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

September 11, 2019

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 18A00064
	)	
IMACUCLEAN CLEANING SERVICES, LLC, Respondent.	)	

FINAL DECISION AND ORDER

This case arises under 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. Pending is Complainant's Motion for Summary Decision. Respondent filed a response.

I. BACKGROUND

Respondent, Imacuclean Cleaning Services, LLC, is a limited liability company registered in the State of New York. On March 20, 2017, Complainant, Department of Homeland Security, Immigration and Customs Enforcement, served Respondent with a Notice of Inspection (NOI) and informed Respondent that it would conduct the inspection on March 23, 2017. Mot. Summ. Dec. Ex. G-1. Respondent produced Forms I-9 for 578 employees. Mot. Summ. Dec. at 13. Complainant determined that Respondent should have produced an additional 224 I-9s. 439 of the 578 I-9s produced contained substantive violations of § 1324a. *Id*. at 7.

On February 12, 2018, Complainant served Respondent with a Notice of Intent to Fine (NIF). Compl. Ex. A. On March 6, 2018, Respondent timely requested a hearing. Compl. Ex. B. On May 30, 2018, Complainant filed a Complaint alleging that three counts for failure to prepare or present I-9s for 224 employees, failure to timely prepare I-9s for 102 employees, and failure to ensure proper completion of section 1 and/or failure to properly complete section 2 of the I-9s for 337 employees. Compl. Ex. A. Complainant seeks $1,238,509.30 in proposed penalties.

II. STANDARDS

A. Summary Decision

Under the Office of the Chief Administrative Hearing Officer (OCAHO) 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).[1] "An issue of 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); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).[2]

"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." *United States v. Metro. Enters., Inc.*, 12 OCAHO no. 1297, 7 (2017). The government also has the burden of proof with respect to the penalty and the government "must prove the existence of any aggravating factor by the preponderance of the evidence[.]" *Id.* (quoting *United States v. Niche, Inc.*, 11 OCAHO no. 1250, 6 (2015)) (internal citations omitted).

"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 satisfies its burden of proof, "the burden of production shifts to the respondent to introduce evidence . . . to controvert the government's evidence. If the respondent fails to introduce any such evidence, the unrebutted evidence introduced by the government may be

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[1] *See* Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2016).

[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 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.

sufficient to satisfy its burden[.]" *United States v. Durable, Inc.*, 11 OCAHO no. 1231, 5 (2014). All facts and reasonable inferences are viewed "in the light most favorable to the non-moving party." *United States v. Prima Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994) (citations omitted).

B. Employment Verification Requirements

"Employers must prepare and retain Forms I-9 for employees hired after November 6, 1986," and employers must produce the I-9s for government inspection upon three days' notice. *Metro. Enters.*, 12 OCAHO no. 1297 at 7 (citing 8 C.F.R. § 274a.2(b)(2)(ii)). An employer must ensure that an employee 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); 8 C.F.R. § 274a.2(b)(1)(A), (ii)(B). Employers must retain an employee's I-9 for three years after the date of hire or one year after the date of termination, whichever is later. § 274a.2(b)(2)(i)(A).

"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 Memorandum)). As explained in *United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1071, 11 (2001), dissemination of the Interim Guidelines to the public may be viewed as an invitation for the public to rely upon them as representing agency policy. While this office is not bound by the Virtue Memorandum, the government is so bound, and failure to follow its own guidance is grounds for dismissal of those claims. *Id.* at 12.[3] With respect to technical or procedural violations, the employer must be given a period of not less than ten business days to correct the failure voluntarily. 8 U.S.C. § 1324a(b)(6)(A)-(B).

Relevant to the instant case, the Virtue Memorandum characterizes the following violations as substantive: (1) failure to prepare or present a Form I-9; (2) lack of employee signature in section 1; (3) employee attestation not completed on the date of hire; (4) no check mark indicating the employee's work authorization status; (5) no Alien number (A number), when the A number is not on sections 2 or 3, or on any of the documents retained; (6) no employer signature in section 2; (7) employer attestation is not within three days of hire; and (8) section 3 is blank even though the employee's work authorization expired. Virtue Memorandum at 2–4.

C. Penalties

Civil penalties for paperwork violations are assessed in accordance with the parameters set forth in 8 C.F.R. § 274a.10(b)(2) and 28 C.F.R. § 85.5. For civil penalties assessed after January 29, 2018, the minimum penalty for each violation that occurred after November 2, 2015 is $224, and the maximum penalty is $2,236. § 274a.10(b)(2); § 85.5. Complainant has the burden of proof

[3] The undersigned finds it astonishing that implementing regulations for Section 411 have not been finalized for over 22 years.

with respect to penalties and "must prove the existence of an aggravating factor by a preponderance of the evidence." *3679 Commerce Place*, 12 OCAHO no. 1296 at 4 (citing *United States v. March Constr., Inc.*, 10 OCAHO no. 1158, 4 (2012); *United States v. Carter*, 7 OCAHO no. 931, 121, 159 (1997)). Complainant'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).

