whatsoever to show that the original forms were timely prepared in the first instance."). Assuming, arguendo, that Respondent had established this fact, the alleged loss of the Forms I-9 appears to be attributable to Respondent's failure to safeguard the Forms I-9 during its renovation. Respondent states that it "was unable to produce the original I-9 forms . . . because [Respondent] started major renovation to the interior of the hotel [a] few weeks after purchasing and a lot of items including paperwork were misplaced and/or lost in the process." Ans. 1.; *see* Resp. to Mot. 1 ("The originals were accidentally misplaced/discarded during the renovation of the hotel."). By Respondent's own admission, the Forms I-9 were lost or mislaid *after* the current owner purchased the business.

Excusing Respondent's failure to retain the Forms I-9 would undermine the structure of 8 U.S.C. § 1324a; in particular, its provisions requiring that an employer retain the Forms I-9 and attendant documents and make the documents available upon request for inspection. The statute carries an inherent requirement that a party, upon creating the Forms I-9, put them in a place of safekeeping during the entirety of the required period. *See* 8 U.S.C. § 1324a(b)(3). Moreover, the statute expressly permits a party to satisfy the "production" requirement by producing electronic or paper copies of the original forms. Id. Accordingly, Respondent's argument that it mislaid the Forms I-9 is no defense to a liability finding; however, the Court may consider it as a non-statutory factor related to the amount of the penalty. *See* Ideal Transp. Co., 12 OCAHO no. 1290, at 7 ("While the assertion that these forms were actually prepared may be taken into account in setting a penalty, it cannot operate to avoid liability for these violations.").

Respondent also alleged that it was "targeted" for an investigation into his compliance with 8 U.S.C. § 1324a "because [the owner is] a minority." *See* Resp. to Mot. 1. However, Respondent presents no evidence to support this claim. Complainant asserts that Respondent was identified as a subject for investigation "based on its critical infrastructure and key resources services." Mot. Summ. Dec. Ex. B, 1. Respondent offers no evidence that these assertions are a pretext for a discriminatory motive—as such, Respondent's arguments are mere speculation, they do not present a genuine issue which would prevent a ruling on the merits of the claims. *See generally* 28 C.F.R. § 68.38.

Accordingly, the Court finds that Complainant has met its burden as to liability, and Respondent did not raise any viable defense. The Court therefore GRANTS the Motion for

Summary Decision with regard to liability in this matter. Respondent is liable for failing to prepare and/or present Forms I-9 for three employees, and for failing to properly complete Sections 1 or 2 of the Forms I-9 for four employees.

V. CIVIL MONETARY PENALTIES

A. Considerations in Penalty Assessment

"The [G]overnment has the burden of proof with respect to the penalty . . . and must prove the existence of any aggravating factor by a preponderance of the evidence[.]" Metro. Enters., Inc., 12 OCAHO no. 1297, at 7 (internal citations and quotations omitted).

To determine the appropriate penalty amount, "the following statutory 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 [noncitizen], and 5) the employer's history of previous violations." Id. at 4 (citing 8 U.S.C. § 1324a(e)(5)). The Court considers the facts and circumstances of the individual case to determine the weight it gives to each factor. Metro. Enters., Inc., 12 OCAHO no. 1297, at 8 (citation omitted). While the statutory factors must be considered in every case, the statute:

> Does not mandate any particular outcome of such consideration, and nothing in the statute or the regulations requires . . . that the same weight be given to each of the factors in every case . . . or that the weight given to any one factor is limited to any particular percentage of the total.

United States v. Ice Castles Daycare Too, Inc., 10 OCAHO no. 1142, 6–7 (2011) (internal citations omitted).

The Court "is not precluded from considering factors not explicitly outlined in the statute as 'there is no reason that additional considerations cannot be weighed separately.'" United States v. Integrity Concrete, Inc., 13 OCAHO no. 1307, 18 (2017) (quoting United States v. M.T.S. Serv. Corp., 3 OCAHO no. 448, 527, 531 (1992)). "A party seeking consideration of a non-statutory factor, such as ability to pay the penalty, bears the burden of proof in 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. Pegasus Fam. Rest., 12 OCAHO no. 1293, 10 (2016) (citations omitted). Finally, "ICE's penalty calculations are not binding in OCAHO proceedings, and the ALJ may examine the penalties *de novo* if appropriate." United States v. Alpine Staffing, Inc., 12 OCAHO no. 1303, 10 (2017).

