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

June 9, 2020

UNITED STATES OF AMERICA, Complainant, v. 1523 AVENUE J FOODS INC., D/B/A 7-ELEVEN STORE NO. 36802, Respondent.	)	8 U.S.C. § 1324a Proceeding OCAHO Case No. 19A00047

ORDER ON 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 is Complainant's Motion for Summary Decision. Respondent filed a response to Complainant's motion.

I. BACKGROUND

On August 8, 2019, the United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or Complainant or the government) filed a complaint against Respondent, 1523 Avenue J Foods Inc., D/B/A 7-Eleven Store No. 36802 (Respondent or the company) charging Respondent with one count for failure to prepare and/or present I-9s for twenty-eight individuals, and one count for failure to ensure proper completion and/or failure to properly complete I-9s for one individual. Complainant seeks $51,298.10 in penalties. The complaint reflects that the government served a Notice of Intent to Fine (NIF) on June 27, 2018, and Respondent thereafter made a timely request for hearing. Respondent filed an answer to the complaint on September 23, 2019. On April 3, 2020, Complainant filed a motion for summary decision. On May 4, 2020, Respondent filed a response to Complainant's motion. 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).[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]

"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).

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

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

[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.

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, section 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

In Count I, Complainant alleges that Respondent failed to prepare and/or present I-9s for twenty-eight employees. In Count II, Complainant alleges that Respondent failed to ensure proper completion of section 1 and/or failed to properly complete section 2 or 3 of the I-9 forms for one employee.

Respondent admitted to the allegation in Count II. Answer at 1. A visual inspection of the I-9 Form shows that Respondent failed to complete the employer verification in section 2 of that employee's I-9. Complainant's Prehearing Statement Ex. G-2.

Additionally, Respondent does not contest that it did not present the Forms I-9 for the employees in Count I. Instead, Respondent alleges an affirmative defense of impossibility. Specifically, it alleges that the store experienced flooding in the basement in 2016 and 2017, and consequently lost the I-9 Forms. Answer at 3.

As regards to the allegation that Respondent failed to prepare and/or produce I-9s for twenty eight employees in Count I, OCAHO case law recognizes that impossibility may provide a valid affirmative defense to the failure to present Forms I-9 where the forms were actually completed, but later became unavailable through no fault of the employer. *United States. v. Ideal Transportation Co.*, 12 OCAHO no. 1290, 7 (2016); *see also United States v. Noel Plastering & Stucco, Inc.*, 2 OCAHO no. 396, 763, 768 (1991) (finding that a defense of impossibility could potentially succeed if the respondent could prove that fire destroyed the offices where I-9s were kept); *United States v. Alvand, Inc.*, 2 OCAHO no. 352, 378, 383 (1991) (finding that impossibility could be a valid defense if evidence established that the forms had been completed, but were subsequently lost or destroyed in the course of a burglary). Critical to the defense is a demonstration that the forms were completed. *See Alvand, Inc.*, 2 OCAHO no. 396 at 38385. In addition, impossibility is not available as an affirmative defense when the destruction of the documents is attributable to the company's own actions. *United States. v. Ideal Transportation Co.*, 12 OCAHO 1290, 7 (2016) (finding liability where company stated that forms were discarded because they were mutilated, damaged, illegible or outdated); *United States v. Barnett Taylor LLC*, 10 OCAHO no. 1155, 8–9 (2012) (stating that where an employer's own employee voluntarily destroys its Forms I-9, the defense is unavailable); *United States v. SKZ Harvesting, Inc.*, 11 OCAHO no. 1266, 12 (2016).

