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

July 15, 2020

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 19A00026
	)	
ERIKSMOEN COTTAGES, LTD., Respondent.	)	

FINAL DECISION ON PENALTIES

I. INTRODUCTION

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. On May 20, 2019, the Department of Homeland Security Immigration and Customs Enforcement (ICE or the Government) filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that Eriksmoen Cottages, Ltd. (Respondent or "Eriksmoen") failed to prepare and/or present Forms I-9 for six employees and failed to ensure the employee properly completed section 1 and/or failed to properly complete sections 2 or 3 of the Forms I-9 for twenty-four employees. On May 1, 2020, the undersigned issued an Order on Motion for Summary Decision in *United States v. Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355 (2020), finding that Eriksmoen was liable for thirty employment eligibility verification violations under 8 U.S.C. § 1324a. The Administrative Law Judge (ALJ) bifurcated the liability and penalty assessment issues in order to allow the parties to submit supplemental briefings addressing the penalty determination. *Id.* Respondent submitted a supplemental brief addressing the penalty determination. This decision addresses the penalty assessment for Respondent.

II. LEGAL STANDARDS

A. Summary Decision

Under the OCAHO rules, the 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)). 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 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. 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. 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)). 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

[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.

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. *United States v. Metro. Enters., Inc.*, 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, 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). A party seeking consideration of a non-statutory factor, such as the 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 a favorable exercise of discretion. *Id.* at 7.

III. THE POSITIONS OF THE PARTIES

A. The Government's Position

Potential penalties for the thirty violations in this case range from $6,900 to $68,760. The Government is seeking $36,900 in penalties—$1,230 for each violation. The Government asserted that it exercised discretion in deciding to only charge violations for Eriksmoen's current employees, rather than all in-scope employees. *See* Mot. for Summ. Dec. Exh. G-10.

The Government explained that it began its fine calculation by setting a base fine amount based on the "Form I-9 Fine Matrix." *Id*. at 17. Based on the employee lists and reports provided by Eriksmoen, the Government determined that Eriksmoen had a "violation percentage" of 36%. *Id*. According to the Government, thirty of the eighty-four total Forms I-9 that should have been presented had substantive violations; in other words, 36% of the forms had substantive violations. *Id*. Consistent with the matrix, the Government assigned a base fine of $1,230 for all substantive paperwork violations committed by companies with no history of previous enforcement action and a violation percentage of 36%. *Id*. Thereafter, the Government mitigates or aggravates the base fine by 5% for each of the five enumerated factors under 8 C.F.R. § 274a.10(b)(2)(i)-(v). *Id*. The Government determined that business size was a mitigating factor, but the seriousness of the violations was an aggravating factor and treated the other factors as neutral. *Id*. Accordingly, the Government determined that the base fine amount should not be enhanced or mitigated based on those statutory factors. *Id*.

B. Respondent's Position

Respondent opposes the Government's assessment of penalties and argues that the penalty should be adjusted to the low range of permissible penalties. Resp't Supp. Mem. as to Damages ("Resp't Mem.") at 9. Respondent argues that it acted in good faith and, therefore, should have its penalty mitigated based on that factor. *Id*. at 4. Respondent explains that it submitted the Forms I-9 of the office staff the day after it received notice that it erroneously failed to initially

present those forms. *Id*. at 5. Respondent notes that when it received a letter from the Government on August 7, 2018, requesting eight additional Forms I-9, it delivered the requested forms within the time designated on the letter. *Id*. Respondent also explains that once it received the Government's letter of "Notice of Suspect Documents," informing Respondent that two of Respondent's employees appeared to be unauthorized to work, it immediately took the two employees off the work schedule until they provided updated information to verify their employment eligibility. *Id*. In sum, Respondent asserts that it complied with each of the Government's requests in good faith, despite its error in initially failing to submit the Forms I-9 for the office staff.