1. Statutory Factors

The Court considers the following five statutory factors to evaluate the propriety of Complainant's proposed penalties against Respondent: 1) the size of the employer's business, 2) the employer's good faith, 3) the seriousness of the violations, 4) whether any individual at issue

had authorization to work in the United States, and 5) the employer's history of previous violations. *See* 8 U.S.C. § 1324a(e)(5).

Concerning the first factor, size of the company, Complainant has argued that Respondent should not receive mitigation because it is a part of Baymont Inn and Suites, its franchisor. *See* Mot. Summ. Dec. 3, Ex. B, 3. However, Complainant admits that Respondent is not a business owned by Baymont, but rather a franchisee of Wyndham Hotel and Resorts. Id. at Ex. B, 3. While neither party has presented any evidence showing the precise nature of this franchise agreement,[6] Respondent is certain to have only employed seven employees during the relevant reporting period, and only four during the period of inspection. Id. at Ex. A, 1 ¶ 6, Ex. B, 1. Complainant has not demonstrated why Respondent should be held to the same standard as its large franchisor. The Court will consider Respondent's business size as four employees.

In weighing the size of the business factor, prior OCAHO case law has generally placed the benchmark for a small employer at fewer than 100 employees. United States v. Visiontron Corp., 13 OCAHO no. 1348, 7 (2020) (citing United States v. Fowler Equip. Co., Inc., 10 OCAHO no. 1169, 6–7 (2013)). The Court makes the same determination here and will mitigate based on the size of the business. However, prior OCAHO case law has distinguished those companies that employ a very small number of employees as deserving additional consideration. *See, e.g.*, United States v. Intelli Transp. Servs., Inc., 13 OCAHO no. 1319, 5 (2019) (finding a business with ten employees to be a very small business); United States v. Keegan Variety, LLC, 11 OCAHO no. 1238, 5 (2014) (finding a business with two employees to be a very small business). Respondent employed four employees during the period of inspection; accordingly, the Court finds that it is at the extreme end of being a small employer, and that an additional element of mitigation is warranted given its very small size.

Addressing the second factor, the business's good faith efforts, Respondent argues that it acted in good faith by attempting to produce the records at the Government's request, making efforts to recreate Forms I-9 which were mislaid, and directing its employees to put the accurate dates on the recreated Forms I-9 (i.e, the date that the documents were recreated, rather than the date that they were originally made). *See* Ans. 1–2; Resp. to Mot. 1. Respondent also asserts that all of its current and former employees are authorized to work in the United States, which ostensibly relates to the business's good faith efforts. Resp. to Mot. 2.

OCAHO case law regarding the statutory factor of good faith "looks primarily to the steps an employer took before issuance of the [Notice of Inspection (NOI)], not what it did afterward." United States v. Hartmann Studios, Inc., 11 OCAHO no. 1255, 14 (2015) (citation omitted). Respondent's arguments tend to address what actions it took after it was advised of the Government's investigation, not before. Moreover, Respondent's arguments concerning its efforts reflect a bare compliance with the law, rather than to either obfuscate or evade DHS's lawful

[6] Absent evidence to the contrary, the Court may presume that Bliss Hospitality, LLC is a separate legal entity which has contracted for the right to hold itself out to others as a part of the Wyndham hotel chain. Its relationship as a franchisee does not militate against any of the considerations which animate this statutory factor. Insofar as neither party has presented any evidence that Bliss Hospitality, LLC has any right to the capital of Wyndham, or to control the personnel of the franchisor, its character as a small business is unaffected by the fact that its vendors and branding are presumably controlled by its franchise agreement.

inquiry. *See* Intelli Transport Servs., Inc., 13 OCAHO no. 1319, at 5. Accordingly, the Court treats the factor of good faith as neutral.

