

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

December 16, 2021

UNITED STATES OF AMERICA,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324a Proceeding
)	OCAHO Case No. 2020A00049
)	
MAVERICK CONSTRUCTION LLC,)	
Respondent.)	
_____)	

Appearances: Daniel Burkhart, Esq., for Complainant
Robert H. Gibbs, Esq., for Respondent

ORDER ON MOTION FOR SUMMARY DECISION

This case arises under the employer sanctions provisions under Section 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. Pending before the Court are Complainant's Motion for Summary Decision filed July 22, 2020, seeking \$286,356.00 in penalties, and Respondent's Motion for Summary Decision filed July 27, 2020, seeking a recalculation and lowering of the amount of the fines.

I. BACKGROUND

Respondent, Maverick Construction LLC, is a corporation authorized to conduct business in the State of Washington. Compl. 1; Complainant's Motion for Summary Decision Dec. Ex. G-3.¹ Maverick Construction is a residential framing contractor. R's Mot. Ex. 5. On July 16, 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-1. On November 13, 2019, Complainant served Respondent with the Notice of Intent to Fine (NIF). Compl. Ex.

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. #." Respondent's response to Complainant's Motion for Summary Decision will be cited as "R's Opp."

A. Respondent timely requested a hearing. *Id.* at Ex. B. Complainant filed the Complaint on February 14, 2020, and charged Respondent with one count for failure to prepare and/or present Forms I-9 for 136 employees. *Id.* at 3–4, Ex. A. Complainant seeks \$286,356.00 in penalties. *Id.* The Complainant and Respondent filed timely cross-motions for summary decision, and 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).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. Primera Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994) (internal citations omitted). Federal Rule of Civil Procedure 56(c), a permissible guidance in OCAHO proceedings, *see* 28 C.F.R. § 68.1, allows an ALJ to consider “admissions on file” for the basis

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>.

of summary decision. *United States v. St. Croix Pers. Servs., Inc.*, 12 OCAHO no. 1289, 9 (2016) (internal 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 any 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), and then citing *United States v. Carter*, 7 OCAHO no. 931, 121, 159 (1997)).

The civil penalties for violations of § 1324a are intended “to set a sufficiently meaningful fine to promote future compliance without being unduly punitive.” *Id.* 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) (citing *United States v. Raygoza*, 5 OCAHO no. 729, 48, 51 (1995)). 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 (internal citation omitted). Finally, 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) (internal citation omitted).

III. DISCUSSION

A. Liability

Complainant argues that there is no genuine issue of material fact as to Respondent’s liability in this matter. C’s Mot. 3. The evidence shows that Respondent indicated in an email to ICE that it did not maintain I-9 forms for its employees. R’s. Mot. 1; C’s Mot. Ex. 6. Respondent does not contest liability in its motion, citing to the email. *See* R’s Mot. 1–2. Further, Respondent admitted in the motion that there were 136 employees during the audit period. *Id.*

Accordingly, based on the admissions in the file, the Court finds that there is no genuine issue of material fact as to whether the violations occurred. *See St. Croix Pers. Servs., Inc.*, 12 OCAHO no. 1289, at 9 (“admissions on file” permissible basis for summary decision). The Court finds that Complainant met its burden to establish that Respondent is liable for hiring 136 individuals without complying with the requirements under Section 274A(a)(1)(B) of the Act.

B. Civil Penalties

The Court will bifurcate the issues of liability and penalty assessment in light of the passage of time and the ongoing COVID-19 pandemic. *See United States v. Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355, 8–9 (2020) (bifurcating liability and penalty given the COVID-19 national emergency). The decision to bifurcate proceedings is in the Court’s discretion. *Id.* (citing *Hernandez v. Farley Candy Co.*, 5 OCAHO no. 781, 464, 465 (1995)).

Respondent submitted multiple exhibits potentially relevant for penalty assessment, including: a Quarterly Unemployment Insurance Tax Summary for the first quarter of 2020, R’s Mot. Ex. 1; a CARES SBA-PPP printout for the first five months of 2020, R’s Mot. Ex. 2; and a declaration from the owner with attached 2020 workers’ compensation return, profit and loss statements for tax years 2017–2019, and three IRS Quarterly Tax Returns for 2019 and 2020, R’s Mot. Ex. 5. Respondent argued that from the time of the audit to the time of its motion, it reduced the number of employees from 136 people to 60 due to the pandemic. *Id.* at Ex. 5; C’s Mot. Ex. 4.

As it appears that the COVID-19 pandemic has resulted in a dynamic business climate, and the last financial information was provided from the first quarter of 2020, the Court provides Respondent the opportunity to submit updated financial information relevant to the penalty determination. Complainant may file a response to address updated financial information submitted by Respondent. The Court will assess the penalties in a subsequent order.

Respondent must submit the supplemental information no later than January 6, 2022. Complainant may submit a response no later than January 17, 2022.

IV. CONCLUSION

Complainant’s Motion for Summary Decision is GRANTED IN PART. The Court finds Respondent liable for failing to prepare and/or present Forms I-9 for 136 employees, in violation of Section 274A(a)(1)(B) of the Act.

V. FINDINGS OF FACT

1. On July 16, 2018, the Department of Homeland Security, Immigration and Customs Enforcement, served Maverick Construction, LLC, with a Notice of Inspection.
2. On November 13, 2019, the Department of Homeland Security, Immigration and Customs Enforcement, served Maverick Construction LLC with a Notice of Intent to Fine.
3. Maverick Construction LLC did not prepare or present Forms I-9 for 136 employees.

VI. CONCLUSIONS OF LAW

1. Maverick Construction LLC 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. There is no genuine issue of material fact that Maverick Construction LLC Inc. is liable for 136 violations of 8 U.S.C. § 1324a(a)(1)(b).
4. An 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).
5. An Administrative Law Judge may consider “admissions on file” for the basis of summary decision. *United States v. St. Croix Pers. Servs., Inc.*, 12 OCAHO no. 1289, 9 (2016) (internal citations omitted).

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.

SO ORDERED.

Dated and entered on December 16, 2021.

Jean C. King
Chief Administrative Law Judge