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 [an] individual [at issue] was an unauthorized alien, and 5) the employer's history of previous violations." *Id.* at 9 (citing 8 U.S.C. § 1324a(e)(5)). This administrative tribunal considers the facts and circumstances of each case to determine the weight, if any, given to each factor. *Metro. Enters.*, 12 OCAHO no. 1297 at 8. While the statutory factors must be considered in every case, § 1324a(e)(5) "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). Further, this administrative tribunal may also consider other, non-statutory factors, such as inability to pay and the public policy of leniency toward small businesses, as appropriate in the specific case. *3679 Commerce Place*, 12 OCAHO no. 1296 at 4 (citation omitted).

III. DISCUSSION

A. Liability

1. Count I

Complainant contends that Respondent failed to prepare or present Forms I-9 for twelve employees listed in Count IA and 212 employees listed in Count IB.[4] Respondent does not contest that it failed to prepare or retain I-9s for the employees listed in Count I. Based on the payroll records and Respondent's employee list, Respondent was required to retain I-9s for each of the 224 employees listed in Count IA or IB. Mot. Summ. Dec. Exs. G-3, G-7. The record establishes that Respondent did not prepare or present I-9 forms for these 224 employees. As such, Respondent is liable for twelve violations listed in Count IA and 212 violations listed in Count IB.

2. Count II

Complainant contends that Respondent failed to timely prepare Forms I-9 for eleven employees in Count IIA and ninety-one employees in Count IIB.[5]

[4] The names of the employees in Counts IA and IB are listed in the Appendix.

[5] The names of the employees in Counts IIA and IIB are listed in the Appendix.

A visual inspection of the eleven I-9s in Count IIA reveals that Respondent completed eight I-9s after Complainant served the NOI. Further, Respondent did not sign section 2 on two I-9s and the issuance date postdates the two employees' dates of hire. Finally, Respondent's representative, Stacy Alleyne, signed the employer attestation on one I-9 and dated it before Alleyne's employment began with Respondent. *See infra* Section III.B.3. As such, Respondent is liable for failing to timely prepare the eleven I-9s listed in Count IIA.

In Count IIB, the record shows that Respondent hired all ninety-one employees prior to 2017. Respondent completed eighty-three of the ninety-one I-9s in 2017, more than three days after Respondent hired the employees at issue. Respondent completed eighty-two of said I-9s in April 2017, after Complainant served the NOI. Additionally, Respondent completed four I-9s using a version of the form that did not exist at the time Respondent hired the four employees. Further, on five I-9s, Respondent hired the five employees more than three days before it hired the authorized representative who signed the section 2 attestation. As such, Respondent is liable for failing to timely prepare ninety-one I-9s in Count IIB. As such, Respondent is liable for eleven violations in Count IIA and ninety-one violations listed in Count IIB.

3. Count III

Complainant contends that Respondent failed to ensure that the employees properly completed section 1 and/or that Respondent failed to properly complete sections 2 or 3 for twenty employees listed in Count IIIA and 317 employees listed in Count IIIB.[6]

Regarding the twenty alleged violations listed in Count IIIA, Complainant has established that nineteen I-9s contain at least one substantive violation. A visual inspection reveals that the violations include no employer attestation in section 2, no employee attestation in section 1, no check mark indicating a work authorization status in section 1, no documents recorded in section 2, untimely completion of three I-9s, and nine I-9s that were missing a page.

In Count IIIA, Complainant also alleges a substantive violation related to Jose Martinez Centeno's I-9. Specifically, in its prehearing statement, Complainant alleges that section two of Centeno's I-9 is blank or the second page is missing entirely. Complainant's Prehearing Statement at 9. Complainant has the burden of proving by the preponderance of the evidence that Respondent is liable for committing a violation of the employment eligibility verification requirements. *United States v. Jula888, LLC*, 12 OCAHO no. 1286, 6 (2016). Complainant provided a copy of Centeno's visa, but Complainant failed to provide any evidence of Centeno's I-9 form. Without Centeno's I-9, there is no evidence that Respondent failed to properly complete sections two or three. Thus, Complainant has not met its burden to show by the preponderance of the evidence that Centeno's I-9 form contained substantive violations. As such, the violation related to Jose Martinez Centeno's I-9 is DISMISSED.

In Count IIIB, Complainant contends that 317 I-9s contain substantive violations. A visual inspection of the I-9s reveals that 310 I-9s contain a least one substantive violation, including, missing or blank pages, no employee attestation in section 1, no employer attestation in section

[6] The names of the employees Counts IIIA and IIIB are listed in the Appendix.

