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

October 16, 2015

UNITED STATES OF AMERICA, Complainant, v. BUFFALO TRANSPORTATION, INC., Respondent.	))))))))	8 U.S.C. § 1324a Proceeding OCAHO Case No. 14A00090

AMENDED FINAL DECISION AND ORDER

A Final Decision and Order was initially issued in the above-captioned case on September 25, 2015. Pursuant to 28 C.F.R. § 68.52(f), this Amended Final Decision and Order clarifies the decision previously issued on September 25, 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). On July 8, 2014, the United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a complaint consisting of a single-count against Buffalo Transportation, Inc. (BTI, respondent, or the company). The company filed an answer, and the parties completed prehearing procedures.

Presently pending are the government's Motion for Summary Decision and the company's "Cross-Notice of Motion For Summary Decision." The motions are fully briefed and are ready for resolution. As set forth in detail below, the government's motion is granted in part, respondent's motion is granted in part, and the civil money penalties are reduced on account of mitigating factors presented in this case.

II. BACKGROUND INFORMATION AND POSITIONS OF THE PARTIES

BTI is a small, domestic company that provides transportation services in the greater Buffalo, New York, area. On August 22, 2013, the government personally served BTI with a Notice of

Inspection. The Notice of Inspection informed BTI that a review of BTI's Employment Eligibility Verification Forms I-9 was scheduled for August 28, 2013. The letter also indicated that federal regulations provide "three days notice prior to conducting a review of an employer's Forms I-9." ICE conducted its review of the Forms I-9 as scheduled on August 28, 2013, and it appears from the evidence of record that BTI cooperated fully with the government's document review and investigation.

On October 3, 2013, ICE issued a "Notice of Technical or Procedural Failures" to BTI, which included the attachment of six Forms I-9 containing technical or procedural failures that had been "highlighted or circled in ink." ICE explained that these technical or procedural failures could constitute violations of the INA if they remain uncorrected. ICE asked BTI to make the corrections and submit them to ICE by October 21, 2013, in order to avoid the issuance of a Notice of Intent to Fine with respect to these six Forms I-9. Importantly, the Notice of Technical or Procedural Failures also contained the following notations:

> Note: Additional failures to meet the employment verification requirements of Section 274A(b) of the INA may have been discovered. These failures are not included in this notification and may result in the issuance of a Notice of Intent to Fine. If a Notice of Intent to Fine is issued, it will be served separately from this notification.

See Notice of Technical or Procedural Failures at 1. Based on the evidence of record, it appears that BTI complied with the government's request and corrected the six Forms I-9.

ICE personally served a Notice of Intent to Fine on respondent on March 14, 2014. The Notice of Intent to Fine identified that respondent failed to prepare or present Forms I-9 for 84 employees, and that respondent failed to prepare timely Forms I-9 within three days of hiring 54 employees. As a result of these violations, ICE assessed a fine of $109,675.50. In a letter dated March 17, 2014, BTI requested a hearing before an Administrative Law Judge.

On July 8, 2014, ICE filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO). The complaint alleged that BTI failed to prepare or present Forms I-9 for 84 of its employees, and that BTI failed to prepare timely Forms I-9 within three days of hiring 54 employees. The complaint also identified that ICE assessed a penalty against BTI in the amount of $109,675.50 for violating sections 274A(a)(1)(B) and 274A(a)(2) of the INA.

On August 29, 2014, BTI filed its answer to the complaint. BTI admitted that it had hired the 138 individuals listed in the complaint, but BTI denied the allegations that it had failed to prepare, present, and/or timely complete the Forms I-9 for the 138 individuals. BTI also set forth seven affirmative defenses. Of particular note, BTI raises in its second affirmative defense that

ICE should be estopped from assessing fines for these 138 employees because ICE waived its right to do so by failing to reference these employees in the previously served "Notice of Technical or Procedural Failures." Respondent in its fourth affirmative defense argues that the "fines sought to be imposed by ICE are arbitrary and capricious and constitute an abuse of discretion in violation of INA sec. 274A(a)(1)(B), 28 CFR sec. 68.52(c)(5) and 8 CFR 274a.9(c)." In its fifth and seventh affirmative defenses, BTI argues that it is a small business, that it has acted in good faith, that the violations are not serious, that it did not hire any unauthorized workers, and that it has no history of prior violations.