The third factor, the seriousness of Respondent's violations, justifies an aggravation of the penalties. Respondent is liable for failing to prepare and/or present Forms I-9 for three employees. "[F]ailure to prepare an I-9 at all is among the most serious possible violations because it frustrates the national policy intending to ensure that unauthorized [noncitizens] are excluded from the workplace." Pegasus Fam. Rest., 12 OCAHO no. 1293, at 9 (citation omitted). Respondent is further liable for failure to properly complete Sections 1 or 2 of the Forms I-9 for four employees. Respondent's failure to properly complete Sections 1 or Section 2 of the Form I-9 is also very serious, although less serious than failing to prepare the I-9 at all. *See* Visiontron Corp., 13 OCAHO no. 1348, at 8–9 (citations omitted); *see also* United States v. Cruz, 3 OCAHO no. 453, 595, 600 (1992) (finding that the respondent was not entitled to mitigation for the seriousness factor given that I-9 forms were not prepared until after the respondent received a NOI).

The fourth factor, whether any individual at issue had authorization to work in the United States, warrants neither aggravation nor mitigation. Respondent asserts that its employees were authorized to work in the United States; Complainant's review of the employee records substantiates Respondent's assertion. Resp. to Mot. 1–2; C's Mot. Summ. Dec. Ex. B, 5. However, OCAHO case law generally treats this factor as neutral where the evidence shows that the employees at issue are all authorized to work in the United States because "compliance with the law is the expectation, not the exception." *See* United States v. Eriksmoen Cottages, Ltd., 14 OCAHO no. 1355a, 7 (2020) (citing United States v. Romans Racing Stables, Inc., 11 OCAHO no. 1232, 5 (2014)). Accordingly, the Court treats this factor as neutral.

Moving to the fifth factor, the history of previous violations, Complainant recommends mitigation due to Respondent's lack of a history of previous violations and its recent acquisition of the franchisee hotel. C's Mot. Summ. Dec. 3, Ex. B, 5. As stated previously, Bliss Hospitality had very recently acquired the Macon, Georgia Baymont Inn and Suites (the franchisee hotel) at the time of the inspection. Although OCAHO typically treats this factor as neutral where the business has no history of previous violations, *see* United States v. New China Buffet Rest., 10 OCAHO no. 1133, 6 (2020), circumstances may sometimes weigh in favor of mitigation. *E.g.*, United States v. Sunshine Bldg. & Maint., Inc., 7 OCAHO no. 997, 1, 47–48 (1998); United States v. Task Force Sec., 4 OCAHO no. 625, 333, 338 (1994). Given Complainant's recommendation of mitigation and Respondent's unique circumstances, the Court will treat this factor as mitigating.

2. Non-Statutory Factors

Respondent has repeatedly argued an inability to pay the fine proposed by Complainant. *See* Ans. 2; Resp. to Mot. 1–3; Supp. Filing 1.

OCAHO has recognized a respondent's inability to pay as a non-statutory factor rooted in equity. *E.g.*, United States v. Cityproof Corp., 15 OCAHO no. 1392a, 6–7 (2022); United States v. Mott Thoroughbred Stables, Inc., 11 OCAHO no. 1233, 5–6 (2012); *see also* United States v. Two for Seven, LLC, 10 OCAHO no. 1208, 8–9 (2014) (citation omitted) ("The penalties are not meant to force employers out of business or result in the loss of employment for workers."). To

support this equitable consideration, employers are expected "to submit detailed financial statements so that the Court can consider the 'complete picture of [the business's] financial health.'" Eriksmoen Cottages, Ltd., 14 OCAHO no. 1355a, at 7–8 (quoting Integrity Concrete, Inc., 13 OCAHO no. 1307, at 13).

In February 2021, Respondent asserted that it had suffered significant revenue losses due to recent renovations, as well as the COVID-19 pandemic, the global economic downturn which followed, and acute impact of this economic downturn on the hotel sector. *See* Resp. to Mot. 1–2 (claiming that it lost 15% of revenue from the year prior due to renovations, and a subsequent 25% reduction due to the pandemic). Respondent stated any penalty would be very difficult to pay because of its losses. Id.

In December 2022, Respondent submitted updated financial information, including an income statement and affidavit.[7] *See* Supp. Filing 1–3. Respondent's income sheet, for the seven months ending July 31, 2022, shows, inter alia, income from operations as $50,644.67, and a negative net income. Id. at 2–3. Respondent states that as the "business is still struggling," it is "incapable of paying the proposed fine." Id. at 1.