As both parties agree that Respondent did not present the Forms I-9, Complainant has met its initial burden to establish liability and that it is entitled to judgment as a matter of law. The burden shifts to Respondent and as noted above, "the 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.'" *3679 Commerce Place, Inc.*, 12 OCAHO no. 1296 at 4. Contrary to the arguments set forth in Respondent's motion, Respondent must do more that meet the pleading standard at this stage, but must provide evidentiary materials to establish that there is a genuine issue of material fact. *Id.*

Respondent provided an affidavit from Rajesh Motwani, an owner of the business. Mr. Motwani states, "In 2016 and 2017 I experienced flooding issues in the store basement. The store had a significant amount inventory, documents and other fixtures that were destroyed and thrown away due to these incidents. Included in the lost documents were Purchase invoices, Cash report summaries, Inventory records and HR documents. Unbeknownst to me at the time, I-9 Records were among the HR documents lost." Answer Ex. A. Also included are copies of undated photographs that show cleaning supplies on a basement floor, and trash bags and piles. Answer Ex. B. There are no explanations of the photographs. *Id.*

Complainant argues that Respondent did not establish that the forms were ever prepared, and did not provide sufficient evidence to establish the flood damage, such as insurance claims or correspondence with its parent company. Mot. Summ Dec. at 6, 13. Further, Complainant argues that the photographs are undated and do not adequately explain or show a flood. *Id.*

The statement from Mr. Motwani is insufficient to establish a genuine issue of fact as to an affirmative defense of impossibility. The evidence provided by Respondent raises an issue as to whether there was water damage in the store basement, and construing the facts favorably to the non-moving party, the Court would find that such a fact survives summary judgment. However, Respondent does not set forth sufficient facts to demonstrate that the I-9 Forms were completed. Mr. Motwani does not indicate that I-9 Forms were completed for each of the persons identified in Count 1. He does not indicate it was a regular business process to complete I-9 Forms for each employee. He did not appear to know where the I-9 Forms were kept. He does not indicate how he came to know that the Forms were destroyed, if they ever existed, as he states that the loss of the Forms was "unbeknownst to me". The thirteen Forms I-9 presented by Respondent were completed during the same years as those purportedly destroyed. Complainant's Prehearing Statement Ex. G-2. Mr. Motwani has therefore not set forth sufficient facts to establish that the I-9 Forms were completed for the twenty-eight individuals named in the Complaint.

Accordingly, the Complainant met its burden to establish that there is no genuine issue of material fact as to Counts I and II, and Respondent is liable for twenty-eight violations as set forth in Count I, and one violation in Count II.

B. Penalties

Respondent argues that Complainant's proposed penalty amount is excessive and asks the Court to impose a lesser penalty of $6,380 based on the statutory and non-statutory factors.

Complainant indicated that it employed the standardized fine structure utilized by ICE, in which the base amount of each violation is determined by dividing the number of substantive violations by the number of Forms I-9 presented for inspection to obtain a violation percentage. Mot. Summ. Dec. at 8. In this case, Respondent presented thirteen Forms I-9 for inspection, one of which contained violations, and Respondent did not present a further twenty-eight Forms I-9. Therefore, twenty-nine violations were identified out of a possible forty-one. Since the violation percentage was above fifty percent, Complainant set the standard fine amount for each violation at $1,862.00. Mot. Summ. Dec. at 8-9; Comp. Prehearing Statement Exh. G-5. Complainant then mitigated the penalty based on the size of the business. Complainant treated the history of violations and good faith factors as neutral factors. Complainant also treated the seriousness of the violations as neutral but argues that the violations are very serious and should not be mitigated as Respondent did not have any Form I-9s for twenty-eight individuals and, assuming the forms were lost in a flood, did not attempt to recreate them. Complainant seeks $1,768.90 per violation. As to the Count II violation, Complainant also argues that the violation is serious and seeks the same amount.

1. Size of Business and History of Violations

There is no dispute that Respondent is a small business with fewer than 100 employees. Mot. Sum. Dec. at 9. OCAHO has generally considered companies with fewer than 100 employees to be small businesses. *United States v. Fowler Equipment Co., Inc.*, 10 OCAHO no. 1169, 6–7 (2013). Thus, the Court finds that mitigation is warranted based on the size of Respondent's business.

2. History of Violations

Complainant treated the history of violations factor as neutral as Respondent did not have a history of violations. However, "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). As such, the history of violations is a neutral factor.