The government filed its prehearing statement, which included seven proposed exhibits as attachments, on September 18, 2014. The government refuted many of respondent's affirmative defenses. Importantly, the government explained the distinction between substantive violations and violations characterized as technical or procedural. The government stated, "a failure to complete an I-9 form at all is not a technical or procedural failure; it is substantive in nature and defeats the purpose of the law." *See Government's Prehearing Statement* at 6 (citing *United States v. DJ Drywall, Inc.*, 10 OCAHO no. 1136 (2010)). [1] Moreover, the government argued that "OCAHO case law indicates that the United States 'is virtually impervious to an equitable estoppel claim.'" *See Government's Prehearing Statement* at 7 (quoting *United States v. Tom & Yu, Inc.*, 3 OCAHO no. 412, 163, 169 (1992)).

The government also set forth in its prehearing statement the factors it weighed in assessing the fines and the fine calculation. The government explained that BTI employed 138 individuals during the period of inspection, and the government documented 138 substantive violations, which is a violation rate of one-hundred-percent. As a result, the government used the baseline fine rate of $935. After considering the statutory factors, ICE determined that the baseline fine rate should be mitigated by five percent due to the small size of the business, mitigated by an additional five percent due to absence of bad faith, mitigated by another five percent due to the absence of illegal workers, and mitigated by five percent more due to having no history of prior violations. However, ICE deemed the violations serious and found that a five percent fine aggravation was warranted. Therefore, ICE reduced the baseline penalty of $935 by $187 and

[1] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage. htm# PubDecOrders.

added $46.75, which results in a fine amount of $794.75 per violation.[2] When the $794.75 per violation assessment is multiplied by 138 violations, the total fine assessment is $109,675.50.

It is important to note that attached to ICE's prehearing statement are BTI's employee earnings records and BTI's Forms I-9. In addition, ICE attached its spreadsheet by which it assessed BTI's Forms I-9. This ICE spreadsheet sets forth all relevant data for each employee, including employee name, date of hire, date of termination, and ICE's violation assessment.

Respondent filed its prehearing statement on October 21, 2014. In its prehearing statement, BTI reiterated the arguments and affirmative defenses previously raised in its answer. In addition, BTI argues that ICE incorrectly assessed the fines for substantive violations and violated BTI's due process by failing to give BTI prior notice of the violations in the Notice of Technical or Procedural Failures and by failing to give BTI an opportunity to cure the paperwork defects. BTI also claims to have substantially complied with the Form I-9 requirements "through documentary means." Although BTI argues that no monetary penalty should be imposed, BTI indicates that a minimal fine such as $100 per violation is more appropriate.

Importantly, BTI claims that five of the individuals listed in the complaint fall outside of the period of inspection. Specifically, BTI asserts that it did not need to retain the Forms I-9 for the following former employees because they are outside of the retention period requirements: Joelle Johnson, Cherly Harts, Carmen Glazier, Tommy Summage, and Yevgeniy Kazhdan. As such, BTI requests that the number of violations for failure to prepare or present Forms I-9 be reduced from 84 violations to 79 violations.

Complainant's Motion for Summary Decision was filed on May 29, 2015. The government reiterates the arguments previously discussed in its prehearing statement. The government notes that although BTI raises "potential defenses" with respect to the 5 employees whose Forms I-9 might be outside of the retention period, the government argues that BTI "fails to specify how these employees can be considered outside of the scope of the Form I-9 audit process." Moreover, ICE argues that BTI failed to present documentation to support its claimed inability to pay the stated fine. Finally, ICE argues that its fine assessment is "justified and appropriate" and that there is no need for OCAHO to conduct a de novo review of the penalty assessment.