2, no check indicating a work authorization status in section 1, no A number listed or apparent, a blank section 3 for employees whose work authorization expired, or untimely completion of the I-9s. Further, the majority of the I-9s in Count IIIB contain multiple substantive violations.

In Count IIIB, Complainant alleges that employee, Carmen Lopez, signed the section 2 attestation, rather than the employer. A visual inspection reveals that the employer's authorized representative also signed section 2 and completed the requisite information in the employer attestation. As such, the alleged violation with respect to Carmen Lopez's I-9 is DISMISSED.

Additionally, Complainant alleged seven substantive violations in Count IIIB because Respondent failed to print its authorized representative's name in section 2.[7] Complainant does not assert that these seven I-9s contained other substantive violations. Respondent argues that it made good-faith efforts to comply with the employment verification requirements. "Section 1324a(b)(6) provides an affirmative defense where an employer made a good-faith attempt to comply with the employment eligibility requirements, but nevertheless committed certain technical and procedural violations." *United States v. PM Packaging, Inc.*, 11 OCAHO no. 1253, 7 (2015). The good faith defense does not apply to substantive violations. *Id.* The Virtue Memorandum does not expressly categorize the lack of the authorized representative's printed name as a substantive violation. *See* Virtue Memorandum at 2–4.

Some OCAHO ALJs have found that the failure to provide the authorized representative's printed name in section 2 is a substantive violation. *Alpine Staffing, Inc.*, 12 OCAHO no. 1303 at 17; *see also United States v. Agri-Systems*, 12 OCAHO no. 1301, 13 (2017); *PM Packaging, Inc.*, 11 OCAHO no. 1253 at 9. Other OCAHO ALJs, however, have found that the failure to print the representative's name in section 2 is not always a substantive violation. *See United States v. Corporate Loss Prevention Assocs.*, 6 OCAHO no. 908 974, 999 (1997); *Carter*, 7 OCAHO no. 931 at 158 (finding the omission of the printed name and title of the authorized representative was not a violation because the name and title appeared on other I-9s presented). In *Agri-Systems*, the ALJ found that the failure to print the authorized representative's name on one I-9 was a substantive violation "because the signature does not appear on any of the other Forms I-9 at issue and there is no indication who the signatory in Section 2 is[.]" *Agri-Systems*, 12 OCAHO no. 1301 at 13.

Complainant contends that Respondent failed to print the authorized representative's name on the I-9s for Stephen David Cooperberg, Diana Caro, Shana Dilleser, Shakeem Sewell, Amaury Mora, Lorraine Wadington, and Rosa Peralta. Complainant does not argue that it cannot determine whose signature appears in section 2. While all seven I-9s lack the printed name, six of those I-9s include the representative's title, "H.R. Director." This representative signed many other I-9s in the record, and although the representative's signature is difficult to read, the representative's printed name, Sandra Baptiste, appears on other I-9s in the record. Mot. Summ. Dec. Ex G-2 at 567, 603. Additionally, on these six I-9s, Respondent completed the information

[7] In its prehearing statement, Complainant alleged that twenty-four I-9s contained one substantive violation because the forms lacked the authorized representative's printed name. A visual inspection establishes that seven of these twenty-four I-9s included other substantive violations.

in section 2, except for the authorized representative's printed name. As such, I find that Complainant failed to establish that the I-9s related to Stephen David Cooperberg, Diana Caro, Shana Dilleser, Shakeem Sewell, Amaury Mora, and Lorraine Wadington contain a substantive violation.

With regard to the remaining I-9 concerning Rosa Peralta, section 2 of Peralta's I-9 does not contain the authorized representative's printed name and lacks any of the employer's information. The individual who signed section 2 of Peralta's I-9 does not appear on any other I-9s in the record and the signature is not legible. Therefore, unlike the six I-9s discussed above, the record does not indicate who signed section 2 of Rosa Peralta's I-9. The undersigned cannot determine who signed Peralta's I-9 in the absence of a printed name, the employer's information, or a matching signature on any of the other I-9s in the record. *See Agri-Systems*, 12 OCAHO no. 1301 at 13. Thus, I conclude that lack of the employer's printed name on Rosa Peralta's I-9 is a substantive violation.

As such, the undersigned finds that Respondent is liable for nineteen violations in Count IIIA and 310 violations in Count IIIB. The violations related to Jose Martinez Centeno, Stephen David Cooperberg, Diana Caro, Shana Dilleser, Carmen Lopez, Shakeem Sewell, Amaury Mora, and Lorraine Wadington are DISMISSED.