3. Good Faith

Complainant treated the good faith factor as neutral. Respondent argues that because it did complete Forms I-9, it should receive mitigation. 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." *United States v. Integrity Concrete, Inc.*, 13 OCAHO no. 1307, 13 (2017). Nevertheless, the absence of bad faith does not show good faith. *United States v. Guewell*, 3 OCAHO no. 478, 814, 820 (1992). Instead, 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 [Notice of Inspection], not what it did afterward.'" *Integrity Concrete, Inc.*, 13 OCAHO no. 1307 at 12 (quoting *United States v. Hartmann Studios, Inc.*, 11 OCAHO no. 1255, 12 (2015)).

OCAHO case law has looked at whether an employer honestly exercised reasonable care and diligence to ascertain what the law requires and to conform its conduct to the law. *United States v. Sunshine Bldg. Maint., Inc.*, 7 OCAHO no. 997, 1122, 1177 (1998). It appears that the Respondent did complete and produce thirteen Forms I-9. However, it did not provide sufficient evidence that it completed the remaining twenty-eight forms. As noted above, however, mere failure of compliance is not sufficient for a finding of bad faith, thus the good faith factor is neutral.

4. Seriousness

Complainant considered the violations to be serious and argued that the fine should not be reduced. Respondent agrees that failure to prepare a Form I-9 would be serious, but argues that it prepared the Forms. "Paperwork violations are always potentially serious." *United States v.*

Skydive Acad. Haw. Corp., 6 OCAHO no. 848, 235, 245 (1996). The Court 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). Furthermore, 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)).

Here, the evidence presented shows that Respondent did not complete the twenty-eight Forms I-9. In addition, a visual inspection of the Form I-9 in Count II shows that Respondent failed to complete the section 2 attestation. Complainant's Prehearing Statement Ex. G-2. All of the violations at issue are serious, thus, the Court will aggravate the penalties based on the seriousness of violations.

5. Presence of Unauthorized Workers

Complainant has not alleged that there were any unauthorized workers, and therefore this is appropriately considered a neutral factor.

6. Non-statutory Factors

Respondent argues that the Court should consider factors other than the five factors mentioned in the statute, citing to *United States v. Buffalo Transportation*. 11 OCAHO no. 1263 (2015). Respondent argues that the Court has previously considered mitigation arguments based in equity including in favor of small business, the ability of Respondent to pay the fine and the proportionality of the fine to the size of the business and income of the Respondent, all of which Respondent argues are present in this case.

OCAHO may consider non-statutory factors to determine appropriate penalties. *Id.* 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 *Buffalo Transp.*, 11 OCAHO no. 1263 at 11). 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 argues that the business operates at a loss or very small profit, and a large, unscheduled expense would put it out of business. Response at 13. The affidavit submitted by Mr. Motwani as well as the tax returns indicate that the store's net income for the years 2014 to 2017 was a loss for three of the years of between $9,664 and $52,050, and a profit for one year of $13,004. Answer Ex. A. Mr. Motwani states that on the date of the affidavit, September 2019, he was behind on the franchise's requirement to maintain a minimum net worth of $15,000, and the proposed fine would put an end to his business. *Id*. Respondent has established that it will have difficulty paying the penalty amount that ICE seeks. As such, the Court will mitigate the penalty based on this non-statutory factor. Although some ALJs have considered the general policy of leniency to small businesses as a non-statutory factor, the Court declines to consider this non-statutory factor since the Court has already considered the size of the business as a statutory factor. *See Integrity Concrete*, 13 OCAHO no. 1307 at 12.

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

As previously discussed, paperwork violations are continuing 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* 8 C.F.R. § 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). Violations are assessed when the government serves the NIF, in this case on June 27, 2018. *United States v. Farias Enter. LLC*, 13 OCAHO no. 1338, 7 (2020).

Here, all of the violations for which Respondent is liable occurred after November 2, 2015. In Count I, Respondent failed to prepare I-9s for twenty-eight employees, and in Count II, the employer failed to sign section 2. *See* Complainant's Prehearing Statement Ex. G-2. Since these violations all occurred after November 2, 2015 and are continuing violations, the $224–$2,236 penalty range applies.

Complainant's proposed penalties are approximately eighty percent of the maximum of 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 high 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. This calculation gives the strongest weight to a factor that is not explicitly set out in the statute, and relegates the

statutory factors to relatively small five percent adjustments. As a consequence, the most aggravated cases are those with the highest percentage of violations, regardless of the other factors.