Respondent's Cross-Notice of Motion For Summary Decision was filed on July 15, 2015. In this cross-motion, BTI reiterates the same arguments it previously set forth in its prehearing statement. BTI also explains that imposition of ICE's proposed penalty "would likely be catastrophic to BTI and result in business closure and the consequent loss of work for BTI's

[2] Although ICE's prehearing statement contains a simple calculation error that indicates the fine assessment is $841.50 per violation, it is clear from ICE's entire fine calculation assessment that the per violation fine assessment is $794.75, which results in a total fine assessment of $109,675.50 for all 138 alleged violations set forth in the complaint.

employees." *Cross-Motion for Summary Decision* at 2. BTI requests that the complaint be dismissed. In the alternative, BTI requests that the alleged violations be reduced consistent with the facts, and that the penalty assessment be reduced to the "lowest amount permissible."

III. DISCUSSION

A. Applicable Legal Standards

1. Summary Decision

Both parties seek 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). OCAHO jurisprudence looks to federal case law for guidance in determining when summary decision is appropriate. *Id*.

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). Based on the arguments of both parties and the evidence of record, this case is appropriate for disposition through summary decision as there are no genuine issues as to any material facts.

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)(1) 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.

Moreover, 8 C.F.R. § 274a.2(b)(2)(i)(A) establishes that Forms I-9 "must be retained by an employer . . . three years after the date of hire or one year after the date the individual's employment is terminated, whichever is later . . . ." In addition, 8 C.F.R. § 274a.2(b)(2)(ii) states, "At the time of inspection, Forms I-9 must be made available in their original paper,

electronic form, a paper copy of the electronic form, or on microfilm or microfiche at the location where the request for production was made."

In the case of an employee rehired by the same employer, 8 C.F.R. § 274a.2(c)(1) establishes that a previously executed Form I-9 can be used for the purposes of satisfying the Form I-9 requirements in lieu of completing a new Form I-9. The employer can use the previously executed Form I-9 when rehiring the same employee only if the employer inspects the previously executed Form I-9, the employer verifies the identity and continued work eligibility of the employee, and "the individual is hired within three years of the date of the initial execution of the Form I-9 and the employer updates the Form I-9 to reflect the date of rehire." 8 C.F.R. § 274a.2(c)(1). Regarding retention of these re-executed Forms I-9 for rehired employees, the regulation at 8 C.F.R. § 274a.2(c)(2) states:

> For purposes of retention of the Form I-9 by an employer for a previously employed individual hired pursuant to paragraph (c)(1) of this section, the employer shall retain the Form I-9 for a period of three years commencing from the date of the initial execution of the Form I-9 or one year after the individual's employment is terminated, whichever is later.

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. Burden of Proof

The government has the burden of proving both liability and penalty by a preponderance of the evidence, and the government must prove the existence of aggravating factors in the penalty assessment by a preponderance of the evidence. *See United States v. Nebeker, Inc.*, 10 OCAHO no. 1165, 4 (2013) (citing *United States v. Am. Terrazo Corp.*, 6 OCAHO no. 877, 577, 581 (1996)).

B. Employer Liability for Paperwork Violations

ICE's pleadings and documentary evidence in this case establish that BTI is liable for a total of 135 violations of the INA. Specifically, the government has proven by a preponderance of the evidence that BTI failed to prepare, present, and/or retain 81 Forms I-9 for the employees listed in Attachment A of the complaint, with the exception of employees Joelle Johnson, Cherly Harts, and Tommy Summage. As discussed below, BTI did not need to retain the Forms I-9 for these three employees because the retention period for them had expired. In addition, the government met its burden of proving that BTI is liable for 54 violations of the INA because it failed to

prepare timely Forms I-9 within three business days of the dates of hire for these employees, who are named in Attachment B of the complaint.

