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

February 19, 2020

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 19A00027
T-RAY CONSTRUCTION COMPANY, INC., Respondent.	)	

ORDER ON MOTION FOR SUMMARY DECISION

This case arises under the employer sanctions provisions under § 274A of the Immigration and Nationality Act (INA or the Act), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a (2019). Pending before the Court are the Complainant's Motion for Summary Decision seeking $81,743.40 in penalties and Respondent's Motion for Summary Decision seeking a recalculation and lowering of the amount of fines, both filed on December 16, 2019. Both parties filed timely oppositions.

I. BACKGROUND

Respondent, T-Ray Construction Company, Inc., is a corporation authorized to conduct business in the State of Minnesota. Complaint at 1; Complainant's Mot. Summ. Dec. Ex. G-11.[1] On September 21, 2018, the Department of Homeland Security, Immigration and Customs Enforcement (Complainant or ICE), served Respondent with the Notice of Inspection (NOI). C's Mot. Ex. G-2. On September 26, 2018, Respondent presented Forms I-9. C's Mot. Ex G-3. On January 16, 2019, Complainant served Respondent with the Notice of Intent to Fine (NIF). Compl. Ex. A. Respondent timely requested a hearing. *Id.* at Ex. B. Complainant filed the Complaint on May 20, 2019, and charged Respondent with one count for failure to prepare and/or present Forms I-9 for two employees, and one count for failure to ensure that the

[1] Complainant's Motion for Summary Decision and exhibits thereto will be abbreviated as "C's Mot. Ex #." Respondent's Motion for Summary Decision and exhibits thereto will be abbreviated as "R's Mot. Ex. #." Complainant's response to Respondent's Motion for Summary Decision will be cited as "C's Opp." Respondent's response to Complainant's Motion for Summary Decision will be cited as "R's Opp."

employee properly completed section 1 and/or failure to properly complete section 2 or 3 of the Forms I-9 for forty-one employees. Complainant seeks $82,743.40 in penalties. On December 16, 2019, Complainant and Respondent filed cross-motions for summary decision. On January 9, 2020, Complainant filed a response to Respondent's motion, and Respondent responded to Complainant's motion on January 10, 2020. All conditions precedent to this proceeding have been satisfied.

II. STANDARDS

A. Summary Judgment

Under the 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).[2] "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)).[3]

"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)). The Court views all facts and reasonable inferences "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).

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[2] *See* Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2019).

[3] 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.

B. Civil Money Penalties

The Court assesses civil penalties for paperwork violations in accordance with the parameters set forth in 8 C.F.R. § 274a.10(b)(2) and 28 C.F.R. § 85.5. Complainant has the burden of proof 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)).

The civil penalties for violations of § 1324a are intended "to set a meaningful fine to promote future compliance without being unduly punitive." *3679 Commerce Place*, 12 OCAHO no. 1296 at 7. To determine the appropriate penalty amount, "the following statutory factors must be considered: 1) the size of the employer's business, 2) the employer's good faith, 3) the seriousness of the violations, 4) whether or not the individual was an unauthorized alien, and 5) the employer's history of previous violations." *Id.* at 4 (citing 8 U.S.C. § 1324a(e)(5)). The Court considers the facts and circumstances of the individual case to determine the weight it gives to each factor. *United States v. Metro. Enters.*, 12 OCAHO no. 1297, 8 (2017). 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, the Court may also consider other, non-statutory factors as appropriate in the specific case. *3679 Commerce Place*, 12 OCAHO no. 1296 at 4 (citation omitted). Finally, Complainant's "penalty calculations are not binding in OCAHO proceedings, and the [Administrative Law Judge] may examine the penalties de novo if appropriate." *United States v. Alpine Staffing, Inc.*, 12 OCAHO no. 1303, 10 (2017).

III. DISCUSSION

A. Liability

Complainant argues that there is no genuine issue of material fact as to Respondent's liability in this matter. Respondent does not contest liability in its motion for summary decision. R's. Opp. at 5. Complainant submitted the Forms I-9 at issue in this case. C's Mot. Ex. G-6–9. Respondent did not object to the exhibits.

