

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

May 27, 2025

UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. § 1324a Proceeding
	)	OCAHO Case No. 2023A00054
	)	
PASQUEL HERMANOS, INC.,	)	
Respondent.	)	
_____	)	

Appearances: Christopher Ford, Esq., for Complainant
Guillermo G. Alarcon, Esq., for Respondent

ORDER GRANTING SUMMARY DECISION – FINAL ORDER

This case arises under the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324a.

On March 28, 2023, Complainant, the U.S. Department of Homeland Security, Immigration and Customs Enforcement (ICE), filed a complaint with the Officer of the Chief Administrative Hearing Officer (OCAHO). Complainant alleges Respondent, Pasquel Hermanos, Inc., “failed to prepare and/or present” Forms I-9 for 22 employees in violation of § 1324a(a)(1)(B). Compl. 3.

On May 16, 2023, Respondent filed an answer. In its Answer, Respondent denies liability; and states the proposed penalty is “clearly excessive as all listed individuals presented satisfactory proof of citizenship or authorization for work in the United States.” Answer 1-3, 3.

On January 17, 2024, Complainant filed a Motion for Summary Decision,¹ and a separate filing, which the Court construed as a supplement. *United States v. Pasquel Hermanos*, 18 OCAHO no. 1506b, 2-3 (2024).² The Court provided Respondent with an opportunity to submit matters in Response. *Id.* at 3. On May 21, 2024, Respondent filed its Updated Opposition.

¹ On May 13, 2025, the Complainant was permitted to file an Amended Motion for Summary Decision. The Amended Motion for Summary Decision removed two pages of attached evidence that were included erroneously. Order Accepting Amended Mot. Summ. Dec. 2.

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

I. COMPLAINANT’S POSITION

Complainant argues no genuine issues of material fact exist and it is entitled to summary decision.

Complainant asserts Respondent “was informed of the three-day notice and the requirement to provide all I-9 Forms for all current employees and employees terminated on or after October 1, 2018, and turn over select documents during the audit.” Mot. Summ. Dec. 3. “Respondent did not present any Forms I-9 within three days for the 22 employees listed... in the Complaint.” *Id.* Complainant attaches evidence to its motion (further outlined below).³ Mot. Summ. Dec, Ex 1-2.⁴

Complainant proposed a penalty based on “ICE guidelines.” Mot. Summ. Dec. 5. The proposed penalty was calculated “in accordance with the five statutory factors set out in Section 274A of the Act. The amount... was mitigated for the [small] size of the business. The fine was aggravated for the seriousness of the violations.” *Id.* Complainant noted Respondent presented only one Form I-9, meaning it presented no Forms I-9 for 22 of its 23 employees. C’s Mot. Summ. Dec. 5-6.

Complainant proposes an assessed penalty of \$1,948.00 per violation (total penalty of \$42,856.00).

II. RESPONDENT’S POSITION

Respondent characterizes the 22 violations as “verification violations,” and takes issue with Complainant’s characterization of the violations as “substantive.”⁵ Response 1-2.⁶ Respondent states “[Complainant did not allege] any violation actually involving the employment of any

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 <https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-decisions>.

³ The Motion and attached evidence total 196 pages. It has page numbers, but the attached evidence is not paginated (either in total or individually). For ease of reference, the Court will cite an Exhibit and then the page within the filing as a whole (i.e. a citations to the first page of Exhibit 1 would reference page 10 as it is on the tenth page of the combined file).

⁴ Exhibit 1 contains sub-exhibits A-G, and Exhibit 2 contains sub-exhibits A-K.

⁵ Respondent argues these violations should be “technical or procedural failures.” Response 6.

⁶ When it filed its Updated Opposition, Respondent attached a previously rejected Response as Ex. 1. Page references are to this Exhibit 1.

unauthorized alien, let alone knowingly, to trigger any penalty under 8 U.S.C. § 1324a(e)(4)... Nonetheless Complainant is requesting \$1948.000 for each of the 22 alleged violations, as if they were serious aggravated violations done in bad faith, even though no bad faith was actually alleged.” *Id.* at 2.

On penalty, the Respondent identifies the statutory factors. Respondent’s position on the application of the statutory factors differs from Complainant’s. Respondent takes issue with the “good faith factor” being assessed as “neutral,” and argues that the violations are not serious as this is a case of “paperwork omission.” Response 4-5. Respondent acknowledges some employees are “non-citizens;” however, Complainant has not shown any non-citizen employees were unauthorized to work in the United States. *Id.* at 5.

Respondent attaches no evidence to its Response.