C. Technical and Procedural Failures

BTI's argument that ICE violated its due process by failing to provide notice of and an opportunity to correct the alleged 138 paperwork violations when it issued the Notice of Technical or Procedural Failures lacks merit. As discussed in the government's prehearing statement and motion for summary decision, and as set forth clearly in OCAHO case precedent, there is a distinction between substantive paperwork violations and violations deemed technical or procedural failures that can be corrected to avoid fines. The evidence of record shows that BTI was notified of the six technical or procedural violations found by the government, that BTI was provided an opportunity to correct the six violations, and that BTI corrected these six violations. Therefore, there appears to be no issue with respect to the six corrected violations that were technical or procedural.

The Notice of Technical or Procedural Failures issued on October 3, 2013, contained an important "note," which informed respondent that additional "failures" to meet the requirements of section 274A(b) of the INA "may have been discovered." The Notice stated that these additional "failures are not included in this notification and may result in the issuance of a Notice of Intent to Fine. If a Notice of Intent to Fine is issued, it will be served separately from this notification." Accordingly, based on the language in the Notice of Technical or Procedural Failures, BTI was informed that additional violations may exist, and that the government would issue a Notice of Intent to Fine for such violations. ICE served the Notice of Intent to Fine on BTI on March 14, 2014.

Respondent has failed to provide any support for its contention that ICE violated its due process rights. The evidence in this case shows that ICE properly issued a Notice of Technical or Procedural Failures and provided respondent a meaningful opportunity to respond and take corrective action with respect to the technical or procedural failures. Therefore, due process was afforded related to these technical or procedural violations. *See* Memorandum from Paul W. Virtue, INS Acting Executive Commissioner of Programs, *Interim Guidelines: Section 274A(b)(6) of the Immigration & Nationality Act Added by Section 411 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (Mar. 6, 1997), *available at* 74 Interpreter Releases 706 app. 1 (Apr. 28, 1997) ("Virtue Memorandum").

D. Substantive Paperwork Violations

Regarding the substantive paperwork violations, ICE does not provide employers with the same notice and correction opportunity that employers are provided when ICE discovers technical and procedural failures. *See* Virtue Memorandum. Respondent has not provided any support for its contention that such notice and opportunity is available or required. Moreover, respondent's

arguments lack merit that ICE's enforcement efforts in this case are estopped and have been waived by failing to provide BTI notice of the substantive violations prior to issuing the Notice of Intent to Fine and by failing to provide a subsequent period for correction. BTI has failed to substantiate these arguments. Moreover, there does not appear to be any support for respondent's arguments in OCAHO case law, in the relevant statutes, or in the pertinent regulations. Accordingly, BTI has failed to demonstrate that estoppel and/or waiver are applicable in this case.

However, BTI has challenged five of the paperwork violations assessed by ICE, claiming that it no longer needed to retain and present the Forms I-9 for these five former employees because the retention period had expired and because these forms are outside of the scope of ICE's inspection. In this case, the Notice of Inspection was personally served on August 22, 2013. In the Notice of Inspection, the government stated that it scheduled its review of BTI's Forms I-9 for August 28, 2013. Therefore, I find that BTI was required to present its Forms I-9 for inspection on August 28, 2013, and that Forms I-9 with retention periods expiring prior to August 28, 2013, did not need to be presented to ICE.

BTI asserts in its affirmative defenses that ICE should not have assessed fines for its failure to present Forms I-9 for the following five former employees because the retention periods of these employees had expired: Joelle Johnson, Cherly Harts, Carmen Glazier, Tommy Summage, and Yevgenly Kazhdan. However, the evidence of record supports a finding that the retention period requirement expired with respect to only three employees: Joelle Johnson, Cherly Harts, and Tommy Summage. This finding is based on a comparison between the retention requirements and the dates of hire, rehire, and termination, as outlined in the below-listed chart that was compiled from the evidence of record, including ICE's spreadsheet, employee earnings records, and Forms I-9.

