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

December 20, 2021

UNITED STATES OF AMERICA, Complainant, v. BAZAN'S ENTERPRISES, INC., d/b/a TACO OLE MISSION Respondent.	)))))))))	8 U.S.C. § 1324a Proceeding OCAHO Case No. 2020A00084

Appearances: Colin Maguire, Esq., and Mark Whitworth, Esq., for Complainant
Anthony Matulewicz, Esq., for Respondent

AMENDED ORDER ON MOTION FOR SUMMARY DECISION

An Order on Motion For Summary Decision was initially issued in the above-captioned case on December 3, 2021. Pursuant to 28 C.F.R. § 68.52(f), this Amended Order on Motion for Summary Decision amends the order issued on December 3, 2021, and corrects solely for typographical and clerical errors.

This case arises under the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a. Pending is Complainant's Motion for Summary Decision.

I. BACKGROUND

Respondent, Bazan's Enterprises, Inc. d/b/a Taco Ole Mission,[1] hereinafter Taco Ole Mission, is a corporation registered in the state of Texas. Mot. Summ. Dec. Attach. A. On September 26, 2018, Complainant, the Department of Homeland Security, Immigration and Customs

[1] OCAHO Case No. 2020A00087, *United States v. Bazan Enterprises of Edinburg, Inc., d/b/a Taco Ole Edinburg*, is currently pending before the Court. While Case No. 2020A00087 has a similar name, it is considered to be a distinct entity from Taco Ole Mission.

Enforcement (ICE), served Respondent with a Notice of Intent to Fine (NIF). Compl. Ex. A. The NIF alleges seventy-one violations of § 274A(a)(1)(B) and sixty-one violations of § 274A(a)(1)(A), seeking a total of $431,609 in civil penalties. *Id.* Respondent timely filed a request for a hearing on October 24, 2018. Compl. Ex. B.

On August 21, 2020, Complainant filed with the Office of Chief Administrative Hearing Officer (OCAHO) a complaint alleging seventy-one violations of § 274A(a)(1)(B) and sixty-one violations of § 274A(a)(1)(A), seeking a total of $431,609 in civil penalties. Compl. Ex. A. Respondent filed an answer on October 2, 2020. On November 5, 2020, Complainant filed its Motion for Summary Decision & Prehearing Statements With Initial Disclosures. On November 30, 2020, Complainant filed a Motion for Dismissal by Abandonment. The Court granted Complainant's subsequent Motion to Withdraw Its Motion for Dismissal on December 17, 2020. Respondent filed its Prehearing Statement on December 8, 2020. The Respondent has not filed an opposition to the Motion for Summary Decision.

II. STANDARDS

A. Summary Decision

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). OCAHO precedent has held that "[a]n issue of fact is genuine only if it has a real basis in the record" and a "[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) (first citing *Matsuhita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986), and then citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).[2]

B. Employment Verification Requirements

"In cases arising under 8 U.S.C. § 1324a, the government has the burden of proving by a preponderance of the evidence that the respondent is liable for committing a violation of the employment verification requirements." *United States v. Metro Enters.*, 12 OCAHO no. 1297, 7 (2017) (citing *United States v. Nebeker, Inc.*, 10 OCAHO no. 1165, 4 (2013)).

Per 8 C.F.R. § 274a.2(b)(2)(ii), "employers must prepare and retain Forms I-9 for employees hired after November 6, 1986, and are required to produce the Forms I-9 for inspection by the

[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.

government upon three days' notice." *Metro Enters.*, 12 OCAHO no. 1297, at 7 (citing 8 C.F.R. § 274a.2(b)(2)(ii); *United States v. Keegan Variety, LLC*, 11 OCAHO no. 1238, 2 (2014)).

C. Paperwork Violations Penalties

8 C.F.R. § 274a.10(b)(2) and 28 C.F.R. § 85.5 set forth parameters for civil penalties in paperwork violations cases. "The applicable penalty range depends on the date of the violations and the date of assessment." *United States v. Psychosomatic Fitness, LLC*, 14 OCAHO no. 1387a, 9 (2021) (citing 8 C.F.R. § 274a.10(b)(2); 28 C.F.R. § 85.5). "The date of assessment is the date that ICE services the NIF on a respondent." *United States v. Farias Enters.*, 13 OCAHO no. 1338, 7 (2020).

For civil penalties assessed between January 29, 2018, and June 19, 2020, the maximum penalty for each violation that occurred after November 2, 2015, is $224, and the maximum penalty is $2,236. 8 C.F.R. § 274a.10(b)(2); 28 C.F.R. § 85.5. The government has the burden of proof on penalty, *United States v. March Constr., Inc.*, 10 OCAHO no. 1158, 16 (2012), and must prove the existence of any aggravating factor by a preponderance of the evidence. *United States v. Niche, Inc.*, 11 OCAHO no. 1250, 6 (2015) (internal citation omitted). Proposed penalty calculations by Complainant are not binding in OCAHO proceedings. *Alpine Staffing, Inc.*, 12 OCAHO no. 1303, 10 (2017) (citing *United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6 (2011)).

To assess an appropriate penalty, "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." 8 U.S.C. § 1324a(e)(5). Neither 8 U.S.C. § 1324a(e)(5) nor the regulations mandate a particular outcome or weight given to each factor. *Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, at 6–7. OCAHO considers the circumstances and facts of each case to determine any weight given to each factor. *United States v. Eriksmoen Cottages*, *Ltd.*, 14 OCAHO no. 1355a, 7 (2020) (citing *Metro Enters.*, 12 OCAHO no. 1297, at 8).