III. EVIDENCE CONSIDERED

At the outset, the Court will analyze the evidence offered by Complainant in support of its Motion for Summary Decision. Respondent provided no evidence for the Court’s consideration and does not contest the reliability or relevance of evidence offered by Complainant.⁷

To conduct its evidentiary analysis, “[t]he Court must ensure that evidence is sufficiently reliable, and then it must consider what weight, if any, to assign the evidence based on its probative value.”⁸ *United States v. R&SL, Inc.*, 13 OCAHO no. 1333b, 24 (2022). The evidence considered by the Court will serve as the basis for factual findings made in a later section.

⁷ This data point notwithstanding, the Court must still ensure it meets its “obligation to hold a moving party to its burden and must evaluate motions based on the sufficiency of the moving papers.” *Contreras v. Cavco Industries, Inc.*, 16 OCAHO no. 1440a, 2 (2023).

⁸ For documentary evidence to be reliable, its proponent must “authenticate [the] document by evidence sufficient to demonstrate that the document is what it purports to be[.]” *United States v. Carpio-Lingan*, 6 OCAHO no. 914, 1, 5 (1997) (citations omitted).

Generally, documentary evidence that is complete, signed, sworn under penalty of perjury, dated, authenticated, laid down with foundation contain sufficient indicia of reliability. *See United States v. Psychosomatic Fitness LLC*, 14 OCAHO no. 1387a, 5–7 (2021).

“Probative value is determined by how likely the evidence is to prove some fact[.]” *United States v. Commander Produce, LLC*, 16 OCAHO no. 1428d, 9 n.15 (2023) (citation omitted).

A. Complainant's Evidence

With its Motion for Summary Decision Complainant includes two evidentiary exhibits, with associated sub-exhibits.⁹ See Mot. Summ. Dec., Exs. 1-2. These exhibits contain the following documentary evidence: an affidavit from a Homeland Security Investigations (HSI) Special Agent (with internal exhibits attached including: Notice of Inspection, Subpoena;¹⁰ Receipt of Property; Notice of Technical or Procedural Failures dated July 22, 2019; Notice of Discrepancies dated July 22, 2019; Notice of Suspect Documents dated July 22, 2019; Notice of Intent to Fine served on Respondent company on October 2, 2019; and several Reports of Investigation dated June 5, 2023), and an affidavit from an ICE forensic auditor (with internal exhibits attached, including: Earnings History Report/payroll report for dates between October 1, 2018 and April 26, 2019 for Respondent; Respondent's Quarterly Federal Tax Return for Quarter 4 of 2018 including a Schedule B form; Business Organizations Inquiries for Respondent company on the Texas Secretary of State's website; employee search results from a Texas State website for Respondent for Quarter 4 of 2018; employee search results from a Texas State website for Respondent for Quarter 1 of 2019; email communications between the ICE auditor and an employee of Respondent's accounting department from between June 24, 2019 and June 26, 2019; an envelope address to the ICE auditor sent from Laredo Staff Solutions; a table listing the employees in Count 1 along with their Social Security Numbers, dates of birth, hire dates, termination dates, and the associated violation; Forms I-9 for the individuals listed in Count 1).

In its Supplement, Complainant provides additional evidence, specifically: an attachment to the Notice of Intent to Fine, which was not included in Ex. A of the original Complaint.¹¹

The Court finds almost all¹² of Complainant's documentary evidence to be reliable (to the extent the documents are signed, printed on the issuer's letterhead, or published by a government agency). In each case, it is clear "that the document is what it purports to be[.]" *United States v. Carpo-Lingan*, 6 OCAHO no. 914, 5 (1997). Moreover, each considered piece of evidence is highly probative, as each is likely to assist the Court in making a factual determination relative to whether Respondent met its statutory obligations.

B. Respondent's Evidence

Respondent attached no evidence to its Response.

⁹ Exhibit 1 includes sub-exhibits A-G, while Exhibit 2 includes sub-exhibits A-K.

¹⁰ The subpoena was unsigned and was missing a continuation page wherein ICE supposedly listed the documents the Respondent was required to produce. The subpoena is not sufficiently reliable, and will not be considered.

¹¹ The NIF attachment included in the Supplement appears to be identical to the NIF attachment in the Motion for Summary Decision's Ex. 1-F.

¹² *Supra* note 9.

IV. FINDINGS OF FACT

Based on the reliable evidence presented by Complainant through its Motion and by Respondent in its Answer, the Court makes the following findings of fact.

1. Respondent, Pasquel Hermanos, Inc. (of Laredo, Texas) is a business specializing in freight transportation arrangements. Mot. Summ. Dec. 11, Ex. 1.
2. Respondent employees were hired on or after November 6, 1986. Mot. Summ. Dec. 141, Ex. 2-H; *see generally* Answer 2-3.