ICE #	Name	Hire date	Rehire date	Termination date
72	Joelle Johnson	4/10/2010	2/20/2012	6/15/2012
70	Cherly Harts	8/26/2009	None noted	7/2/2012
69	Carmen Glazier	10/18/2010	None noted	11/5/2012
64	Tommy Summage	8/23/2010	None noted	07/10/2012
63	Yevgenly Kazhdan	8/27/2007	None noted	11/26/2012

As previously discussed, 8 C.F.R. § 274a.2(b)(2)(i)(A) establishes that Forms I-9 "must be retained by an employer . . . three years after the date of hire or one year after the date the individual's employment is terminated, whichever is later . . . ." In addition, 8 C.F.R. § 274a.2(b)(2)(ii) states, "At the time of inspection, Forms I-9 must be made available in their original paper, electronic form, a paper copy of the electronic form, or on microfilm or microfiche at the location where the request for production was made."

In the instant case, the date of inspection is August 28, 2013. Therefore, BTI did not need to present to ICE any Form I-9 that had a retention period expiring prior to August 28, 2013. The retention period expired prior to August 28, 2013, for the following three employees: Cherly Harts, whose retention period expired on July 2, 2013, one year after termination date; Tommy Summage, whose retention period expired on August 23, 2013, three years after date of hire; and Joelle Johnson, whose retention period expired on June 15, 2013, one year after the date of termination. Although Joelle Johnson was rehired in 2012, which could have given rise to a document retention period through 2015 if a new Form I-9 had been executed at the time of the 2012 rehire, it appears from the evidence of record that 8 C.F.R. sections 274a.2(c)(1) and (2) govern Ms. Johnson's Form I-9 retention issue, which preserve the initial hire date for purposes of retaining the Form I-9. *See* 8 C.F.R. § 274a.2(c)(2) ("an employer for a previously employed individual hired pursuant to paragraph (c)(1) of this section . . . shall retain the Form I-9 for a period of three years commencing from the date of the initial execution of the Form I-9 or one year after the individual's employment is terminated, whichever is later"). Accordingly, BTI would only need to retain Ms. Johnson's Form I-9 until one-year after termination, which would have been through June 2013. Although BTI did not produce the original Form I-9, ICE failed to meet its burden of proving that Ms. Johnson's Form I-9 should have been retained past June 2013. When evaluating the government's motion for summary decision, the facts must be viewed in the light most favorable to BTI. *United States v. Primera Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994).

However, BTI failed to rebut ICE's violation assessment with respect to the Forms I-9 for Carmen Glazier and Yevgenly Kazhdan. Based on the evidence of record showing termination dates for both of these former employees in November 2012, BTI should have retained Ms. Glaizier's Form I-9 through November 5, 2013, and it should have retained Mr. Kazhdan's Form I-9 through November 26, 2013. Because BTI failed to rebut the evidence of record and because ICE demonstrated that it met its burden of proof with respect to these two retention violations, BTI was properly assessed violations for failure to present or prepare Forms I-9 for Ms. Glazier and Mr. Kazhdan.

BTI has not rebutted any other paperwork violations alleged by ICE. Therefore, BTI is liable for 81 of the 84 paperwork violations for the employees listed in Attachment A of the complaint for failure to prepare or present Forms I-9 to ICE, with the exception of Forms I-9 for Joelle Johnson, Cherly Harts, and Tommy Summage, for which the retention periods had expired. BTI is also liable for paperwork violations for failure to prepare timely Forms I-9 within three days of hire for the 54 employees listed in Attachment B to the complaint. Accordingly, BTI is liable for a total of 135 paperwork violations.

E. 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 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.

1. Seriousness of Violations

Although BTI argues that its substantive paperwork violations are not serious, all substantive violations are potentially serious, and BTI has failed to provide any explanation to show that the substantive violations in this case are not serious. *See United States v. Skydive Acad. of Haw. Corp.*, 6 OCAHO no. 848, 235, 245 (1996). In fact, the failure of an employer to prepare or present a Form I-9 is among the most serious of paperwork violations because this failure subverts the employment verification requirements. *United States v. Niche, Inc.*, 11 OCAHO no. 1250, 10 (2015) (citing *United States v. Golf Int'l*, 11 OCAHO no. 1222, 4 (2014)). In addition, an employer's failure to prepare Forms I-9 within three days of hire are considered 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), *cited in Niche, Inc*, 11 OCAHO no. 1250 at 10.