B. Penalties

Complainant seeks a total of $1,238,509.30 in proposed civil penalties. For the violations involving unauthorized workers, Complainant seeks $1,955.10 per violation. Complainant seeks $1,862 per violation for the remaining violations. Complainant treated the size of the business, the history of violations, Respondent's good faith, and the seriousness of violations as neutral factors. Complainant contends that Respondent's near complete lack of compliance with the employment verification requirements warrants its proposed penalty assessment amount.

1. Size of Business

Complainant treated the size of the business factor as neutral because Respondent "employed approximately 798 employees within the past year." Mot. Summ. Dec. Ex. G-8 at 1.[8] Respondent briefly argues that Complainant did not consider the size of the business factor, but Respondent does not argue that it is a small business.

OCAHO ALJs have mitigated the penalty amount when the respondent is a small business. "OCAHO case law generally considers businesses with fewer than 100 employees to be small businesses." *United States v. Holtsville 811 Inc.*, 11 OCAHO no. 1258, 12 (2015). OCAHO also considers the Small Business Administration's (SBA) guidelines to determine whether a respondent qualifies as a small business. *Carter*, 7 OCAHO no. 931 at 160–61.

[8] Complainant refers to its Memorandum to Case File for its reasoning regarding its treatment of the size of business factor. The Memorandum to Case File is not dated. Thus, it is not clear what time frame Complainant refers to when it says "within the past year."

Respondent's Quarterly Combined Withholding, Wage Reporting, and Unemployment Insurance Returns show that, in 2016, the number of employees that Respondent employed greatly fluctuated. Specifically, in 2016, Respondent employed 179 individuals in the second quarter, 49 individuals in the third quarter, and 300 individuals in the fourth quarter. Under the SBA's guidelines, a janitorial service is a small business if it has less than $18 million in annual receipts. 13 C.F.R. § 121.201. The record lacks any evidence concerning the amount of Respondent's annual receipts. Therefore, based on the record and the lack of evidence regarding Respondent's annual receipts, the undersigned finds that Complainant properly treated the size of the business as a neutral factor.

2. History of Previous Violations

Complainant also treated Respondent's history of violations as a neutral factor. Complainant did not establish that Respondent has any history of previous violations. OCAHO case law states that "never having violated the law before does not necessarily warrant additional leniency, and it is still appropriate to treat this factor as a neutral one." *United States v. New China Buffet Rest.*, 10 OCAHO no. 1133, 6 (2010). Although this precedent states that the absence of prior history does not necessarily warrant additional leniency and it is appropriate to treat this factor as neutral, such precedent contains hortatory, discretionary language, provides no convincing rationale, and makes little sense to me. Either a respondent has a history of violations or it does not. This Respondent has no history of violations on this record. Accordingly, I exercise my discretion to find this to be a mitigating factor.

3. Good Faith

Complainant treated the good-faith factor as neutral. Respondent argues that it made good-faith efforts to comply with the employment verification requirements by "obtaining I-9 forms for all prior employees, and by requiring and continuing to require all new employees to properly complete the requisite paperwork and utilizing E-Verify." Resp. Mot. Summ. Dec. at 2.

"The primary focus of a good[-]faith analysis is on the respondent's compliance *before* the investigation." *United States v. Jula888, LLC*, 12 OCAHO no. 1286, 10 (2016). "Accordingly, OCAHO precedent 'looks primarily to the steps an employer took before issuance of the NOI, not what it did afterward.'" *United States v. Integrity Concrete, Inc.*, 13 OCAHO no. 1307, 12 (2017) (quoting *United States v. Hartmann Studios, Inc.*, 11 OCAHO no. 1255, 12 (2015)). Complainant contends that Respondent should have provided 798 Forms I-9 in response to the NOI. As discussed above, Respondent is liable for 655 violations of the employment verification process because it failed to present 224 I-9s, failed to timely prepare 102 I-9s, and failed to properly complete or ensure proper completion of 329 I-9s. As such, prior to the NOI, Respondent did not act in good faith to ensure compliance with the employment verification requirements.

Additionally, while Complainant initially treated the good faith factor as neutral, in its Motion for Summary Decision, it argues that Respondent acted in bad faith because it backdated thirty-seven I-9s listed in Count II. Complainant argues that Respondent's authorized representative, Stacy Alleyne, backdated her signature in section 2 on five I-9s. Further, in thirty-two other

instances, the version of the I-9 form used did not exist when the employees purportedly signed the form. Thus, Complainant contends that Respondent's bad faith justifies Complainant's proposed penalty assessment.

To support an assertion of bad faith, Complainant must present "evidence of culpable conduct that goes beyond the mere failure of compliance with the verification requirements." *Id.* at 13 (quoting *United States v. Azteca Dunkirk, Inc.*, 10 OCAHO 1172, 1, 3 (2013)). OCAHO case law states that "backdating alone, without more, is insufficient to support a finding by a preponderance of the evidence that good faith was lacking." *Id.* (quoting *United States v. Speedy Gonzalez Constr., Inc.*, 11 OCAHO no. 1243, 4 (2015)).