Respondent further submits that its penalty should be mitigated because its failure to initially present the Forms I-9 for the office staff is not a serious violation. *Id*. at 7. Respondent asserts that, while the failure to prepare a Form I-9 *at all* is a serious violation, Eriksmoen prepared Forms I-9 for the six employees of the office staff and kept them in a separate filing cabinet from the individuals that Respondent mistakenly considered "the employees." *Id*. Accordingly, Respondent asserts that its violation does not frustrate the national policy intended to ensure that unauthorized aliens are excluded from the workplace. *Id*. Moreover, Respondent asserts that Forms I-9 that are untimely presented by a day should warrant a lower penalty than Forms I-9 which are presented months later and certainly a lower penalty than Forms I-9 which are not presented at all. *Id*. (citing to *United States v. Alpine Staffing, Inc.*, 12 OCAHO no. 1303 (2017)).

Respondent asserts that its penalty should be mitigated because all employees listed in the Notice of Intent to Fine were authorized to work in the United States. *Id*. at 8. Respondent also asserts that its penalty should be mitigated because it has no history of previous violations. *Id*.

Lastly, Respondent argues that, as a matter of equity, the Court should mitigate the penalty due to the challenges Eriksmoen has faced by the current national emergency. Respondent states that it "has had multiple clients and employees test positive for the Coronavirus, has spent substantial time and effort to hire, train and manage staff to keep people safe, and has incurred substantial expenses in acquiring and providing personal protection equipment (PPE) for its staff and clients." *Id*. According to the Supplemental Declaration of Brittany Markfort and Vicky Matson, "[i]mposition of the penalties sought by the Government would create a substantial economic hardship under the present circumstances." *Id*.

IV. DISCUSSION

OCAHO case law has long recognized that there is no single preferred method of calculating penalties. *Fowler Equip. Co.*, 10 OCAHO no. 1169 at 4 (citing *United States v. Felipe, Inc.*, 1 OCAHO no. 108, 726, 732 (1989)). The primary focus is on the reasonableness of the result achieved. *Id*. The goal is to set a penalty that is sufficiently meaningful to enhance the probability of future compliance, *United States v. Jonel, Inc.*, 8 OCAHO no. 1008, 175, 201 (1998), without being unduly punitive in light of Respondent's resources, *United States v. Minaco Fashions, Inc.*, 3 OCAHO no. 587, 1900, 1909 (1993).

A. Statutory Factors

The Court has considered the five statutory factors in evaluating the appropriateness of the Government's proposed penalty against Respondent: (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. *See* 8 U.S.C. § 1324a(e)(5).

As both the Government and Eriksmoen noted, mitigation of the penalty is warranted given that Eriksmoen is a small, family-owned business. *See United States v. Carter*, 7 OCAHO no. 931, 121, 162 (1997) (noting that OCAHO case law generally considers businesses with fewer than 100 employees to be small businesses).

The Government treated "good faith" as a neutral factor but Respondent argues that it should be considered a mitigating factor in this case. While the issue is close, the Court agrees with the Government that "good faith" should be a neutral factor. The primary focus of a good faith analysis is "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. Executive Cleaning Servs. of Long Island Ltd.*, 13 OCAHO no. 1314, 3 (2018); *see also United States v. Frio Cnty Partners, Inc.*,12 OCAHO no. 1276, 16 (2016). Respondent put forth several arguments in establishing that it acted in good faith with respect to the Government's investigations. However, all of the conduct Eriksmoen asserted in support of its arguments concerned the actions it took *after* the Government began investigating the company.

Accordingly, the only basis upon which to assess the steps that Eriksmoen took before the investigation to reasonably ascertain its legal obligations is Eriksmoen's compliance rate. As noted in the previous Order addressing Respondent's liability, the Court found that, apart from Respondent's failure to present Forms I-9 for the office staff, Respondent had not properly completed Forms I-9 for twenty-four of the company's eighty-four employees, a compliance rate of 71% . *See Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355 at 8. Comparatively, Eriksmoen's compliance rate of 71% is much higher than the compliance rates in cases where OCAHO ALJs have found "good faith" to be a neutral factor. *See e.g., United States v. Farias Enterprises LLC*, 13 OCAHO no. 1338, 5 (2020) (finding good faith to be a neutral factor despite a 100% violation rate); *Executive Cleaning Servs. of Long Island Ltd.*, 13 OCAHO no. 1314 at 3 (finding good faith to be a neutral factor despite a 100% violation rate).