Respondent has failed to rebut the evidence and has failed to provide case precedent or law that contradicts a finding that paperwork violations for failing to prepare or present Forms I-9 and for failing to prepare Forms I-9 within three days of hire are serious and substantive paperwork violations. Therefore, BTI's arguments that the paperwork violations do not constitute serious or substantive violations lack merit. Accordingly, the paperwork violations assessed in this case are serious and substantive violations. ICE deemed penalty aggravation warranted in the amount of five-percent due to the seriousness of the violations. ICE was justified in assessing the seriousness of the violations as an aggravating factor, especially in light of BTI's failure to demonstrate mitigation of the seriousness of the violations. *United States v. Kobe Sakura Japanese, Inc.*, 10 OCAHO no. 1025, 6 (2013).

2. Penalty Mitigation and Factors Considered

a. Small Business Size, Good Faith of the Employer, Lack of Prior Violations, and Absence of Unauthorized Workers

The parties agree that respondent is a small business. *See Niche, Inc.*, 11 OCAHO no. 1250 at 10 (discussing that OCAHO precedent deems businesses with less than 100 employees to be small businesses). In addition, the parties agree that the employer did not act in bad faith, that there is no history of prior violations, and that there is no evidence that BTI hired unauthorized workers. ICE reduced the baseline penalty assessment by five-percent for each of these statutory factors. These factors are deemed to be mitigating factors and are viewed as factors favorable to respondent.

b. Non-Statutory Factors Considered

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). Respondent alleges that imposition of ICE's proposed fine "would likely be catastrophic to BTI and result in business closure and the consequent loss of work for BTI's employees." *Cross-Motion for Summary Decision* at 2. OCAHO case law establishes that an employer's "ability to pay a proposed fine may be an appropriate factor to be weighted in assessing the amount of the penalty." *Niche, Inc.*, 11 OCAHO no. 1250 at 11 (citing *United States v. Mr. Mike's Pizza, Inc.*, 10 OCAHO no. 1196, 3 (2013)). Based on respondent's arguments, it is appropriate to consider its financial allegations with the statutory factors.

F. Recalculation of the Penalty

The government has proposed a civil penalty of $794.75 for each violation, which 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. *Niche, Inc*., 11 OCAHO no. 1250 at 12. "Although the government bears the burden of proof with respect to 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." *Id.*

Penalties assessed in the upper-range of penalty amounts should be reserved for the most serious and egregious violations. *See United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013). The purposes of the fines are to deter future violations and to encourage compliance with employment verification procedures. *United States v. Empl'r Solutions Staffing Grp. II, LLC*, 11 OCAHO no. 1242, 11 (2015). However, fines for paperwork violations should not be

unduly punitive in light of the employer's resources. *See United States v. Minaco Fashions, Inc.*, 3 OCAHO no. 587, 1900, 1909 (1993).

After considering the totality of evidence, the arguments of the parties, the statutory and non-statutory factors to be considered in penalty assessments, 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) 81 violations for failure to prepare or present Forms I-9; and (2) 54 violations for failure to complete timely Forms I-9 within three days of hire. These two types of paperwork violations constitute differing degrees of seriousness, with failure to present or prepare Forms I-9 constituting the most egregious violations in this case.

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 to a fine in the mid-range of penalty amounts based on the presence of differing degrees of serious violations and mitigating factors present in this case, which include the small size of respondent's business, the lack of bad faith, the absence of unauthorized workers, the lack of a history of non-compliance, and the financial factors in this case raised by BTI.