A. Inspection & Audit

3. On April 23, 2019, a Homeland Security Investigations (HSI) Supervisory Special Agent initiated a “Form I-9 Compliance Inspection” on Pasquel Hermanos, Inc. by personally serving the Notice of Inspection and an unsigned and incomplete subpoena on the Human Resources Representative. Mot. Summ. Dec. 10, Ex. 1.
4. On April 23, 2019, the Human Resources Representative acknowledged receipt of both documents by signing the “Certificate of Service” at the end of both documents. Mot. Summ. Dec. 14, 17, Ex. 1-A.
5. The Notice of Inspection explains “[e]mployers must verify the employment eligibility of persons hired after November 6, 1986, using the Employment Eligibility Verification Form I-9 (Form I-9).... [The Notice of Inspection] letter serves as advance notice that... HSI has scheduled an inspection of your Forms I-9 for April 26, 2019... This Inspection will cover all your current employees and those employees who were terminated on or after October 1, 2018.” Mot. Summ. Dec. 13, Ex. 1-A.
6. On April 26, 2019, the Human Resources Representative presented documents for inspection, specifically: most recent payroll register, most recent (4th quarter 2018 federal tax return (IRS Form 941), and photocopies of driver’s licenses and social security cards for 26 terminated employees. Mot. Summ. Dec. 11, Ex 1; *id.* at 59-110, Ex. 2-A (payroll records); *id.* at 113-17, Ex. 2-B (4th quarter 2018 federal tax return); *id.* at 47, Ex. 1-G (Report of Investigation discussing April 26, 2017 investigation listing documents handed over by Respondent).
7. The HSI Supervisory Agent prepared and provided a “Receipt for Property” DHS Form 6051R and provided it to the Human Resource Representative. Mot. Summ. Dec. 11, 19, Ex. 1, Ex. 1-B.
8. The Receipt lists two entries for “Description of Item(s);” the first item is “copy of drivers license & SSN card” with an amount or quantity of “26,” and the second item is “Misc

Business Documents” with no amount or quantity provided.¹³ Mot. Summ. Dec. 19, Ex. 1-B.

9. The Receipt does not list any Forms I-9 (even though one was ultimately provided).¹⁴ Mot. Summ. Dec. 19, Ex. 1-B; *id.* at 22-28, Ex. 1-C; *id.* at 54, Ex. 2; *id.* at 139-140, Ex. 2-G.
10. The HSI Supervisory Special Agent provided the payroll, tax, and photocopied identity documents to the HSI auditor. Mot. Summ. Dec. 11, Ex. 1.
11. The HSI Auditor checked the Texas Workforce wage reports for the 4th Quarter 2018 and 1st Quarter 2019 in order to reconcile the wage and employee status information. Mot. Summ. Dec. 54, Ex. 2.
12. Following her review, the HSI Auditor initially anticipated 25 employees generating Forms I-9, based on the “current employees at the time of inspection and the employees terminated on or after October 1, 2018.” Mot. Summ. Dec. 54, Ex. 2.
13. On June 26, 2019, the HSI Auditor confirmed (for Respondent) via email receipt of one Form I-9, and inquired whether there were any additional Forms I-9; the HSI auditor received a response via email confirming there were no other forms. Mot. Summ. Dec. 54, Ex. 2; *id.* at 133-34, Ex. 2-F.
14. The HSI Auditor determined that two other individuals should be excluded from count of anticipated Forms I-9 (the business owner and another former employee), which caused her to adjust the number of anticipated Forms I-9 to 22. Mot. Summ. Dec. 54, Ex. 2.

¹³ Complainant must be cautioned that such a cursory description in a receipt could, in a different case, make it difficult to establish liability. Complainant need look no further than OCAHO precedent on this issue. *See United States v. R&SL Inc.*, 13 OCAHO no. 1333b, 30-31, 31 n.47 (2022).

“Indeed, it would have been a labor-intensive process for one auditor to account for thousands of I-9 forms by herself. However, on balance, Complainant also valued each of those forms at \$1,457.30 per form, and thus valued the missing I-9 forms in this case at \$744,680.30. If the boxes contained the cash equivalent, it seems unfathomable that such a receipt [which described the property received by DHS only as “3 large boxes of original Forms I-9”] from the federal government would be sufficient.” *Id.* at 31 n.47.

¹⁴ This Form I-9 was sent via the mail (postmark June 21, 2019) to Complainant from a different entity, Laredo Staff Solutions. Mot. Summ. Dec. at 54, Ex. 2-.