In *United States v. Occupational Res.*, 10 OCAHO no. 1166, 27 (2013), this administrative tribunal found that the employer backdated multiple I-9s when its authorized representatives "signed multiple I-9s that were dated prior to the start of their own employment." Therefore, this tribunal further found that it was not possible that the employer actually completed the I-9s on the date in section 2 and "the forms themselves constitute clear evidence of culpable conduct beyond the mere failure of compliance[.]" This tribunal reasoned that an employer "does not act in good faith when its agents enter false information in its I-9 forms in order to make the records look correct." *Id*. Thus, this tribunal found that the employer acted in bad faith and aggravated the penalty for the violations related to the backdated I-9s. *Id.*

Similarly, Respondent presented five I-9 forms that reveal culpable conduct on their face. Respondent hired its authorized representative, Stacy Alleyne, on October 28, 2016. Mot. Summ. Dec. Ex. G-2 at 195. On five I-9s, Alleyne signed and dated the section 2 attestation using dates that predate her own hire date. Mot. Summ. Dec. Ex. G-2 at 145, 237, 299, 426, 476. The dates Alleyne used in section 2 are closer in time to each employee's hire date.[9] It is not possible that Respondent completed these five I-9s on the dates set forth in section 2. While Complainant did not aggravate the penalty for bad faith for these five I-9 forms, based on the evidence, the undersigned declines to ignore the blatantly back-dated I-9s. Therefore, the undersigned finds that Respondent acted in bad faith when its authorized representative dated section 2 of five I-9s using a date that predated the representative's own date of hire to make it appear that Respondent timely completed the I-9 forms. As such, the penalties are aggravated by five percent for the violations related to Sidian Clarke, Sophia Edwards, Sheena Jeffrey, Kori Robinson, and Asha Thapa.[10]

Complainant also alleges that Respondent acted in bad faith when it allegedly backdated 32 additional I-9s. Specifically, Complainant argues that Respondent backdated 32 I-9s because the

[9] Respondent hired Sidian Clarke on June 14, 2016 and dated section 2 for January 12, 2016. Respondent hired Sophia Edwards on October 21, 2015 and dated section 2 for October 15, 2015. Respondent hired Kori Robinson on October 20, 2016 and dated section 2 for October 18, 2016. Respondent hired Sheena Jeffrey on August 6, 2016 and dated section 2 for December 8, 2014. Respondent hired Asha Thapa on July 14, 2016 and dated section 2 for July 7, 2016.

[10] In the Appendix, the violations aggravated for bad faith are delineated with a "+" symbol under each individual's name.

forms that Respondent used did not exist on the date that the employees allegedly signed section 1. Respondent hired all thirty-two employees prior to 2017, and it appears that these employees dated section one on a date close to their hire dates. Respondent, however, signed and dated the employer attestations in 2017, after Complainant served the NOI. OCAHO case law establishes that absent an indication in the instructions that Complainant gave Respondent at the time of service of the NOI, "backdating the Forms I-9 alone is insufficient to meet [Complainant's] burden of proving by a preponderance of the evidence that an employer lacked good faith." *United States v. Holtsville 811 Inc.*, 11 OCAHO no. 1258, 8 (2015) (citing *Metro Warehouse, Inc.*, 10 OCAHO no. 1207, 5 (2013); *U.S. v Kobe Sapporo Japanese, Inc.*, 10 OCAHO no. 1204, 4 (2013)). Unlike the five I-9s previously discussed, there is no evidence that Respondent tried to "feign compliance' or engaged in 'culpable conduct' tantamount to bad faith" with respect to these thirty-two I-9s, as Respondent did not backdate the employer attestations. *Id.* at 9. Therefore, Complainant has not established that Respondent acted in bad faith with respect to these thirty-two I-9s.

In sum, the undersigned will aggravate the penalties for the five violations related to the backdated I-9s. For the remaining violations, Complainant properly treated the good-faith factor as neutral.

4. Seriousness of the Violations

Complainant treated the seriousness of the violations as a neutral factor. Complainant argues that the violations are serious, but does not seek to aggravate the penalty based on this factor because it already considered the seriousness of the violations when calculating the base penalty amount. Consequently, Complainant contends that if it also aggravated the penalty based on this factor it "would be akin to fining Respondent twice for the same reason." *Id.*

"Paperwork violations are always potentially serious." *United States v. Skydive Acad. Haw. Corp.*, 6 OCAHO no. 848, 235, 245 (1996). "[T]he seriousness of the violations should be determined by examining the specific failure in each case." *Id.* at 246. This administrative tribunal evaluates the seriousness of violations "on a continuum since not all violations are necessarily equally serious." *United States v. Solutions Group Int'l, LLC*, 12 OCAHO no. 1288, 10 (2016) (quoting *United States v. Siam Thai Sushi Rest.*, 10 OCAHO no. 1174, 4 (2013)). "The complete failure to prepare a Form I-9 for an employee is among the most serious of paperwork violations[.]" *Id.* (citations omitted). When an employer fails to prepare or present an I-9, "it completely subverts the purpose of the employment verification requirements." *Speedy Gonzalez Constr., Inc.*, 11 OCAHO no. 1243 at 5–6 (2015). Accordingly, Respondent's 224 violations in Count I for failure to prepare and/or present I-9s are serious.