In Count I, Complainant alleges that Respondent did not complete I-9s for two individuals, C.B. and E.B. Respondent does not contest these alleged violations and the record does not contain any I-9 for C.B. Respondent originally hired E.B. in 2013, and rehired him in 2018. C's Mot. Ex. G-6 at A4. Instead of completing a new Form I-9 upon rehire, Respondent completed

section 3 of E.B.'s previous I-9. *Id.* If an employer rehires an individual more than three years after the date of the execution of the original I-9, the employer must complete a new Form I-9 for the employee upon rehire. 8 C.F.R. § 274a.2(c). E.B.'s original I-9 was completed on July 30, 2015. C's Mot. Ex.G-6 at A4. Respondent rehired E.B. in September 2018, more than three years after his previous I-9 was completed. As such, Respondent is liable for two violations in Count I for failure to prepare and/or present Forms I-9.

Additionally, an employer must ensure that the employee completes section 1 of the I-9 within one day of hire, and the employer must complete section 2 within three days of 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). Respondent failed to timely complete I-9s for thirty-nine employees.[4] Four of those I-9s also contained other substantive violations, including Respondent's failure to include a checkmark for the employee's employment authorization status and failure to complete section 3 prior to the expiration of the employer's employment authorization status. *See* Appx; *United States v. Imacuclean Cleaning Servs.*, 13 OCAHO no. 1327, 3 (2019); *U.S. v. Buffalo Transp., Inc.*, 11 OCAHO no. 1263. Finally, the I-9s related to two employees, G.O. and L.F., were timely completed but contained other substantive violations. *Id.* Specifically, Respondent failed to sign the employer attestation on L.F.'s I-9 and, regarding G.O.'s I-9, Respondent failed to record the List B document expiration date and did not include a copy of the document. Thus, Respondent is liable for forty-one violations of § 1324a in Count II.

Accordingly, the Court finds that there is no genuine issue of material fact as to whether the violations occurred. The Court finds that Complainant met its burden to establish that Respondent is liable for hiring forty-three individuals without complying with the requirements under § 274A(b) of the Act.

B. Civil Penalties

Complainant contends that summary decision is appropriate as to the penalties. In the Motion for Summary Decision, Complainant states that it calculated the penalties in accordance with ICE internal methodology set out in the "Substantive Violation Fine Schedule matrix." C's Mot. at 8. According to Complainant, the base fine was calculated by first ascertaining the percentage of violations, which was 75% because Respondent should have presented fifty-eight I-9s, and forty-four of those I-9s had substantive paperwork violations. *Id.* Therefore, the base fine for each violation was $1,901. *Id.* at 9. Complainant then considered the five statutory factors and concluded that the business size and good faith of the business were neutral factors, the seriousness of the violations was an aggravating factor while the lack of unauthorized aliens was a mitigating factor, resulting in no adjustments. *Id.*

[4] The names of the employees in Count II are listed in the Appendix.

Complainant submitted eleven exhibits with its motion, including the Forms I-9 at issue in the case (Exs. G-6-9), employee lists and wage information (Ex. G-10).

Respondent argues that the company has no prior history of immigration violations, is a small construction company, operated in good faith, did not employ unauthorized aliens, and warrants reductions in the penalty as the penalty is disproportionate to the income and will present an undue financial burden. Respondent submitted as exhibits an affidavit from Respondent's president, as well as tax returns from 2016-2018. In its Response, Respondent submitted quarterly tax returns for 2019, the Small Business Administration Table of Small Business Size Standards, and Profit and Loss Comparison through July 2019.

1. Statutory Factors

The Court has considered the five statutory factors in evaluating the appropriateness of Complainant's proposed penalty. 8 U.S.C. § 1324a(e)(5). Respondent is a small business with fewer than 100 employees. R's Mot., Decl. Steve Sunderland. Respondent indicates that it employs approximately fifteen people during the winter months, and approximately seventy during the summer months. *Id.* OCAHO has generally considered companies with fewer than 100 employees to be small businesses, and Respondent fits within that definition regardless of the time of year. *United States v. Fowler Equipment Company, Inc.*, 10 OCAHO no. 1169, 6–7 (2013). ALJs also look at business income and loss, both of which show that Respondent had total income of around $1 million in the years 2016-18, but reported an ordinary business income loss in two of those years. The mid-year statement shows a net ordinary income of $340,000 through July 2019. R's Mot. Attach.; R's Opp. Ex. 3. The Court finds that mitigation is warranted based on the size of Respondent's business.