B. Complainant Identifies Issues and Deficiencies with Forms I-9 – Notice of Intent to Fine Issued

15. On July 22, 2019, the HSI Supervisory Special Agent personally served a Notice of Technical or Procedural Failures on Respondent's Human Resources Representative. Mot. Summ. Dec. 11, Ex 1.
16. The Notice of Technical or Procedural Failures acknowledges one Form I-9 was presented. Mot. Summ. Dec. 22, 28 Ex. 1-C.
17. The Notice of Technical or Procedural Failures was issued "to notify [Respondent] of the technical or procedural failures identified¹⁵ and to provide [Respondent] with [an opportunity] to correct these failures [within 10 business days]." Mot. Summ. Dec. 22, Ex 1-C.
18. On July 22, 2019, the HSI Supervisory Special Agent personally served a Notice of Discrepancies on the Human Resources Representative. Mot. Summ. Dec. 11, Ex. 1, *id.* at 30, Ex. 1-D.
19. The Notice of Discrepancies informs Respondent, "there is a discrepancy related to the identity and employment authorization of [one named] employee..." and requests Respondent contact the Special Agent "to discuss information necessary to reconcile [the] discrepancies." Mot. Summ. Dec. 30, Ex. 1-D.
20. On July 22, 2019, the HSI Supervisory Special Agent personally served a Notice of Suspect Documents on the Human Resources Representative. Mot. Summ. Dec. 11, Ex., 1; *id.* at 33, Ex. 1-E.
21. The Notice of Suspect Documents informs Respondent that two named employees "appear, at the present time, not to be authorized to work in the United States."¹⁶ Mot. Summ. Dec. 33, Ex. 1-E.

¹⁵ The Notice identifies the deficiency as "No document expiration date of a List A, or List B and C document in Section 2 where a copy of the document(s) is retained with the Form I-9 and presented at the time of inspection." MSD Ex 1, p. 24-28.

The Notice was accompanied by a page identifying the employee at issue, a photocopy of her Permanent Resident Card and Social Security Card, and a Form I-9 for the employee. The Form I-9, completed on the first date of her employment, lists her birthdate in the "expiration date" blank on the Form. The photocopied Permanent Resident Card shows an expiration date of April 2027. Mot. Summ. Dec., Ex 1, 24-28.

¹⁶ The letter explains:

The documents submitted to [Respondent] were found to pertain to other individuals, or there was no record of the documents being issued, or the documents pertain to the individuals, but the

22. On October 2, 2019, the HSI Supervisory Special Agent personally served the Notice of Intent to Fine (Form I-763) on the Human Resources Representative. Mot. Summ. Dec. 11, *id.*, at 38-42, Ex. 1-F.
23. The Notice of Intent to Fine lists 22 individuals (with two individuals proposed to be “unauthorized workers”¹⁷), and alleges Respondent “failed to prepare and/or present the Forms I-9 for the individuals listed... after being requested to do.” Mot. Summ. Dec. 41, Ex. 1-F.
24. The Notice of Intent to Fine also provides a penalty of \$1,948 per violation with a total proposed penalty of \$42,856. Mot. Summ. Dec. 42, Ex. 1-F.
25. The HSI auditor proposed a penalty assessment based on her application of statutory factors at 8 U.S.C. 1324a(e)(5) and additional guidance from the “Worksite Enforcement: Guide to Administrative Form I-9 Inspections and Civil Monetary Penalties”, dated November 25, 2008 at page 31. Mot. Summ. Dec. 55, Ex. 2.
26. In her application of her agency’s guidelines, she noted as to “unauthorized workers,” that “two noncitizens were identified during the inspection,” and she “did not aggravate this factor.” Mot. Summ. Dec. 56, Ex. 2.

individuals are not employment authorized, or their employment authorization has expired

Unless these employees present valid identification and employment eligibility documentation acceptable for completing the Form I-9, other than the documentation previously submitted to [Respondent], [these two employees] are considered by HSI to be unauthorized to work in the United States.

Mot. Summ. Dec. 33, Ex. 1-E.

The letter provides no further detail to assist the Respondent (and eventually the Court) in understanding how Complainant determined these two individuals are or were possibly unauthorized to work in the United States. The language in the letter leaves open the possibility that these individuals are authorized to work, and could present more or different documents demonstrating such.

Complainant places no further evidence in the record on this issue, but later refers to these two individuals (in the affidavit of the HSI auditor) as “noncitizens” and not “unauthorized workers.” Mot. Summ. Dec. at 55, Ex. 2. Complainant also does not offer an alternate or additional charge predicated on Respondent’s employment of unauthorized workers. *See generally* Compl.

¹⁷ The same two individuals identified in the Notice of Suspect Documents. Mot. Summ. Dec. 41, Ex. 1-F; *id.* at 33, Ex. 1-E.