Furthermore, "while not as serious as total failure to prepare the form, failure to prepare an I-9 within three business days of hiring an employee is still a serious violation." *United States v. Metro. Warehouse, Inc.*, 10 OCAHO no. 1207, 7 (2013) (citations omitted). "Timely completion of the I-9 is crucial to the employment verification process because the longer an employer delays in completing an individual's I-9, the longer that individual could be working without authorization." *United States v. Schaus*, 11 OCAHO no. 1239, 9 (2014).

In Count II, Respondent failed to timely prepare I-9s for 102 employees. Respondent completed the majority of the I-9s in April 2017, after it received the NOI. Further, many of the I-9s in Count II also contained additional substantive violations. Accordingly, the violations in Count II are serious.

Additionally, OCAHO case law states that the failure to sign the section 2 employer attestation is "among the most serious of possible violations." *Solutions Group*, 12 OCAHO no. 1288, at 11 (quoting *United States v. Hartmann Studios, Inc.*, 11 OCAHO no. 1255, 14 (2015)). An employer's failure to ensure that the employee checks the section 1 box attesting to their employment authorization status is serious "because if the employee fails to provide information sufficient to disclose his or her immigration status on the face of the form, the employee's signature attests to nothing at all." *United States v. Pegasus Family Rest., Inc.*, 12 OCAHO no. 1293, 9 (2016). Failure to ensure that the employee signs the section 1 attestation is also serious because the employee "has not attested to being authorized to work in the United States." *Id.* (citation omitted).

In Count III, 329 I-9s contain substantive violations and the majority of those I-9s contain multiple substantive violations, including: no employee signature in section 1, no employer signature in section 2, no check mark for the work authorization status, no documents in section 2, and no alien number in section 1 when it was not available on other documentation. Further, many I-9s contained blank pages or were missing pages entirely. These are all serious violations and the majority of the I-9s in Count III contained multiple serious violations.

Despite the seriousness of the violations, Complainant did not aggravate the penalties based on this factor because it considered the seriousness when determining the base penalty amount. As such, the undersigned finds that Complainant properly treated the seriousness factor as neutral.

5. Unauthorized Workers

Complainant alleges that Respondent employed forty-one unauthorized workers and enhanced the penalties for those forty-one violations.[11] Complainant has the burden to prove the presence of unauthorized workers and a penalty enhancement only applies to violations involving those particular unauthorized workers. *Integrity Concrete, Inc.*, 13 OCAHO no. 1307 at 16. Additionally, Complainant must provide more than a Notice of Suspect Documents or Notice of Discrepancies. *Id.*

In Counts IA, IIA, and IIIA, Complainant specifically identified each of the alleged unauthorized workers and enhanced the penalties related to those specific violations. Complainant provided the declaration of its auditor, Dariusz Solecki. Solecki states that he ran Respondent's employees' names and A numbers through several databases. Complainant's Prehearing Statement Ex. C2 at 1. Solecki declares that seventeen employees provided an A number that

[11] Complainant charged Respondent with forty-three alleged violations involving unauthorized workers, including the violation related to Jose Martinez Centeno's I-9. The undersigned previously found that Respondent is not liable for a violation related to Centeno's I-9. *Supra* Section III.A.3.

was not issued to them. *Id.* at 2. Further, Complainant provided database results which show that twenty-three employees had expired temporary visas, and several of those visas permitted only specific work. Complainant's Prehearing Statement Ex. C2. Additionally, Complainant provided a 2009 Order of Removal for Beatris Arturo-Altamirano. *Id.*

Complainant also aggravated the penalty related to Julina Roberts's I-9 because Complainant alleges that she was an unauthorized worker. In support, Complainant provided Julina Robert's restricted Social Security card which permitted work only with Department of Homeland Security authorization. A restricted Social Security card is not a valid document to prove employment authorization. Yet, without more, Julina Roberts' restricted Social Security card does not prove by the preponderance of the evidence that she was an unauthorized worker. Accordingly, the undersigned finds that Complainant did not meet its burden to prove that Julina Roberts was an unauthorized worker.