Complainant treated the good faith factor as neutral. The good faith analysis primarily focuses on 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. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 10 (2010); *United States v. New China Buffet Rest.*, 10 OCAHO no. 1133, 5 (2010). Respondent completed Forms I-9 for all of the relevant employees except two, and one of those had a prior Form I-9. Almost all were completed untimely, at least ten were completed more than ten years after the hire date, whereas the rest were completed between a few months and several years after the date of hire. A low compliance rate, alone, does not warrant a finding of bad faith, however. *United States v. Metro. Enters*., 12 OCAHO no. 1297 at 15 (citing *New China Buffet Rest.*, 10 OCAHO no. 1133 at 6). "[T]here must be some evidence of culpable conduct beyond the mere failure of compliance." *United States v. Siam Thai Sushi Rest.*, 10 OCAHO no. 1174, 3–4 (2013). Additionally, Complainant bears the burden of proving by a preponderance of the evidence that an employer lacked good faith. *United States v. Metro. Warehouse, Inc*., 10 OCAHO no. 1207, 5 (2013). Here, there is no evidence that Respondent acted in bad faith.

Complainant treated the seriousness of the violations as an aggravating factor. OCAHO precedent has stated that failure to timely complete the Form I-9 is serious, though marginally less serious than failure to complete a Form I-9 or to ensure that the employer or employee sign the form. *United States v. Durable, Inc.*, 11 OCAHO no. 1229, 15 (2014); *United States v. Anodizing*, 10 OCAHO no. 1184, 4 (2013). Further, other violations presented in this case include the failure to provide a Form I-9 for one employee altogether, the failure to complete a new Form I-9 for two other employees who were reemployed more than three years after initial hire, and no documents were indicated on the form for one Form I-9. Other violations include no employer signature for one Form I-9, no expiration date of a document on another, no check mark attesting to status, and another had a blank section 1. C's Mot. Ex. G-6–9. Complainant has the burden to prove that an aggravation of the penalty is warranted, and in this case, the Court finds that it has met its burden. *3679 Commerce Place*, 12 OCAHO no. 1296 at 4.

Complainant treated the lack of presence of unauthorized workers as a mitigating factor. Complainant did not present any evidence of unauthorized workers, and accordingly, the Court considers this factor to be neutral. The Court does not believe that mitigating the fine is appropriate.

Complainant did not address the history of violations. The record does not indicate that Respondent has a previous history of violations. A lack of a history of previous violations "does not automatically entitle the respondent to mitigation of the civil penalty[.]" *United States v. Red Coach Rest.*, 10 OCAHO no. 1200, 4 (2013) (affirmance by the CAHO). Under OCAHO precedent, "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." *New China Buffet Rest.*, 10 OCAHO no. 1133 at 6. Thus, the Court finds Respondent's lack of history of previous violations is properly treated as a neutral factor.

2. Non-Statutory Factor

Respondent contends that the Court should mitigate the penalties based on its inability to pay the penalty. "A party seeking consideration of a non-statutory factor, such as ability to pay the penalty, bears the burden of proof in showing that the factor should be considered as a matter of equity, and that the facts support such a favorable exercise of discretion." *United States v. Pegasus Family Rest.*, 12 OCAHO no. 1293, 10 (2016) (citing *United States v. Buffalo Transp., Inc.*, 11 OCAHO no. 1263, 11 (2015)).

Respondent argues that its net profit for 2019 as of July is $341,718.65, and the proposed penalty would amount to more than 23% of the company's net income. As noted above, Respondent had total income of around $1 million in the years 2016-18, but reported an ordinary business income loss in two of those years. The mid-year statement shows a net ordinary income of $340,000 through July 2019. As that figure is only a mid-year figure, it does not represent an appropriate figure to calculate the net share. Suffice to say, a high proposed penalty will not likely bankrupt

the company, but may be a determinative factor in whether the company has an ordinary business income loss or gain at the end of the year, and could impact operations.