C. OCAHO Proceedings Commence

27. On October 11, 2019, Respondent requested a hearing. Compl. 10, Ex. B.
28. On March 28, 2023, Complainant filed its Complaint. Compl. 1.
29. On May 16, 2023, Complainant filed its Answer. Answer 1.
30. On or about August 29, 2023, Respondent's counsel presented 22 Forms I-9¹⁸ to Complainant's counsel. Mot. Summ. Dec. 55, Ex. 2.
31. On August 29, 2023, the HSI Auditor reviewed the 22 Forms I-9 provided by Respondent, and concluded the Forms were incomplete (missing pages and signatures), and she questioned the timing of the Forms I-9 creation (i.e., she believed them to be backdated.¹⁹) Mot. Summ. Dec. 55, Ex. 2.

V. CONCLUSIONS OF LAW

A. Propriety of Summary Decision – Law & Analysis

OCAHO regulations allow for resolution of cases via summary decision when “the pleadings, affidavits, material obtained . . . show that there is no genuine issue as to any material fact²⁰ and that [the moving] party is entitled to summary decision.” 28 C.F.R. § 68.38(c).

“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*,

¹⁸ These Forms I-9 were included with Complainant's Motion for Summary Decision as an attachment to the HSI Auditor's affidavit (at page 144-65).

¹⁹ Ostensibly, she came to this conclusion because the Human Resources Representative informed her in 2019, during the audit there was only one Form I-9; however, these Forms I-9 all had dates which preceded the investigation timeframe. Additionally, some Forms I-9 provided were the 2017 version of the form; however, they are dated in 2015, 2016 or the first half of 2017, prior to the version's existence. Mot. Summ. Dec. 167-70, Ex. 2-J.

²⁰ “An issue of material fact is genuine only if it has a real basis in the record” and “[a] genuine issue of material 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) (first 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, 284 (1986)).

477 U.S. 317, 323 (1986)). The Court views all facts and inferences “in the light most favorable to the non-moving party.” *United States v. Primera Enters.*, 4 OCAHO no. 615, 259, 261 (1994) (citations omitted).

Only Complainant submitted evidence. This leaves the Court to infer Respondent believed the evidentiary record submitted to be sufficiently established. Additionally, after receipt and review of Complainant’s evidence, Respondent did not argue genuine issues of material fact exist in this case. There are no genuine issue of material fact.

The analysis now turns to whether Complainant is entitled to judgment as a matter of law on liability.

B. Liability – Law & Analysis

In cases arising under 8 U.S.C. § 1324a, the government 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. *See United States v. ABCO Solar, Inc.*, 17 OCAHO no. 1465a, 2 (2023) (citing *United States v. Metro Enters., Inc.*, 12 OCAHO no. 1297, 7 (2017)).

Employers must prepare and retain Forms I-9 for employees hired after November 6, 1986, and are required to produce the I-9 Forms for inspection by the government upon three days’ notice. 8 C.F.R. § 274a.2(b)(2)(ii).

Forms must be retained for current employees. *United States v. H&H Saguaro Specialists*, 10 OCAHO no. 1144, 6 (2012) (first citing 8 U.S.C. § 1324a(b)(3); then citing 8 C.F.R. § 274a.2(a)(3); and then citing *United States v. Ojeil*, 7 OCAHO no. 984, 982, 992 (1998)). With respect to former employees, forms must be kept “only for a period of three years after that employee’s hire date, or one year after that employee’s termination date, whichever is later.” *Id.*

In the Count, Complainant alleges Respondent failed to prepare and/or present²¹ a Form I-9 for 22 employees employed during the relevant period.

²¹ Complainant elected to pursue an “in the alternative” charging theory with its use of “and/or” in the Charge; however, the record evidence indicates no Forms I-9 were ever completed (or at least where never completed pre-Complaint when charging decisions were made).

While Complainant has prosecutorial discretion in choosing charging language, it should consider that “failure to present” is functionally a lesser included offense of “failure to prepare.” A Complainant who can prove “failure to prepare,” has also de facto proven “failure to present.” In the simplest terms, a business cannot “present” something that does not exist, so there is no need to charge the “present” when the evidence supports the proposition they were never “prepared.” *See United States v. El Paso Paper Box, Inc.*, 17 OCAHO no. 1451b, 7 (2023) (noting that certain “preparation” charges “necessarily and inherently encompass... presentation” charges).

As noted above, the retention period required is three years. HSI initiated an inspection on April 23, 2019. Mot. Summ. Dec. 10, Ex. 1; *id.* at 53, Ex. 2. HSI anticipated receiving Forms I-9 for then-current employees as of April 26, 2019. *Id.* at 13, Ex. 1-A (Notice of Inspection giving three days' notice for inspection of Respondent's Forms I-9). No Forms I-9 were prepared by this Respondent²² for the 22 individuals referenced in the Complaint and Motion for Summary Decision these employees; thus, Respondent is liable for the violations alleged in the Count.