The Court finds that a penalty mitigation is not warranted in this case. OCAHO's case law has made it clear that "a low compliance rate, alone, does not warrant a finding of bad faith." *Farias Enterprises LLC*, 13 OCAHO no. 1338 at4 (citing *Metro. Enters.*, 12 OCAHO no. 1297 at 15). However, OCAHO precedent is silent on whether a high compliance rate, alone, warrants a finding of good faith. As shown in this case, ICE factors in the compliance or violation rate when assessing the initial penalty amount, specifically, when it sets the base penalty amount. A company with a high compliance rate will have its penalty set at a lower amount on the "Form I-9 Fine Matrix." This Court finds that a high compliance rate could be evidence of good faith, but in this case, the remaining violations demonstrated some persistent problems with the

Respondent's compliance program, in particular with reverification requirements. *See* Mot. for Summ. Dec. Exh. G-18. Further, there was no other evidence provided regarding the Respondent's program and the steps it took to follow the law. Accordingly, the Court finds the good faith factor to be neutral.

The Government aggravated the penalty based on the seriousness of the violations. However, Respondent argues that its penalty should be mitigated because its violations were not serious. Respondent asserts that, while the failure to prepare a Form I-9 *at all* is a serious violation, Eriksmoen prepared Forms I-9 for the six employees of the office staff and kept them in a separate filing cabinet from the individuals that Respondent mistakenly considered "the employees." Resp't Mem. at 7. Moreover, Respondent asserts that Forms I-9 that are untimely presented by a day should warrant a lower penalty than Forms I-9 which are presented months later and certainly a lower penalty than Forms I-9 which are not presented at all. *Id*. (citing to *United States v. Alpine Staffing, Inc.*, 12 OCAHO no. 1303 (2017)). Eriksmoen did not address the seriousness of the paperwork violations it was found liable for under Count II of the complaint.

Although the Court finds that Respondent's violations are serious, the Court agrees with Respondent that there is a meaningful difference between a complete failure to present Forms I-9 and the manner that Eriksmoen presented its forms for the office staff. Eriksmoen demonstrated that it had initially, by mistake, failed to present Forms I-9 for the office staff, and subsequently presented these forms to the Government one day after it was notified of the mistake. The seriousness of a violation must be evaluated on a continuum because not all violations are necessarily equal. *United States v. Cawoods Produce, Inc.*, 12 OCAHO no. 1280, 17 (2016) (citing *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 8 (2010)). A violation is serious if it undercuts the effectiveness of the congressional prohibition of hiring unauthorized aliens. *Id*. (citing *United States v. Sunshine Bldg. Maint., Inc.*, 7 OCAHO no. 997, 1122, 1180 (1998)). Moreover, it is well-established in OCAHO case law that the failure to prepare or present an I-9 is one of the most serious violations because it frustrates the national policy intended to ensure that unauthorized aliens are excluded from the workplace. *United States v. Golden Employment Group, Inc.*, 12 OCAHO no. 1277, 2 (2016). The Court believes that the conduct for which Respondent was found liable, under Count I of the complaint, does not render the congressional prohibition of hiring unauthorized aliens ineffective to the same degree as a complete failure of an employer to prepare or present Forms I-9 to the Government and accordingly will treat the violations as less serious under the circumstances in this case.

With respect to the paperwork violations for which Respondent was found liable under Count II of the complaint, the Court finds that these violations are serious, albeit to a lesser degree than a complete failure to prepare or present Forms I-9. *See United States v. Speedy Gonzales Constr., Inc.*, 11 OCAHO no. 1243, 5 (2015) ("violations involving failure to ensure proper completion of I-9 forms are serious, but somewhat less so than are the . . . violations involving failure to present the forms upon request by the government."). The differing degrees of seriousness for each count may be reflected in the final penalty. *See Cawoods Produce, Inc.*, 12 OCAHO no. 1280 at 17. Since the Court finds that Respondent's violations are serious, the Court finds that aggravation of the penalty is warranted.