OCAHO case law instructs that "a corporation's ability to demonstrate tax losses does not necessarily establish a company's poor financial condition or its inability to pay." Mott Thoroughbred Stables, Inc., 11 OCAHO no. 1233, at 5 (citation omitted). Still, the Court finds it significant that Complainant's proposed penalty of $13,636 is nearly 27% of Respondent's recent income from operations. Paying that penalty amount would, most likely, seriously impact Respondent's operations. *See also* United States v. Kurzon, 4 OCAHO no. 637, 414, 424 (1994) ("[The ALJ] must keep in mind that the function of the [C]ourt, basically, is to make sure that the Respondent is in compliance with the law; it is not to levy a civil monetary penalty which may be so severe that Respondent is put out of business.").

The Court also will mitigate based on Respondent's representation that the original documents were accidentally lost or destroyed due to recent renovations. *See also* United States v. Bakovic, 3 OCAHO no. 482, 853, 866 (1991) ("The judge has discretion to consider factors other than those catalogued by the statute."). Complainant did not challenge this representation. While the renovations do not obviate Respondent's duty to maintain its records, or the concomitant liability for its failure to do so, the Court accepts Respondent's representations that, as a first-time hotel owner, it had simply misplaced or discarded the Forms I-9 while renovating the hotel it had recently purchased.

B. Penalty Calculation

Following a finding of § 1324a(a)(1)(B) liability, the Court imposes civil monetary penalties in accord with 8 U.S.C. § 1324a and 28 C.F.R. § 68.52(c). 28 C.F.R. § 68.52(c)

[7] Audited financial history is a preferred way to show a complete picture of a respondent's financial health. *See* Integrity Concrete, Inc., 13 OCAHO no. 1307, at 18. Respondent's 2022 income statement is not audited. Nonetheless, in light of Respondent's pro se status and Complainant's lack of response to the income statement, the Court will give weight to the document as material and reliable evidence. *See generally* 28 C.F.R. § 68.40.

proscribes that the applicable penalty amount range depends on when the § 1324a(a)(1)(B) violations occurred. *See* § 68.52(c)(5) (setting one range for violations that occurred before March 15, 1999, and another range for violations that occurred after March 15, 1999); § 68.52(c)(8) (setting range for violations that occurred after November 2, 2015).

Here, the violations occurred after November 2, 2015. Thus, the Court consults 28 C.F.R. § 68.52(c)(8) for further guidance on penalty. 28 C.F.R. § 68.52(c)(8) provides that "[f]or civil penalties assessed after August 1, 2016 . . . the applicable penalty amounts are set forth in 28 C.F.R. § 85.5."

28 C.F.R. § 85.5 provides specific ranges for "IRCA; Paperwork violation" penalties (i.e., § 1324a(a)(1)(B) violations). If a penalty is assessed between January 29, 2018 and June 19, 2020, the minimum penalty is $224 and the maximum is $2,236. § 85.5. If the penalty is assessed between June 19, 2020 and December 13, 2021, the minimum penalty is $234 and the maximum is $2,332. Id. If the penalty is assessed between December 13, 2021 and May 9, 2022, the minimum penalty is $237 and the maximum is $2,360. Id. If the penalty is assessed between May 9, 2022 and January 30, 2023, the minimum penalty is $252 and the maximum is $2,507. Id. If the penalty is assessed after January 30, 2023, the minimum penalty is $272 and the maximum is $2,701. Id.

While 28 C.F.R. § 68.52(c)(8) and 28 C.F.R. § 85.5 pivot on date of assessment, neither regulation explains how to determine that date. Accordingly, this Court looks to OCAHO precedent on this topic. The Chief Administrative Hearing Officer has recently clarified that "for the purposes of 28 C.F.R. § 85.5(d), OCAHO does assess civil money penalties, those penalties are assessed through the issuance of a final order, and the date of assessment is the date of the OCAHO final order." United States v. Edgemont Grp., LLC, 17 OCAHO no. 1470e, 26 (2023). The Court issues this Order after January 30, 2023, making the appropriate penalty range between $272 and $2,701.

Using a mid-range penalty as a base, the Court will reduce the penalties by 70% for the mitigating factors of the very small size of the business, the lack of previous violations, Respondent's inability to pay, and Respondent's inadvertent loss of the Forms I-9. The Court will aggravate the mid-range penalty by 10% given the seriousness of the violations.

The Court will therefore impose a fine of $594.60 per each violation. The total fine is $4,162.20.

V. CONCLUSION

Complainant's Motion for Summary Decision is GRANTED. Complainant is liable for seven violations of § 1324a, for failing to prepare or present Forms I-9 for three employees, and for failing to properly complete Sections 1 or 2 of the Form I-9 with respect to four employees.