C. Penalty Law & Analysis

Because Respondent is liable, the Court must now consider the appropriate penalty. "The government 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" *United States v. Niche, Inc.*, 11 OCAHO no. 1250, 6 (2015) (citations omitted).

²² It is true that some incomplete and otherwise problematic Forms I-9 arrived much later in these proceedings (not only post-Complaint, but also post-Answer); however, these Forms I-9 have no impact on liability. See *United States v. Liberty Packaging, Inc.*, 11 OCAHO no. 1245, 5-6 (2015).

OCAHO precedent has considered how to view or treat late-provided Forms I-9. But in those cases, the Forms I-9 were provided post-Notice of Inspection (NOI) but pre-Notice of Intent to Fine (NIF) or complaint. See *El Paso Paper Box, Inc.*, 17 OCAHO 1451b at 7; see also *United States v. John Ferguson Moving and Storage, LLC*, 21 OCAHO 1651, 24 n. 28 (2025).

This case is distinct in that the Forms I-9 were presented post-NIF and post-Complaint - that distinction matters.

The NOI informs a respondent that complainant will investigate and audit (in the future) for compliance with the law. When the NOI is issued, it is unknown to Complainant whether they will find a violation. Inspections are of varying durations, but, in cases that come to this forum, they ultimately conclude with the Complainant issuing a NIF. That NIF (and eventually complaint), memorialize what are (at the time of issuance or filing) past instances where a respondent business has allegedly violated the law. Moreover, the Respondent's request for hearing, which precipitated this action, is a request for hearing based on the alleged violations listed in the NIF.

Those allegations (and the liability captured in them) cannot be overcome by superseding events, like the provision of Forms I-9 which post-date the NIF and/or complaint. In any event, even if the Court were to take an alternate view (i.e. one where a Respondent business could provide Forms I-9 at any time pre-final order), OCAHO precedent and regulations empower an ALJ to use a commonsense approach to evaluating liability. See *El Paso Paper Box, Inc.*, 17 OCAHO no. 1451b, at 7 (CAHO Order) (noting "an ALJ, under certain circumstances, [has the authority] to conform [a charge] to the evidence and find liability[.]"); see also 28 C.F.R. § 68.9(e).

The penalty range depends on the date of the violations and the date of assessment. *See* 28 C.F.R. § 68.52(c)(8); 28 C.F.R. § 85.5.²³

As the Court has previously noted:

[T]here is . . . no single method mandated for calculating civil money penalties for violations of 8 U.S.C. § 1324a(a)(1)(B). *See United States v. Senox Corp.*, 11 OCAHO no. 1219, 4 (2014); *see also United States v. The Red Coach Rest., Inc.*, 10 OCAHO no. 1200, 3 (2013) (affirmance by the CAHO noting decisions using varied approaches to calculating penalties); *cf. United States v. Int'l Packaging, Inc.*, 12 OCAHO no. 1275a, 6 (2016) (noting that nothing in 8 U.S.C. § 1324a(e)(5) requires the five statutory factors to be considered exclusively on a binary scale); *United States v. Romans Racing Stables, Inc.*, 11 OCAHO no. 1232, 5 (2014) (affirmance by the CAHO) (noting a failure to establish a statutory factor as aggravating does not require that the factor necessarily be treated as mitigating).

United States v. HDB Network, 18 OCAHO no. 1483a, 10 (2024) (citing *R&SL Inc.*, 13 OCAHO no. 1333b, 36 (2022)).

“The civil penalties for violations of § 1324a are intended ‘to set a meaningful fine to promote future compliance...’” *United States v. 1523 Ave. J Foods Inc.*, 14 OCAHO no. 1361, 3 (2020) (quoting *United States v. 3679 Com. Place, Inc.*, 12 OCAHO no. 1296, 7 (2017)).

As the Court noted in *United States v. HDB Network*, there are five statutory factors the Court must consider when assessing a penalty: 1) the size of the employer's business; 2) the employer's

²³ 28 C.F.R. § 68.52(c)(8) provides: “For civil penalties assessed after August 1, 2016, whose associated violations ... occurred after November 2, 2015, the applicable civil penalty amounts are set forth in 28 C.F.R. 85.5.” When a penalty for a “paperwork violation” is assessed after February 12, 2024, the minimum penalty is \$281.00 per individual, and the maximum is \$2,789.00 per individual.