C. Penalty Range

The applicable penalty range depends on the date of the violations and the date of assessment. *See* § 274a.10(b)(2); 28 C.F.R. § 85.5. For violations that occurred before September 29, 1999, the minimum penalty is $100 and the maximum is $1,000. § 274a.10(b)(1)(C). If the violation occurred between September 29, 1999 and November 2, 2015, the minimum penalty amount is $110 and the maximum is $1,100. *Id.* For violations that occur after November 2, 2015, the adjusted penalty range as set forth in § 85.5 applies. *See* § 85.5. When a violation occurs after November 2, 2015, and the penalty is assessed between February 4, 2017 and January 29, 2018, the minimum penalty amount is $220 and the maximum amount is $2,191. *Id.* If the penalty is assessed after January 29, 2018, the minimum penalty is $224 and the maximum is $2,236. *Id.*

Generally, paperwork violations are "continuous" violations until they are corrected or until the employer is no longer required to retain the Form I-9 pursuant to IRCA's retention requirements. *See* § 274a.2(b)(2)(i)(A); *Curran Eng'g*, 7 OCAHO no. 975 at 895; *see also United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1061, 11 (2000). However, a paperwork violation that alleges a timeliness failure is "frozen in time" at the point when the employer "fail[s] to complete, or to ensure completion, of an I-9 form by the date that the completion is required." *WSC Plumbing*, 9 OCAHO no. 1061 at 11–12 (quoting *Curran Eng'g*, 7 OCAHO no. 975 at 897).[5] Unlike other kinds of paperwork violations, timeliness verification failures cannot be cured. *WSC Plumbing*, 9 OCAHO no. 1061 at 15 ("Once the requisite deadlines for completion of the I-9 form have passed, the timeliness violation is 'perfected,' and the employer is powerless to 'cure' it."); *see also Durable, Inc.*, 11 OCAHO no. 1229 at 12–13; *New China Buffet Rest.*, 10 OCAHO no. 1132 at 5. Thus, if a timeliness violation involves only the employee's failure to sign section 1 of the I-9, the violation occurred on the first business day after hiring. *Curran Eng'g*, 7 OCAHO no. 975 at 897. If the violation involves the employer's failure to sign section 2, the violation occurred on the fourth business day after hiring. *Id.*

The record reflects that the charges as to the two employees in Count I are continuing violations that were assessed when the Notice of Intent to Fine was served, on January 16, 2019. Compl. Ex. A at 2. The range is therefore $224-$2,236 for the violations related to the I-9s of C.B. and E.B.

The charges in Count II include a number of violations for improper completion of the Form I-9, some of which are continuing violations, and some of which were fixed when the employee was

[5] Respondent does not assert a statute of limitations defense. *See Curran Eng'g*, 7 OCAHO no. 975 at 893–94; *United States v. Davila*, 7 OCAHO no. 936, 1, 16 (1997).

hired. Exhibit G-8; Appx.[6] Thirty-five of the violations were timeliness violations only. *See* Appx. Six of those violations occurred before September 1999, so those violations fall in the $100-$1000 penalty range. *Id.* Fifteen of those violations occurred between September 1999 and November 2, 2015, so those violations fall in the $110-$1100 range. *Id.* The remaining fourteen timeliness violations all occurred after November 2, 2015, so the penalty ranges are based on the date the penalties are assessed. § 85.5; Appx. The penalties for the fourteen violations that occurred after November 2, 2015, were assessed on January 16, 2019, when the Notice of Intent to Fine was served on Respondent, and therefore fall within the later of the penalty ranges, $224-$2,236. *United States v. Farias Enter. LLC*, 13 OCAHO no. 1338, 7 (2020); § 85.5.