IT IS SO ORDERED that Complainant pay a total civil monetary penalty of $4,162.20.

VI. FINDINGS OF FACT

1. Respondent, Bliss Hospitality LLC d/b/a Baymont Inn and Suites, is a hotel located in Macon, Georgia.

2. Brijesh Patel is the owner of Bliss Hospitality LLC d/b/a Baymont Inn and Suites; he purchased the hotel on January 4, 2019. At the time of purchase, the hotel had two employees.

3. On June 24, 2019, Matt DeVane, a special agent with the United States Department of Homeland Security, Immigration and Customs Enforcement (Complainant), served a Notice of Inspection on Respondent.

4. On June 24, 2019, Inspector Janice Bell, a forensic auditor with Complainant's Homeland Security Investigations Unit, conducted an inspection of Respondent; the inspection sought Employment Eligibility Verification Forms (Forms I-9).

5. Respondent produced Forms I-9 for four employees and payroll records; Inspector Bell's review of these Forms I-9 indicated that there were substantive deficiencies in the preparation of the Forms I-9.

6. The payroll records revealed that Respondent employed seven employees during the reporting period.

7. Respondent did not provide Forms I-9 for three employees; the original documents were accidentally lost or destroyed due to recent renovations.

8. Complainant's examination substantiated Respondent's assertion that its employees were authorized to work in the United States.

9. On December 10, 2019, Complainant's special agent Jermaine Lee served a Notice of Intent to Fine on Respondent.

10. On June 17, 2020, Complainant filed a complaint with the Office of the Chief Administrative Hearing Officer against Bliss Hospitality LLC d/b/a Baymont Inn & Suites.

11. Absent evidence to the contrary, the Court may presume that Bliss Hospitality, LLC is a separate legal entity which has contracted for the right to hold itself out to others as part of the Wyndham hotel chain.

12. The Court will consider Respondent's business size as seven or less employees.

13. For the seven months ended July 31, 2022, Respondent, through its 2022 income statement, reported total sales of $272,440.33; income from operations as $50,644.67; and net income as ($32,598.28).

14. Complainant's proposed penalty of $13,636 is nearly 27% of Respondent's recent income from operations.

VII. CONCLUSIONS OF LAW

1. Respondent, Bliss Hospitality LLC d/b/a Baymont Inn & Suites is an entity within the meaning of 8 U.S.C. § 1324a(a)(1).

2. It is appropriate for the Court to evaluate liability in this case under the summary decision standard. *See* 28 C.F.R. § 68.38.

3. Even when viewed in the light most favorable to Respondent, Respondent did not dispute the factual allegations which Complainant argued to establish liability, and did not raise genuine issues of material fact as to liability. *See* Sepahpour v. Unisys, Inc., 3 OCAHO no. 500, 1012, 1014 (1993) (citations omitted); United States v. Four Seasons Earthworks, Inc., 10 OCAHO no. 1150, 3 (2012) (citation omitted); United States v. 3679 Commerce Place, Inc., 12 OCAHO no. 1296, 4 (2017) (citation omitted); United States v. Primera Enters., Inc., 4 OCAHO no. 615, 259, 261 (1994) (citations omitted); United States v. Metro. Enters., Inc., 12 OCAHO no. 1297, 7 (2017) (citation omitted); United States v. Durable, Inc., 11 OCAHO no. 1231, 5 (2014) (affirmance by the CAHO) (citations omitted).

4. Failure to prepare and/or present Forms I-9, and failure to ensure proper completion of Section 1 or failure to properly complete Section 2, are substantive violations pursuant to Complainant's Virtue Memo. *See* United States v. Metro. Enters., Inc., 12 OCAHO no. 1297, 7 (2017) (citation omitted); United States v. New China Buffet, 10 OCAHO no. 1132, 3 (2010) (citations omitted); United States v. Eriksmoen Cottages, Ltd., 14 OCAHO no. 1355, 2 (2020) (citation omitted); United States v. Eriksmoen Cottages, Ltd., 14 OCAHO no. 1355, 2 (2020); United States v. R&SL, Inc., 13 OCAHO no. 1333a, 3 (2020) (citation omitted).