The Government treated the fourth factor, whether or not an individual at issue was an unauthorized alien, as a neutral factor. Respondent asserts that its penalty should be mitigated because all employees listed in the Notice of Intent to Fine were authorized to work in the United States. The Court agrees with the Government that this should be treated as a neutral factor. Under OCAHO case law, ICE's failure to affirmatively show that particular individuals were unauthorized for employment does not require that the factor be treated as a mitigating factor. *United States v. Romans Racing Stables, Inc.*, 11 OCAHO no. 1232, 5 (2014). This "may be treated as neutral, under the rationale that 'compliance with the law is the expectation, not the exception.'" *Id*. (quoting *Snack Attack Deli, Inc.*, 10 OCAHO no. 1137 at 9).

Respondent also asserts that its penalty should be mitigated because it has no history of previous violations. *Id*. The Court agrees with the Government that this should be treated as a neutral factor. Similar to the previous factor, OCAHO case law makes it clear that having no history of previous violations should be treated as a neutral factor, rather than a mitigating factor, because "compliance with the law is the expectation, not the exception." *See, e.g.*, *Alpine Staffing, Inc.*, 12 OCAHO no. 1303 at 18-19; *Snack Attack Deli, Inc.*, 10 OCAHO no. 1137 at 9; *see also Romans Racing Stables, Inc.*, 11 OCAHO no. 1232 at 5 (listing numerous cases that have held that it is appropriate to treat the lack of history of previous violations as a neutral factor).

B. Non-Statutory Factors

Respondent argues that its penalty should be mitigated due to the economic hardships that the company is currently facing due to the Coronavirus pandemic. While the Court recognizes Eriksmoen's hardships as a factor, Respondent has not satisfied its burden of proving that the facts support a favorable exercise of discretion. *See United States v. Buffalo Transp., Inc.*, 11 OCAHO no. 1263, 11 (2015).

OCAHO case law has recognized that an employer's financial circumstances is an appropriate non-statutory consideration. *See 3679 Commerce Place*, 12 OCAHO no. 1296 at 9. OCAHO has also 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). Commonly, the Court considers, as a matter of equity, an employer's inability to pay the fine. *See United States v. Raygoza*, 5 OCAHO no. 729, 49, 52 (1995) ("One factor which is often looked at in the precedents is the respondent's ability to pay.") (internal quotation omitted).

Here, Respondent has not explicitly stated that it is unable to pay the fine or has provided any specific evidence showing that it is unable to pay the fine. Respondent stated that it "has had multiple clients and employees test positive for the Coronavirus, has spent substantial time and effort to hire, train and manage staff to keep people safe, and has incurred substantial expenses in acquiring and providing personal protection equipment (PPE) for its staff and clients." Resp't Mem. at 7. According to the Supplemental Declaration of Brittany Markfort and Vicky Matson, "[i]mposition of the penalties sought by the Government would create a substantial economic hardship under the present circumstances." *Id*. These statements are insufficient to warrant a mitigation of the final penalty. Typically, this Court expects an employer to submit detailed financial statements so that the Court can consider the "complete picture of [the business's]

financial health." *See United States v. Integrity Concrete, Inc.*, 13 OCAHO no. 1307, 17 (2017). ("Without an audited financial history or more detailed information concerning [Respondent's] overall financial health, I find that [Respondent] has failed to establish financial inability to pay the total civil penalty at issue in this matter."). Since Respondent has not provided any evidence of its financial state, beyond its own statements, the Court will not mitigate the penalty based on this factor.

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 occur after November 2, 2015, the adjusted penalty range in § 85.5 applies. *See* § 85.5. For civil penalties assessed between January 29, 2018, and June 19, 2020, the minimum penalty for each violation is $224, and the maximum penalty is $2,236. *Id*.