Complainant's proposed penalties at $1,901 per violation are 85% of the maximum for the range that it considered. OCAHO case law directs that penalties approaching the maximum should be reserved for the most egregious violations. *See Fowler Equip*., 10 OCAHO no. 1169 at 6. The penalty is on the higher end in the range because of the formula Complainant uses to calculate the base fine, that is, the percentage of violations as compared to the number of employees. As a consequence, the most aggravated cases are those with the highest percentage of violations, regardless of the other factors. The rate of violations is a factor to be considered along with other factors, but it is not a factor enumerated in § 1324a(e)(5). Considering a totality of the circumstances as set forth in the evidence of record and pleadings, ICE's proposed penalty is disproportionate to the Form I-9 violations and mitigating factors present in this case. Accordingly, this Court will make adjustments to the fines based upon the five statutory factors, non-statutory factor, and adjusted penalty ranges. Using a mid-range penalty as a base penalty, the Court considers that the small business mitigating factor is offset by the aggravating factor of the seriousness of the violation. The claims in Count I present more serious violations as Respondent did not present a Form I-9 for one person, and did not execute a new Form I-9 for a rehire, while the violations in Count II vary, but are nevertheless considered to be serious. Further, the timeliness violations were pervasive. For the violations in Count I, the Court will impose a fine of $1,453 per violation. For the timeliness violations in Count II, which are not as serious as the other substantive paperwork violations but were pervasive, the Court will impose a fine slightly above the mid range of $1,290 for the violations in the 2018 adjusted penalty range (fourteen violations), $635 for the violations that occurred between September 29, 1999 and November 2, 2015 range (fifteen violations), and $630 for the violations occurring before September 29, 1999 (six violations). One violation (G.O.) is less serious than other violations that occurred after November 2, 2015, so the Court will impose a lower fine of $1,118. For five I-9s with other substantive paperwork violations that are more serious, see App'x, the Court will impose the higher fine of $1,453, with a total fine of $42,654.

[6] The names of the employees in Count II are listed in the Appendix, as well as the applicable penalty range and the specific violation(s).

IV. CONCLUSION

Complainant's Motion for Summary Decision is granted in part. After considering the statutory factors, the non-statutory factor, and the totality of the evidence, the undersigned finds that Complainant's penalty should be adjusted, and therefore Respondent's Motion for Summary Judgment is also granted in part. The penalty amount for forty-three violations of § 1324a is $42,654.

V. FINDINGS OF FACT

1. On September 21, 2018, the Department of Homeland Security, Immigration and Customs Enforcement, served T-Ray Construction Company Inc. with a Notice of Inspection.

2. On January 16, 2019, the Department of Homeland Security, Immigration and Customs Enforcement, served T-Ray Construction Company Inc. with a Notice of Intent to Fine.

3. T-Ray Construction Company, Inc. failed to prepare or present Forms I-9 for two employees.

4. T-Ray Construction Company Inc. failed to properly complete Forms I-9 for forty-one employees.

5. T-Ray Construction Company Inc. is a small business with no history of previous violations.

6. Prior to the investigation, T-Ray Construction Company Inc. had a poor rate of compliance with the requirements of 8 U.S.C. § 1324a as errors were found in 43 out of 55 Form I-9s.

7. T-Ray Construction Company completed thirty-five Forms I-9 more than three days after hire.

8. T-Ray Construction Company did not timely complete I-9s for six employees who were hired prior to September 29, 1999.

9. T-Ray Construction Company did not timely complete I-9s for fifteen employees who were hired between September 30, 1999 and November 2, 2015.

10. T-Ray Construction Company did not timely complete I-9s for fourteen employees who were hired after November 2, 2015.

VI. CONCLUSIONS OF LAW

1. T-Ray Construction Company 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. T-Ray Construction Company Inc. is liable for forty-three violations of 8 U.S.C. § 1324a(1)(b).

4. An Administrative Law Judge "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).

5. "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)).

6. The Court views all facts and reasonable inferences "in the light most favorable to the non-moving party." *United States v. Prima Enters., Inc*., 4 OCAHO no. 615, 261 (1994) (citations omitted).

7. If an employer rehires an individual more than three years after the date of the execution of the original I-9, the employer must complete a new Form I-9 for the employee upon rehire. 8 C.F.R. § 274a.2(c).

8. An employer must ensure that the employee completes section 1 of the I-9 within one day of hire, and the employer must complete section 2 within three days of 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).

9. The Court assesses penalties for paperwork violations in accordance with the parameters set forth in 8 C.F.R. § 274a.10(b)(2) and 28 C.F.R. § 85.5.