5. Complainant met its burden of proof that Respondent failed to prepare and/or present Forms I-9 for three employees. *See* United States v. Metro. Enters., Inc., 12 OCAHO no. 1297, 7 (2017) (citation omitted); United States v. Lazy Days South, Inc., 13 OCAHO no. 1322c, 4 (2019) (modification by the CAHO) (citations omitted); 8 C.F.R. § 274a.2(b)(2)(ii); United States v. El Paso Paper Box, Inc., 17 OCAHO no. 1451a, 3 (2022) (citations and subsequent history omitted).

6. Complainant met its burden of proof that Respondent failed to ensure proper completion of Forms I-9 for four employees. *See* United States v. A&J Kyoto Japanese Rest., 10 OCAHO no. 1186, 5 (2013) (citation omitted).

7. Respondent did not raise a viable good faith compliance defense as to liability; specifically, the defense is unavailable for its substantive I-9 failures. 8 U.S.C. § 1324a(a)(3); *see*

United States v. WSC Plumbing, 9 OCAHO no. 1071, 2 (2001); United States v. Eriksmoen Cottages, Ltd., 14 OCAHO no. 1355, 2 (2020) (citation omitted); United States v. Imacuclean Cleaning Servs., LLC, 13 OCAHO no. 1327, 3 (2017) (citation omitted).

8. Respondent did not raise a viable impossibility defense as to liability. Respondent did not present any evidence that the Forms I-9 were prepared at the time of hiring, and the loss is attributable to Respondent's own actions. *See* United States v. Ideal Transp. Co., 12 OCAHO no. 1290, 7 (2016) (citations omitted); United States v. Noel Plastering and Stucco, Inc., 2 OCAHO no. 396, 763, 768 (1991); United States v. Alvand, Inc., 2 OCAHO no. 352, 378, 383 (1991) (modification by the CAHO); United States v. Barnett Taylor, LLC, 10 OCAHO no. 1155, 8–9 (2012); United States v. Jalisco's Bar and Grill, Inc., 11 OCAHO no. 1224, 6 (2014).

9. Excusing Respondent's failure to retain the Forms I-9 would undermine the structure of 8 U.S.C. § 1324a; in particular, its provisions requiring that an employer retain the Forms I-9 and attendant documents and make the documents available upon request for inspection. 8 U.S.C. § 1324a(b)(3); *see* United States v. Ideal Transp. Co., 12 OCAHO no. 1290, 7 (2016).

10. Respondent did not raise a selective prosecution defense as to liability; Respondent's arguments are mere speculation, and do not present a genuine issue which would prevent a ruling on the merits of the claims. *See generally* 28 C.F.R. § 68.38.

11. Respondent is liable for failing to prepare and/or present Forms I-9 for three employees. 8 U.S.C. § 1324a(a)(1)(B).

12. Respondent is liable for failing to properly complete Sections 1 or Section 2 of the Forms I-9 for four employees. 8 U.S.C. § 1324a(a)(1)(B).

13. Complainant has the burden of proof with respect to the penalty and must prove the existence of any aggravating factor by the preponderance of the evidence. The Court is not beholden to Complainant's penalty calculations. *See* United States v. Metro. Enters., Inc., 12 OCAHO no. 1297, 7 (2017) (internal citations and quotations omitted); United States v. Alpine Staffing, Inc., 12 OCAHO no. 1303, 10 (2017).

14. The Court has considered facts and circumstances unique to this case to weigh the statutory factors. 8 U.S.C. § 1324a(e)(5); *see* United States v. 3679 Com. Place, Inc., 12 OCAHO no. 1296, 4, 7 (2017) (citations omitted); United States v. Metro. Enters., Inc., 12 OCAHO no. 1297, 8 (2017) (citation omitted); United States v. Ice Castles Daycare Too, Inc., 10 OCAHO no. 1142, 6–7 (2011) (internal citations omitted).

15. The Court has also considered factors not explicitly outlined in the statute in its penalty assessment. United States v. Integrity Concrete, Inc., 13 OCAHO no. 1307, 18 (2017) (citation omitted); United States v. Pegasus Fam. Rest., 12 OCAHO no. 1293, 10 (2016) (citations omitted).

16. The Court will treat the size of the business statutory factor as neutral because Respondent employed four employees during the period of inspection; an additional element of mitigation is also warranted given its very small size. *See* United States v. Visiontron Corp., 13 OCAHO no. 1348, 7 (2020) (citation omitted); United States v. Intelli Transport Servs., Inc., 13 OCAHO no. 1319, 5 (2019); United States v. Keegan Variety, LLC, 11 OCAHO no. 1238, 5 (2014).