The Chief Administrative Hearing Officer observed “for 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 February 12, 2024, making the appropriate penalty range between \$281.00 and \$2,789.00 per individual.

good faith;²⁴ 3) the seriousness of the violations;²⁵ 4) whether or not the individual was an unauthorized alien; and 5) the employer's history of previous violations. 18 OCAHO no. 1483a, at 11; *see also* 8 U.S.C. § 1324a(e)(5).

While Complainant proposes a fine amount in its Complaint, its proposed penalty is “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) (citing *United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6 (2011)).

Although 8 U.S.C. § 1324a(e)(5) “requires due consideration²⁶ of the enumerated factors, it does not mandate any particular outcome of such consideration, and nothing in the statute or the regulations requires in OCAHO proceedings either 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.”

Id. (quoting *Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, at 6–7). Indeed, the weight placed on each factor varies depending on the facts of case. *Id.* (citing *United States v. Raygoza*, 5 OCAHO no. 729, 48, 51 (1995)).

²⁴ A good faith analysis can encompass “the steps the employer took *before* the investigation to reasonably ascertain what the law requires and the steps it took to follow the law.” *United States v. Exec. Cleaning Servs. of Long Island Ltd.*, 13 OCAHO no. 1314, 3 (2018) (emphasis in original); *see also United States v. Frio Cnty. Partners, Inc.*, 12 OCAHO no. 1276, 16 (2016).

A poor compliance rate alone may be insufficient to find bad faith. *See United States v. Maverick Constr.*, 15 OCAHO no. 1405a, 7 (2022); *United States v. Azteca Dunkirk, Inc.*, 10 OCAHO no. 1172, 4 (2013). A low compliance rate and additional culpable conduct may permit Court to make a finding of bad faith. *See United States v. Integrity Concrete, Inc.*, 13 OCAHO no. 1307, 13–14 (2017) (additional culpable conduct of backdating); *United States v. Karnival Fashions, Inc.*, 5 OCAHO no. 783, 477, 480 (1995) (explaining that bad faith involves an additional finding of knowing disregard for verification requirements). “[T]he absence of bad faith does not show good faith.” *United States v. Visiontron Corp.*, 13 OCAHO no. 1348, 8 (2020) (citing *United States v. Guewell*, 3 OCAHO no. 478, 814, 820 (1992)).

²⁵ “[N]ot all violations are equally serious[.]” and “the seriousness of violations may be evaluated on a continuum[.]” *United States v. Senox Corp.*, 11 OCAHO no. 1219, 9 (2014) (citations omitted). “[V]iolations for failure to prepare I-9 forms . . . are more serious than are the paperwork violations . . . because the failure to prepare the forms completely subverts the purpose of the law.” *Id.* (citing *United States v. Skydive Acad. of Hi. Corp.*, 6 OCAHO no. 848, 235, 246 (1996)).

²⁶ The statute does not require mathematical offsetting, rather each statutory factor must receive “due consideration.” 8 U.S.C. § 1324a(e)(5).

1. Statutory Factors Analysis

A penalty may be mitigated when a respondent is a small business. *See, e.g., United States v. Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355a, 5 (2020) (citing *United States v. Carter*, 7 OCAHO no. 931, 121, 162 (1997)). “OCAHO has generally considered companies with fewer than 100 employees²⁷ to be small businesses.” *1523 Ave. J Foods, Inc.*, 14 OCAHO no. 1361, at 6 (citation omitted). Respondent is a small business, a factor which will serve to mitigate the penalty.

Here, there is no qualifying evidence of bad faith; however, the absence of bad faith does not result in de facto conclusion that a respondent has acted in good faith. The Court can “consider the overall circumstances of a respondent’s action in complying with an NOI in assessing a penalty.” *Alpine Staffing*, 12 OCAHO no. 1303, at 15. While the good faith analysis’ “primary” focus is one centered on pre-inspection conduct, nothing in statute requires pre-inspection conduct to be the only consideration. *Id.* (citing *United States v. New China Buffet Rest.*, 10 OCAHO NO. 1133, 5 (2010)).²⁸

On one side of the ledger, this employer had a poor compliance rate – demonstrating it took virtually no steps to comply with the law before the inspection.²⁹ However, there is nothing to

²⁷ The Court considers many factors when determining the size of a business (number of employees, revenue or income, payroll, nature of ownership, or length of time in business). *See United States v. Fowler Equip. Co., Inc.*, 10 OCAHO no. 1169, 6–7 (2013). While business size is mitigating here, it does not necessarily outweigh the other statutory factors.