10. To determine the appropriate penalty amount, "the following statutory factors must be considered: 1) the size of the employer's business, 2) the employer's good faith, 3) the seriousness of the violations, 4) whether or not the individual was an unauthorized alien, and 5) the employer's history of previous violations." *United States v. 3679 Commerce Place, Inc*., 12 OCAHO no. 1296, 4 (2017) (citing 8 U.S.C. § 1324a(e)(5)).

11. 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.*, 12 OCAHO no. 1296, 4 (2017).

12. The Court considers the facts and circumstances of each individual case to determine the weight it should give to each factor. *United States v. Metro. Enters*., 12 OCAHO no. 1297, 8 (2017).

13. The Court may also consider other, non-statutory factors as appropriate in the specific case. *United States v. 3679 Commerce Place, Inc*., 12 OCAHO no. 1296, 4 (2017).

14. The government's "penalty calculations are not binding in OCAHO proceedings, and the [Administrative Law Judge] may examine the penalties de novo if appropriate." *United States v. Alpine Staffing, Inc.*, 12 OCAHO no. 1303, 10 (2017).

15. A low rate of compliance with the § 1324a requirements, alone, does not warrant a finding of bad faith. *United States v. Metro. Enters*., 12 OCAHO no. 1297, 15 (2017) (citing *United States v. New China Buffet Rest.*, 10 OCAHO no. 1133, 6 (2010)).

16. OCAHO precedent states, "[f]ailure to ensure that the employee checks a box attesting to his or her status in section 1 is serious[.]" *United States v. Metro. Enters*., 12 OCAHO no. 1297, 16 (2017) (citing *United States v. Durable, Inc*., 11 OCAHO no. 1229, 15 (2014)).

17. OCAHO precedent states that failure to timely complete the Form I-9 is serious (though marginally less serious than failure to complete a form or have the employer or employee sign the form). *United States v. Durable, Inc.*, 11 OCAHO no. 1229, 15 (2014).

18. Under OCAHO precedent, "never having violated the law before does not necessarily warrant additional leniency, and it is still appropriate to treat [the history of violations factor] as a neutral one." *United States v. New China Buffet Rest.*, 10 OCAHO no. 1133, 6 (2010).

19. A party seeking consideration of a non-statutory factor has the burden of proof and must show "that the factor should be considered as a matter of equity, and that the facts support such a favorable exercise of discretion." *United States v. Pegasus Family Rest.*, 12 OCAHO no. 1293, 10 (2016) (citing *United States v. Buffalo Transp., Inc*., 11 OCAHO no. 1263, 11 (2015)).

20. Paperwork violations, such as failure to complete section 2, are continuing violations until cured. *United States v. Curran Eng'g Co., Inc*., 7 OCAHO no. 975, 895 (1997).

21. A paperwork violation that alleges a timeliness failure is "frozen in time" at the point when the employer "'fail[s] to complete, or to ensure completion, of an I-9 form by the date that

the completion is required."' *United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1061, 11–12 (2000) (quoting *United States v. Curran Eng'g*, 7 OCAHO no. 975, 895, 897 (1997)).

22. If the violation occurred before September 29, 1999, the minimum penalty amount is $100 and the maximum penalty amount is $1,000. 8 C.F.R. § 274a.10(b)(2). If the violation occurred between September 29, 1999 and November 2, 2015, the minimum penalty amount is $110 and the maximum is $1,100. 8 C.F.R. § 274a.10(b)(2). For violations that occur after November 2, 2015, the adjusted penalty range as set forth in 28 C.F.R. § 85.5 applies. If the penalty is assessed after January 29, 2018, the minimum penalty is $224 and the maximum is $2,236. 28 C.F.R. § 85.5.

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

ORDER

Complainant's Motion for Summary Decision is GRANTED. Respondent is liable for forty-three violations of § 1324a(a)(1)(B) and is directed to pay civil penalties in the total amount of $42,654.

The parties are free to establish a payment schedule to minimize the impact of the penalty on the operations of the company.

SO ORDERED.

Dated and entered on February 19, 2020.

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Jean C. King
Chief Administrative Law Judge