In sum, the undersigned finds that Complainant met its burden to establish the presence of forty-one unauthorized workers. Complainant properly enhanced the penalties by five percent for these forty-one violations.

6. Non-Statutory Factors

OCAHO may also consider non-statutory factors to determine appropriate penalties. *Integrity Concrete*, 13 OCAHO no. 1307 at 18. "The party seeking consideration of non-statutory factors '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.'" *Id.* (quoting *United States v. Buffalo Transp.*, 11 OCAHO no. 1263, 11 (2015)). OCAHO has explained that "penalties are not meant to force employers out of business or result in the loss of employment for workers." *United States v. Two for Seven, LLC*, 10 OCAHO no. 1208, 8–9 (2014). Accordingly, OCAHO ALJs have often considered the employer's ability to pay a proposed fine. *Integrity Concrete*, 13 OCAHO no. 1307 at 18; *United States v. Raygoza*, 5 OCAHO no. 729, 49, 52 (1995); *Niche*, 11 OCAHO no. 1250 at 11. "The ability to pay as a non-statutory factor is governed by (1) the fact that the burden of proof is placed on the company; and (2) that as a matter of equity, the ALJ may weigh the facts to determine whether discretion warrants adjustment of the fine." *Integrity Concrete*, 13 OCAHO no. 1307 at 18 (citations omitted).

Respondent alleges that it is no longer operational as a business, and no longer has a phone number, employees, or an office. During a prehearing conference call on April 18, 2019, Respondent's counsel represented that Respondent is not operating or conducting business. Respondent, however, did not provide any evidence of its financial health. Without an audited financial history or any other information concerning Respondent's overall financial health, the undersigned finds that Respondent has failed to establish financial inability to pay the civil penalty at issue. *See Integrity Concrete*, 12 OCAHO no. 1307 at 18. Respondent did not assert that the penalty should be mitigated based on the policy of leniency towards small businesses; thus, the undersigned will not consider that factor.

IV. CONCLUSION

The undersigned finds that Respondent is liable for 655 total violations of § 1324a. The penalty is enhanced for five violations based on a finding of bad faith, the penalty is enhanced for the forty-one violations involving unauthorized workers, and the penalty for all violations by five percent because Respondent did not have a prior history of violations. Accordingly, Respondent is liable for $1,161,143.20 in total penalties.

	Count I	**Count II**	**Count III**
Violations with no enhancement	212 x $1,768.90 = $375,006.80	88 x $1,768.90 = $155,663.20	309 x $1768.90 = $546,590.10
Violations involving unauthorized workers	12 x $1,862 = $22,344.00	10 x $1,862= $18,620.00	18 x $1,862 = $33,516.00
Violations involving bad faith	n/a	3 x $1,862= $5,586.00	$1,862.00
Violations involving unauthorized workers and bad faith	n/a	$1,955.10	n/a
Total [12]	$397,350.80	$181,824.30	$581,968.10

V. FINDINGS OF FACT

1. Imacuclean Cleaning Services, Inc. is a limited liability company registered in the State of New York.

2. On March 20, 2017, the Department of Homeland Security, Immigration and Customs Enforcement, served Imacuclean Cleaning Services, Inc. with a Notice of Inspection.

3. On March 23, 2017, Respondent produced 578 Forms I-9 for inspection.

4. On February 12, 2018, the Department of Homeland Security, Immigration and Customs Enforcement, served Imacuclean Cleaning Services, Inc. with a Notice of Intent to Fine.

5. On March 6, 2018, Imacuclean Cleaning Services timely requested a hearing.

6. On May 30, 2018, the Department of Homeland Security, Immigration and Customs Enforcement, filed a complaint with the Office of the Chief Administrative Hearing Officer.

[12] The base fine amounts in the table include the five percent mitigation for Respondent's history of no previous violations.

7. Imacuclean Cleaning Services, Inc. hired and employed all of the 663 individuals identified in the complaint after November 6, 1986.

8. Imacuclean Cleaning Services, Inc. does not have a history of previous violations.

9. Imacuclean Cleaning Services, Inc. acted in bad faith when it backdated five Forms I-9.

10. Imacuclean Cleaning Services, Inc. employed forty-one unauthorized workers.

VI. CONCLUSIONS OF LAW

1. Under Count IA, Imacuclean Cleaning Services, Inc. is liable for twelve violations for failure to prepare and/or present Forms I-9.

2. Under Count IB, Imacuclean Cleaning Services, Inc. is liable for 212 violations for failure to prepare and/or present Forms I-9.

3. Under Count IIA, Imacuclean Cleaning Services, Inc. is liable for eleven violations for failure to timely prepare Forms I-9.

4. Under Count IIB, Imacuclean Cleaning Services, Inc. is liable for ninety-one violations for failure to timely prepare Forms I-9.