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. 1523 Avenue J Foods Inc.*, 14 OCAHO no. 1361, 5 (2020). Violations are assessed when the Government serves the NIF, in this case on July 16, 2018. *Id*.

Here, all of the violations for which Respondent is liable occurred after November 2, 2015. In Count I, Respondent failed to present Forms I-9 for six employees, and in Count II, Respondent failed to ensure that Forms I-9 were properly prepared for twenty-four employees. *See Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355 at 8. Since these violations all occurred after November 2, 2015, and are continuing violations, the $224-$2,236 penalty range applies.

The Court finds the Government's calculation of penalties to be generally reasonable, in light of the five enumerated factors, under 8 C.F.R. § 274a.10(b)(2)(i)-(v), but will make adjustments based upon the seriousness of the violations. Complainant's proposed penalties are in the middle of the range that it considered, due to Complainant's compliance rate of 71%. Using the middle range, the penalty is mitigated due to the fact that Eriksmoen is a small business. The penalty is aggravated in reflection of the relative seriousness of the violations. The Court also agreed with the Government that the remaining statutory factors are treated as neutral in this case. Lastly, the Court found that the penalty will not be mitigated based on principles of equity. Accordingly, the Court will mitigate the penalty by 2.5% from the mid-range amount of $36,900. The final penalty amount equals $35,977.50

V. CONCLUSION

The Court has reviewed each statutory factor and adjusted the penalties based upon the seriousness of the violations. With respect to Eriksmoen's purported financial hardships due to the Coronavirus pandemic, the Court found that mitigation of the penalty was not warranted because Eriksmoen did not provide sufficient evidence that it would suffer substantial financial

hardship as a result of the fine. The penalty amount for the thirty violations of § 1324a is $35,977.50.

VI. FINDINGS OF FACT

1. On July 16, 2018, the Department of Homeland Security, Immigration and Customs Enforcement, served Eriksmoen Cottages, Inc., with a Notice of Inspection.

2. On January 16, 2019, the Department of Homeland Security, Immigration and Customs Enforcement, served Eriksmoen Cottages, Inc., with a Notice of Intent to Fine.

3. On May 20, 2019, the Department of Homeland Security, Immigration and Customs Enforcement, filed a complaint with the Office of the Chief Administrative Hearing Officer.

4. Eriksmoen Cottages, Inc., presented Forms I-9 for eighty-four employees.

5. Eriksmoen Cottages, Inc., did not timely present Forms I-9 for six employees.

6. Eriksmoen Cottages, Inc., failed to ensure proper completion of section 1 and/or failed to properly complete section 2 and/or section 3 for twenty-four employees.

VII. CONCLUSIONS OF LAW

1. Eriksmoen Cottages, Inc., 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. Eriksmoen Cottages, Inc., is liable for thirty 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 nonmoving party." *United States v. Prima Enters., Inc.*, 4 OCAHO no. 615, 261 (1994) (citations omitted).

9. An employer cannot avoid liability by submitting I-9 forms at some later point in the process, absent an extension of time. *See e.g.*, *United States v. Golden Employment Group, Inc.*, 12 OCAHO no. 1274, 5 (2016); *United States v. Horno MSJ, Ltd.*, 11 OCAHO no. 1247, 7 (2015); *United States v. A&J Kyoto Japanese Rest. Inc.*, 10 OCAHO no. 1186, 7 (2013) (noting that late-produced I-9's did not absolve employer of liability for failure to present them initially); *United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 5 (2013) (observing that the violations occurred at the time of the inspection).

10. 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.

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. The primary focus of a good faith analysis is "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. Executive Cleaning Servs. of Long Island Ltd.*, 13 OCAHO no. 1314, 3 (2018); *see also United States v. Frio Cnty Partners, Inc.*,12 OCAHO no. 1276, 16 (2016).

16. The seriousness of a violation must be evaluated on a continuum because not all violations are necessarily equal. *United States v. Cawoods Produce, Inc.*, 12 OCAHO no. 1280, 17 (2016) (citing *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 8 (2010)).