²⁸ In *Alpine Staffing*, the CAHO noted “post-investigation behavior warrant[ed] some consideration in assessing an appropriate penalty.” 12 OCAHO no. 1303, at 20. While the CAHO did not place his discussion of that consideration within the “rubric of ‘good faith,’” he seems to signal it would or could be evaluated in the same way. *Id.*

²⁹ It is worth noting that, based on the state of the post-Answer provided forms that the Respondent may still not understand what the law requires. While it does seem like these incomplete forms may have evidence of backdating (which can contribute to a finding of bad faith) Complainant (the party with the burden) does not argue these late-provided Forms merit an aggravation of the penalty. *See HDB Network*, 18 OCAHO no. 1483a, at 27 (finding bad faith where the “employer took no steps to learn what the law requires,” had a poor compliance rate, and engaged in backdating). And, even if it were argued as such, excluding these incomplete and likely backdated forms from penalty assessment consideration is also consistent with OCAHO precedent. *See United States v. Natural Environmental, Inc.*, 10 OCAHO 1197, 4 (2013). In *Natural Environmental*, the Court determined:

The fact that there are substantive violations in some of the later-produced I-9s will not be considered as relevant to the penalty in this case, because the I-9s to be penalized based on the complaint are the twenty-five backdated forms that Natural Environmental initially presented in response to the NOI, each of which will be

indicate that during the inspection and in the time preceding the receipt of the Notice of Intent to Fine this employer engaged in concerning behavior; rather, the record shows the employer was forthcoming about the number of Forms I-9 available for inspection (either zero or one), and seemed to otherwise comply expeditiously with the HSI auditor's requests. Without more, this statutory factor is duly considered, but it does not serve, in this case, to aggravate or mitigate the penalty.

The violations here are serious violations. Respondent failed to prepare any Forms I-9 for the employees named in the Count. Failure to prepare any Forms I-9 completely "subverts the purpose of the law." *Senox Corp.*, 11 OCAHO no. 1219, at 9 (citing *United States v. Skydive Acad. of Hi. Corp.*, 6 OCAHO no. 848, 235, 246 (1996)). The penalty assessed will be aggravated in light of the serious nature of the violations.

This record certainly raises the specter of unauthorized workers; however, on these filings, Complainant has not met its burden with respect to unauthorized workers as it relates to the penalty analysis. Complainant certainly notes the prospect Respondent may have employed individuals unauthorized to work in the United States (which is foreseeable when a business completes virtually no employment authorization checks via the Form I-9 at onboarding); however, Complainant does not provide sufficient record evidence³⁰ to assist the Court in understanding how it came to its initial conclusion about the unauthorized workers. Respondent does not concede it ever hired unauthorized workers. Finally, the HSI auditor, who presumably would have reviewed whatever documents or records were or were not provided eventually shifted her description of the two from "unauthorized worker" to "noncitizen." Mot. Summ. Dec. 56, Ex. 2. She did not recommend penalty aggravation based on this factor, *id.*, and when the Complaint was drafted, Complainant did not include a charge pertaining to unauthorized workers, *see generally* Compl. Without more, this statutory factor is duly considered, but it does not serve, in this case, to aggravate or mitigate the penalty.

penalized only once. In other words, no additional penalties will be assessed based on the existence of violations on a different set of forms that were never addressed in a NIF.

Id.

Applying the reasoning provided in that precedential case, a complainant has the benefit of arguing aggravation on a record where no Forms I-9 were ever completed, which will certainly drive a higher penalty assessment than a case where Forms were incomplete or untimely. It cannot compound or bolster its argument using Forms I-9 that were later provided but also backdated. To this Complainant's credit, it does not seek to make such an argument here.

³⁰ Compare with *HDB Network*, where the Court found "[t]he Respondent knowingly employed someone on a B-2 visa, and continued to employ her even after she overstayed that visa. After she departed and remained abroad (unable to re-enter the United States), this Respondent chose to maintain her on payroll for a period of years." 18 OCAHO no. 1483a, at 13.

The record does not indicate a history of violations. “This factor neither mitigates nor aggravates the penalty.” *United States v. Kodiak Oilfield Servs., LLC*, 16 OCAHO 1436b, 5 (2023); *see also United States v. New China Buffet Rest.*, 10 OCAHO no. 1133, 6 (2010) (“[N]ever having violated the law before does not necessarily warrant additional leniency[.]”).

2. Non-Statutory Factors Analysis

No party presented evidence or made argument pertaining to any non-statutory factors in this case.

VI. CONCLUSION

Respondent is liable for all 22 violations alleged in the Count. The Court has given each statutory factor due consideration in assessing a penalty.

The Court will impose a penalty of \$1450.00 per violation, for a total penalty of \$31,900.

The Court **ORDERS** Respondent to pay \$31,900 for failing to prepare and present 22 Forms I-9.

SO ORDERED.

Dated and entered on May 27, 2025.

Honorable Andrea R. Carroll-Tipton
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).

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.