5. Under Count IIIA, Imacuclean Cleaning Services, Inc. is liable for nineteen violations for failure to ensure proper completion of section 1 and/or failure to properly complete sections 2 or 3 of the Forms I-9.

6. Under Count IIIB, Imacuclean Cleaning Services, Inc. is liable for 310 violations for failure to ensure proper completion of section 1 and/or failure to properly complete sections 2 or 3 of the Forms I-9.

7. Imacuclean Cleaning Services, Inc. is not liable for any violations regarding the Forms I-9 related to Jose Martinez Centeno, Stephen David Cooperberg, Diana Caro, Shana Dilleser, Carmen Lopez, Shakeem Sewell, Amaury Mora, and Lorraine Wadington.

8. For the reasons set forth herein, Imacuclean Cleaning Services, Inc. is liable for a total assessed penalty of $1,161,143.20.

9. Penalties are enhanced by five percent for violations related to individuals listed in Counts IA, IIA, and IIIA because they were not authorized to work in the United States. The penalty related to Julina Roberts's I-9 is not enhanced because Complainant failed to prove she was an unauthorized worker.

10. Penalties are enhanced by five percent for bad faith with respect to violations related to Forms I-9 for Sidian Clarke, Sophia Edwards, Sheena Jeffrey, Kori Robinson, and Asha Thapa because Imacuclean Cleaning Services, Inc. backdated those Forms I-9.

11. Penalties are mitigated by five percent based on Imacuclean Cleaning Services, Inc.'s prior history of no violations.

12. Imacuclean Cleaning Services did not meet its burden to establish that the penalty should be mitigated based on an inability to pay.

13. An employer must ensure that an employee completes section 1 of the Form I-9 on the date of hire, and the employer must complete section 2 within three business days of the hire. *United States v. A&J Kyoto Japanese Rest., Inc.*, 10 OCAHO no. 1186, 5 (2013); 8 C.F.R. § 274a.2(b)(1)(i)(A) (2018).

14. For violations that occurred after November 2, 2015 and were assessed after January 31, 2018, the applicable penalty range is $224 to $2,236. 28 C.F.R. § 85.5 (2018).

15. To determine the appropriate penalty amounts, "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 alien, and 5) the employer's history of previous violations." *United States v. Alpine Staffing, Inc.*, 12 OCAHO no. 1303, 9 (2017) (citing 8 U.S.C. § 1324a(e)(5)).

16. The government has the burden of proof with respect to penalties and "must prove the existence of an aggravating factor by a preponderance of the evidence." *United States v. 3679 Commerce Place, Inc. d/b/a Waterstone Grill,* 12 OCAHO no. 1296, 4 (2017).

17. An employer is required to retain an employee's Form I-9 for three years after hire or one year after termination, whichever is later. 8 C.F.R. § 274a.2(b)(2)(i)(A) (2018).

18. To demonstrate that the employer acted in bad faith, the government must show "evidence of culpable conduct that goes beyond the mere failure of compliance with the verification requirements." *United States v. Integrity Concrete, Inc.*, 13 OCAHO no. 1307, 13 (2017) (quoting *United States v. Azteca Dunkirk, Inc.*, 10 OCAHO 1172, 1, 3 (2013)).

19. "Failure to prepare an I-9 at all is among the most serious of paperwork violations . . . , and while not as serious as total failure to prepare the form, failure to prepare an I-9 within three business days of hiring an employee is still a serious violation." *United States v. Metro. Warehouse, Inc.*, 10 OCAHO no. 1207, 7 (2013).

20. The failure to sign the section 2 employer attestation is "among the most serious of possible violations." *United States v. Solutions Group Int'l, LLC*, 12 OCAHO no. 1288, 11 (2016) (quoting *United States v. Hartmann Studios, Inc.*, 11 OCAHO no. 1255, 14 (2015)).

21. An employer's failure to ensure that an employee checks the section 1 box attesting to employment authorization status and an employer's failure to ensure that the employee signs section 1 are serious violations. *United States v. Pegasus Family Rest., Inc.*, 12 OCAHO no. 1293, 9 (2016).

22. The government has the burden to prove the presence of unauthorized workers and a penalty enhancement applies to violations involving those particular unauthorized workers. *United States v. Integrity Concrete, Inc.*, 13 OCAHO no. 1307, 13 (2017).

To the extent that any statement of fact is deemed to be a conclusion of law or any conclusion of law is deemed to be a statement of fact, the same is so denominated as if set forth as such.

ORDER

Imacuclean Cleaning Services, Inc. is liable for 655 violations of 8 U.S.C. § 1324a(a)(1)(B) and is ordered to pay $1,161,143.20 in civil penalties.

SO ORDERED.

Dated and entered on September 11, 2019.

Thomas P. McCarthy
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.