17. A violation is serious if it undercuts the effectiveness of the congressional prohibition of hiring unauthorized aliens. *United States v. Cawoods Produce, Inc.*, 12 OCAHO no. 1280, 17 (2016) (citing *United States v. Sunshine Bldg. Maint., Inc.*, 7 OCAHO no. 997, 1122, 1180 (1998)).

18. The failure to prepare or present an I-9 is one of the most serious violations because it frustrates the national policy intended to ensure that unauthorized aliens are excluded from the workplace. *United States v. Golden Employment Group, Inc.*, 12 OCAHO no. 1277, 2 (2016).

19. Violations involving failure to ensure proper completion of I-9 forms are serious, but somewhat less so than are the violations involving failure to present the forms upon request by the government. *United States v. Speedy Gonzales Constr., Inc.*, 11 OCAHO no. 1243, 5 (2015).

20. The differing degrees of seriousness for each count may be reflected in the final penalty. *United States v. Cawoods Produce, Inc.*, 12 OCAHO no. 1280, 17 (2016).

21. ICE's failure to affirmatively show that particular individuals were unauthorized for employment does not require that the factor be treated as a mitigating factor. *United States v. Romans Racing Stables, Inc.*, 11 OCAHO no. 1232, 5 (2014).

22. Under OCAHO case law, a lack of history of previous violations should be treated as a neutral factor, rather than a mitigating factor, because "compliance with the law is the expectation, not the exception." *See, e.g., United States v. Alpine Staffing, Inc.*, 12 OCAHO no. 1303, 18-19 (2017); *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 9 (2010); *United States v. Romans Racing Stables, Inc.*, 11 OCAHO no. 1232, 5 (2014).

23. OCAHO case law has recognized that an employer's financial circumstances is an appropriate non-statutory consideration. *United States v. 3679 Commerce Place*, 12 OCAHO no. 1296, 9 (2015).

24. 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).

25. Commonly, the Court considers, as a matter of equity, an employer's inability to pay the fine. *See United States v. Raygoza*, 5 OCAHO no. 729, 49, 52 (1995) ("One factor which is often looked at in the precedents is the respondent's ability to pay.") (internal quotation omitted).

26. Typically, this Court expects an employer to submit detailed financial statements so that the Court can consider the "complete picture of [the business's] financial health." *See United States v. Integrity Concrete, Inc.*, 13 OCAHO no. 1307, 17 (2017). ("Without an audited financial history or more detailed information concerning [Respondent's] overall financial health, I find that [Respondent] has failed to establish financial inability to pay the total civil penalty at issue in this matter.").

27. 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.

28. For violations that occur after November 2, 2015, the adjusted penalty range in § 85.5 applies. *See* § 85.5.

29. For civil penalties assessed between January 29, 2018, and June 19, 2020, the minimum penalty for each violation is $224, and the maximum penalty is $2,236. *See* § 85.5.

30. 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. 1523 Avenue J Foods Inc.*, 14 OCAHO no. 1361, 5 (2020).

ORDER

ICE's motion for summary decision is granted in part. Respondent is directed to pay civil penalties in the total amount of $35,977.50. The parties are free to establish a payment schedule in order to minimize the impact of the penalty on the operations of the company.

SO ORDERED.

Dated and entered on July 15, 2020.

_____

Jean 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) (2012).

Provisions governing the Attorney General's review of this order, or any CAHO order modifying or vacating this order, are set forth at 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. pt. 68. Within thirty (30) days of the entry of a final order by the CAHO, or within sixty (60) days of the entry of an Administrative Law Judge's final order if the CAHO does not modify or vacate such order, the Attorney General may direct the CAHO to refer any final order to the Attorney General for review, pursuant to 28 C.F.R. § 68.55.

A petition to review the final agency order may be filed in the United States Court of Appeals for the appropriate circuit within forty-five (45) days after the date of the final agency order pursuant to 8 U.S.C. § 1324a(e)(8) and 28 C.F.R. § 68.56.