In the exercise of discretion, the penalty assessed for failure to prepare or present Forms I-9 for 81 employees is adjusted to $600 per violation, as these are the most serious violations. The penalty assessed for failure to prepare timely Forms I-9 within three days of hire for 54 employees is adjusted to $500 per violation. Accordingly, the total civil money penalty is $75,600.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Buffalo Transportation, Inc., is a transportation services business operating at 289 Ramsdell Avenue, Buffalo, New York.

2. The Department of Homeland Security, Immigration and Customs Enforcement, served Buffalo Transportation, Inc., with a Notice of Inspection on August 22, 2013.

3. The Notice of Inspection informed Buffalo Transportation, Inc., that a review of its Employment Eligibility Verification Forms I-9 was scheduled for August 28, 2013, which serves as the date of inspection for purposes of calculating the Form I-9 retention period.

4. The Department of Homeland Security, Immigration and Customs Enforcement, served Buffalo Transportation, Inc., with a Notice of Technical or Procedural Failures on October 3, 2013.

5. Buffalo Transportation, Inc., timely corrected the six Forms I-9 identified in the Notice of Technical or Procedural Failures and was not subject to fines related to these Forms I-9.

6. The Department of Homeland Security, Immigration and Customs Enforcement, served Buffalo Transportation, Inc., with a Notice of Intent to Fine on March 14, 2014.

7. Buffalo Transportation, Inc., filed a request for hearing on March 17, 2014.

8. Buffalo Transportation, Inc., is a small business, acted in good faith, has no history of prior employment verification violations, and has not hired unauthorized workers.

9. Buffalo Transportation, Inc., hired and employed all individuals listed in Attachments A and B of the complaint.

10. Buffalo Transportation, Inc., hired the following 81 individuals listed in Attachment A of the complaint and failed to prepare or present Forms I-9 for each of these employees: Ernest Camerun, James Dolinski, Donna Dorman, Cory Dube, Lenora Elmore, Dewayne Farley, Jr., Julio Gomez, Cornelia Harper, Yevgenly Kazhdan, Jamie Tolsma, Darryl Watins, Montrese Wlaker, Beatrice Boone, Carmen Glazier, Arletta Johnson, Albert Shinners, Pavel Vityk, Marquetta Betts, Jerry Bly, Jr., Nicole Branch, Ashley Campbell, Jessica Corcoran, Melissa Cruz, Monica Davis, Joseph Everett, Tankia Garrett, Jenny Girard, Adrian Gray, Tonika Green, Calvin Jones, Julia Lambert, Jermaine Long, Dennis McCormick, Clicyndra Nash, Deidre Pennyamon, Jasmine Smothers, Nicole Tyes, Latoya Allen, Danielle Christy, Charlene Johnson, Kely Knight-Jones, Dominique Williams, Thomas Kozakiewilz, Debra Kunzman, Ronald Lockwood, Yamaris Martinez, Kanielle McFadden, Jenice Persall, Adreinne Phillips, Gerald Toms, Cora Bennett, Crystalynn Dotter, Felix Garcia, Latasha Hare, Jasmine Pearson, Virginia Rajla, Summerlyn Ross, Penney Slisz, Darlena Snead, Jason Elartdo, Frederick Robinson, Richard Williams, George Barton, Keith Clark, James Dorman, Lawrence Jackson, Melvin Payne, Daniel Delluomo, Kenneth Nowakowski, Jenis Foster, Colleen Geary, Angel Keyes, Ashley Marks, Rafael Sarkisov, Gunwant Sodhi, Joseph Matayo, Max Thompson, Nance Laurie, William Busseno, Louis Marianccio, Ali Pioli.

11. Buffalo Transportation, Inc., hired the following three individuals listed in Attachment A of the complaint and was not required to present Forms I-9 for these three former employees as the retention period for the Forms I-9 expired prior to the date of the Department of Homeland Security, Immigration and Customs Enforcement's inspection: Joelle Johnson; Cherly Harts; Tommy Summage.