17. The Court will treat the good faith statutory factor as neutral because Respondent's arguments tend to address what happened after Complainant's inspection, and only reflect compliance with the law. *See* United States v. Hartmann Studios, Inc., 11 OCAHO no. 1255, 14 (2015) (citation omitted); United States v. Intelli Transport Servs., Inc., 13 OCAHO no. 1319, 5 (2019).

18. The seriousness of Respondent's violations justifies penalty aggravation, as both types of violations are very serious. *See* United States v. Pegasus Fam. Rest., 12 OCAHO no. 1293, 9 (2016) (citation omitted); United States v. Visiontron Corp., 13 OCAHO no. 1348, at 8–9, 2020 (citations omitted); United States v. Cruz, 3 OCAHO no. 453, 595, 600 (1992).

19. The Court will treat the unauthorized workers statutory factor as neutral as Respondent did not employ individuals without authorization to work in the United States. *See* United States v. Eriksmoen Cottages, Ltd., 14 OCAHO no. 1355a, 7 (2020) (citations omitted).

20. Although OCAHO typically treats the history of previous violations statutory factor as neutral, given Complainant's recommendation of mitigation and Respondent's unique circumstances, the Court will treat the factor as neutral. *See* United States v. New China Buffet Rest., 10 OCAHO no. 1133, 6 (2020); United States v. Sunshine Bldg. & Maint., Inc., 7 OCAHO no. 997, 1, 47–48 (1998); United States v. Task Force Sec., 4 OCAHO no. 625, 333, 338 (1994).

21. While audited financial history is a preferred way to demonstrate financial health, in this case, the Court will give weight to the recent, unaudited income statement as material and reliable evidence. *See* United States v. Integrity Concrete, Inc., 13 OCAHO no. 1307, 18 (2017); 28 C.F.R. § 68.40.

22. The Court will mitigate penalties based on Respondent's inability to pay, a non-statutory factor recognized by OCAHO, as supported by its income statement and affidavit. *See* United States v. Cityproof Corp., 15 OCAHO no. 1392a, 6–7 (2022); United States v. Mott Thoroughbred Stables, Inc., 11 OCAHO no. 1233, 5–6 (2012); United States v. Two for Seven, LLC, 10 OCAHO no. 1208, 8–9 (2014) (citation omitted); United States v. Eriksmoen Cottages, Ltd., 14 OCAHO no. 1355a, 7–8 (2020) (citation omitted); United States v. Kurzon, 4 OCAHO no. 637, 414, 424 (1994).

23. The Court will also mitigate based on Respondent's representation that the original documents (Forms I-9) were accidentally lost or destroyed due to recent renovation—a representation not challenged by Complainant. *See also* United States v. Bakovic, 3 OCAHO no. 482, 853, 866 (1991),

24. Respondent's violations are 'continuing' violations. *See* United States v. R2M2 Rebar & Stressing, Inc., 14 OCAHO no. 1357, 3–4 (2020) (citations omitted); United States v. El Paso Paper Box, Inc., 17 OCAHO no. 1451, 6 (2022) (citations omitted).

25. While 28 C.F.R. § 68.52(c)(8) and 28 C.F.R. § 85.5 pivot on date of assessment, neither regulation explains how to determine that date. Accordingly, this Court looks to OCAHO precedent on this topic. The Chief Administrative Hearing Officer has recently clarified that "for the purposes of 28 C.F.R. § 85.5(d), OCAHO does assess civil money penalties, those penalties are assessed through the issuance of a final order, and the date of assessment is the date of the OCAHO final order." United States v. Edgemont Grp., LLC, 17 OCAHO no. 1470e, 26 (2023).

26. The applicable penalty range for the violations in this case is $272-$2,701. Beginning with a mid-range penalty and upon weighing the statutory and non-statutory factors, the Court will therefore impose a fine of $594.60 per each violation. The total fine is $4,162.20. *See* 8 U.S.C. § 1324a; 28 C.F.R. § 68.52(c)(8); 28 C.F.R. § 85.5.

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.

SO ORDERED.

Dated and entered on January 31, 2024.

_____
Honorable John A. Henderson
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.