The Court finds that the rate of violations is a factor to be considered along with other factors. Considering a totality of the circumstances as set forth in the evidence of record and pleadings, Complainant'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. For the majority of violations, using a mid-range penalty as a base penalty, the Court considers the small business mitigating factor is partially offset by the aggravating factor of the seriousness of the violations. The seriousness factor weighs more heavily because of the rate of violations. The Court will also make adjustments to the fines based on the non-statutory factors. Respondent's business is small, with minimal to no profit, and the fine proposed by ICE would appear to put the Respondent out of business. Accordingly, the Court will impose a fine of $ 967 per violation.

IV. CONCLUSION

Complainant's Motion for Summary Decision is GRANTED. Respondent is liable for twenty-eight violations in Count I, and one violation in Count II. After considering the statutory and non-statutory factors and the totality of the evidence, the undersigned finds that Complainant's proposed penalty should be adjusted. The penalty amount for twenty-nine violations of § 1324a is $ 28,043.

V. FINDINGS OF FACT

1. On January 10, 2018, the Department of Homeland Security, Immigration and Customs Enforcement, served 1523 Avenue J. Foods, D/B/A 7-ELEVEN STORE NO. 36802 with a Notice of Inspection.

2. On June 27, 2018, the Department of Homeland Security, Immigration and Customs Enforcement served 1523 Avenue J. Foods, DBA 7-ELEVEN STORE NO. 36802 with a Notice of Intent to Fine.

3. On August 8, 2019, the Department of Homeland Security, Immigration and Customs Enforcement, filed a complaint with the Office of the Chief Administrative Hearing Officer.

4. 1523 Avenue J. Foods, DBA 7-ELEVEN STORE NO. 36802 presented Forms I-9 for thirteen employees.

5. 1523 Avenue J. Foods, DBA 7-ELEVEN STORE NO. 36802 did not present Forms I-9 for twenty-eight employees.

6. 1523 Avenue J. Foods, DBA 7-ELEVEN STORE NO. 36802 failed to ensure proper completion of section 1 and/or failed to properly complete section 2 for one employee.

VI. CONCLUSIONS OF LAW

1. 1523 Avenue J. Foods, DBA 7-ELEVEN STORE NO. 36802 is an entity within the meaning of 8 U.S.C. § 1324a(a)(1).

2. All conditions precedent to the institution of this proceeding have been satisfied.

3. 1523 Avenue J. Foods, DBA 7-ELEVEN STORE NO. 36802 is liable for twenty-nine violations of § 1324a(a)(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. "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)).

7. "[T]he party opposing the motion for summary decision 'may not rest upon 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)).

8. 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).

9. Impossibility may provide a valid affirmative defense to the failure to present Forms I-9 where the forms were actually completed, but later became unavailable through no fault of the employer. *United States v. Ideal Transportation Co.*, 12 OCAHO no. 1290, 7 (2016).

10. To assert an impossibility defense, the Respondent must demonstrate that the forms were completed. *See United States v. Alvand, Inc.*, 2 OCAHO no. 352, 378, 383 (1991).

11. 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.

12. 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).

13. 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).

14. 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).

15. 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).

16. Failure to complete a form or to ensure the employer signs the form is serious. *United States v. Metro. Warehouse, Inc.*, 10 OCAHO no. 1207, 7 (2013).

17. 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).

18. Paperwork violations are continuing 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* 8 C.F.R. § 274a.2(b)(2)(i)(A); *United States v. Curran Eng'g Co., Inc*., 7 OCAHO 975, 895 (1997).

19. Penalties are assessed based on the date that the Department of Homeland Security, Immigration and Customs Enforcement serves the Notice of Intent to Fine. *United States v. Farias Enter. LLC*, 13 OCAHO no. 1338, 7 (2020).

20. If the violation occurred before 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 twenty-nine violations of § 1324a(a)(1)(B) and is directed to pay civil penalties in the total amount of $ 28,043 . Respondent shall cease and desist from violating § 1324a.

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

SO ORDERED.

Dated and entered on June 9, 2020.

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Jean C. King
Chief 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.