12. Buffalo Transportation, Inc., hired the following 54 individuals listed in Attachment B of the complaint and failed to prepare timely Forms I-9 for these individuals within three dates of hire: Gwendolyn Kirkendoll, Igor Yuzbashev, Duayne Thomas, Victor Digiacomo, Johnny Parker, Miail Yuzbashev, Tiffany Luciano, John Liddick, Jenya Jaros, Randy Elliot, Arsen Mirzoian, Donald Byrd, Victor Vlasyuk, Lamario Norwood, Leroy Sutton, Odell Tillman, Martelis Walker, Arkadi Beschinsky, Margaret Cifelli, John Dorman, Sherrita Houston, Michael Milich, Vincent Spinelli, Sadowah Tarbell, Jason Enders, Christopher Hartman, Larry Highsmith, Jose Serrano, Passa Beschinsky, Pamela Donaldson, Victoria Davis, Stephanie Diaz, Mellany Brown, Verna McNeill, Eleonora Arotyunov, Irina Chernov, Vlacheslav Beschinsky, Christopher Sardella, Cherie Chatmon, Anita Wilkins, Tiffani Pabellon, Rima Landvert, Ludmila Dinovetskiy, Earl Greene, Jr., Taniqua Christian, Troy Wilson, Angela Judd, Pamela Stewart, Christina Maldonado, John Daum, Colleen Rowlett, Lori Schultz, Philip Fragale, John Byrd.

B. Conclusions of Law

1. Buffalo Transportation, 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. Buffalo Transportation, Inc., is liable for 135 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. 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).

6. 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)).

7. The government has the burden of proving both liability and penalty by a preponderance of the evidence, and the government must prove the existence of aggravating factors in the penalty assessment by a preponderance of the evidence. *See United States v. Nebeker, Inc.*, 10 OCAHO no. 1165, 4 (2013) (citing *United States v. Am. Terrazo Corp.*, 6 OCAHO no. 877, 577, 581 (1996)).

8. 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).

9. 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).

10. Title 8 C.F.R. § 274a.2(b)(1) establishes 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.

11. Title 8 C.F.R. § 274a.2(b)(2)(i)(A) establishes that Forms I-9 "must be retained by an employer . . . three years after the date of hire or one year after the date the individual's employment is terminated, whichever is later . . . ."

12. In the case of an employee rehired by the same employer, 8 C.F.R. § 274a.2(c)(1) establishes that a previously executed Form I-9 can be used for the purposes of satisfying the Form I-9 requirements in lieu of completing a new Form I-9 if the employer inspects the previously executed Form I-9, the employer verifies the identity and continued work eligibility of the employee, and "the individual is hired within three years of the date of the initial execution of the Form I-9 and the employer updates the Form I-9 to reflect the date of rehire." 8 C.F.R. § 274a.2(c)(1).

13. Pursuant to 8 C.F.R. § 274a.2(c)(2), re-executed Forms I-9 for rehired employees shall be retained for a period of three years commencing from the date of the initial execution of the Form I-9 or one year after the individual's employment is terminated, whichever is later.

14. 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.

15. 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).

16. 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).

17. 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. Niche, Inc.*,

11 OCAHO no. 1250, 10 (2015) (citing *United States v. Golf Int'l*, 11 OCAHO no. 1222, 4 (2014)).

18. 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).

19. 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).

20. The purposes of the fines are to deter future violations and to encourage compliance with employment verification procedures. *United States v. Empl'r Solutions Staffing Grp. II, LLC*, 11 OCAHO no. 1242, 11 (2015). However, fines for paperwork violations should not be unduly punitive in light of the employer's resources. *See United States v. Minaco Fashions, Inc.*, 3 OCAHO no. 587, 1900, 1909 (1993).

ORDER

ICE's motion for summary decision is granted in part. BTI is liable for 135 violations of 8 U.S.C. § 1324a(a)(1)(B) and is directed to pay civil penalties in the total amount of $75,600. BTI's cross-motion for summary decision is granted in part, with respect to the Forms I-9 for employees Johnson, Harts, and Summage and with respect to penalty mitigation. 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 October 16, 2015.

_____

Stacy S. Paddack
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.