OCAHO "may also consider non-statutory factors, such as an inability to pay and the public policy of leniency toward small businesses." *Psychosomatic Fitness LLC*, 14 OCAHO no. 1387a, at 10 (internal citations omitted). The party seeking consideration of a non-statutory factor has the burden of proof to show the factor should be considered as a matter of equity, and that there is a factual basis for the ALJ to grant 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)).

D. The Knowing Hire of Unauthorized Aliens

8 U.S.C. § 1324a(a)(2) makes it "unlawful for an employer to hire an alien knowing that the alien is unauthorized to work in the United States." *United States v. Foothill Packing, Inc.*, 11 OCAHO no. 1240, 8 (2015) (citing 8 U.S.C. § 1324a(a)(2), and then citing *United States v. Valdez*, 1 OCAHO no. 91, 598, 604 (1989)). The government must show either that the employer knew, or should have known, an employee was unauthorized to work in the United States at the time of hire. *United States v. Carter*, 7 OCAHO no. 931, 121, 140–41 (1997).

"The knowing hire of an unauthorized alien is a far more serious violation of law than is a paperwork violation of any character." *United States v. Jalisco's Bar and Grill, Inc.*, 11 OCAHO no. 1224, 9 (2014). Penalties assessed for a "knowing hire" violation range from $559 to a maximum of $4,473 for the first offense. 8 C.F.R. § 274a.10(b)(1)(ii)(A); 28 C.F.R. § 85.5.

Unlike 8 U.S.C. § 1324a(e)(5), 8 U.S.C. § 1324a(e)(4) "does not provide any specific factors that must be considered in setting penalties for a knowing hire violation." *Muniz Concrete & Contracting*, 12 OCAHO no. 1278, 9 (2016) (internal citations omitted); *see also Jalisco's Bar and Grill*, 11 OCAHO no. 1224, at 10 (internal citations omitted) ("[h]ad Congress intended [the 8 U.S.C. § 1324a(e)(5)] factors be considered in setting penalties for violations involving the knowing hire . . . of unauthorized aliens, it would have said so").

III. DISCUSSION

A. Position of the parties

Complainant asserts that there is no genuine issue of material fact as to liability because Respondent admitted to liability for both counts in its Answer. Mot. Summ. Dec. 2, 4. Complainant further states that a hearing is not necessary, as the issue of penalty can be resolved based upon the exhibits presented. *Id.* at 2.

Respondent did not submit an opposition to the motion, but in its Prehearing Statement, Respondent acknowledges that the only issue is the amount of the fine, and that the Court has all the evidence before it to resolve that issue. Resp't Prehr'g Stmt, at 2. Respondent submitted tax documents from 2018-2019.[3]

B. Liability

1. Count I

Complainant contends that Respondent failed to prepare or present Forms I-9 for the seventy-one employees listed in Count I of the Complaint. As noted above, an employer "must prepare and retain Forms I-9 for employees hired after November 6, 1986," which an employer must produce for government inspection upon three days' notice. *Metro Enters.*, 12 OCAHO no. 1297, at 7 (citing 8 C.F.R. § 274a.2(b)(2)(ii)). "Any refusal or delay in presentation of the Forms I-9 for inspection is a violation of the retention requirements as set forth in Section 274A(b)(3) of the Act." 8 C.F.R. § 274a.2(b)(2)(ii).

[3] Respondent also takes issue with "some information" provided by Complainant in the Motion for Summary Decision. As the Court need not consider the exhibits submitted by Complainant to resolve liability, it does not address this argument in this Order, but will resolve any issues relating to the admissibility of Complainant's exhibits in the subsequent order on penalties.

The Court finds that Respondent is summarily liable for failing to prepare or present seventy-one Forms I-9 within three days of receiving the Notice of Inspection. Respondent admitted to the allegations of Count I in its Answer. Resp't Answer, at 1; *see also* Resp't Prehr'g Stmt, at 1 ("[s]ince [R]espondent had admitted to all the allegations, the only issue that merits consideration is the amount of the fine"). Federal Rule of Civil Procedure 56(c), a permissible guidance in OCAHO proceedings, *see* 28 C.F.R. § 68.1, allows an administrative law judge to 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). From Respondent's admission on the paperwork violation, Complainant has met its burden of proof and is entitled to judgment as a matter of law on liability for Count I.

2. Count II

Complainant maintains that Respondent hired the sixty-one individuals listed in Count II of the Complaint, with knowledge that the individuals were not authorized for employment in the United States at the time of hire. It is "unlawful for an employer to hire an alien knowing that the alien is unauthorized to work in the United States." *Foothill Packing, Inc.*, 11 OCAHO no. 1240, 8 (internal citations omitted); 8 U.S.C. § 1324a(a)(2).

The Court finds that Respondent is summarily liable for hiring the sixty-one employees named in Count II, with knowledge that the sixty-one individuals were unauthorized to work in the United States at the time of hire. Respondent admitted to the allegations of Count II in its Answer. Resp't Answer, at 2; s*ee also* Resp't Prehr'g Stmt, at 1. Given Respondent's admission on "knowing hire," Complainant has met its burden of proof and is entitled to judgment as a matter of law on liability for Count II.

C. Constitutional Affirmative Defenses

While Respondent concedes liability on the allegations, Respondent maintains two affirmative defenses: 1) that the ICE audit was not random, in violation of the Fourth Amendment, and 2) a "Fifth Amendment challenge since Respondent believes that other similar situated employers have not received such extensive fines." Resp't Answer, at 2.

Pleading an affirmative defense to a § 1324a complaint, including a Fourth or Fifth Amendment challenge, requires a "statement of the facts" in support. *See United States v. Jenkins*, 5 OCAHO no. 743, 165, 175 (1995) (citing 28 C.F.R. § 68.9(c)(2)). However, Respondent has not provided evidence or case law to support the Constitutional defenses. *E.g.*, *United States v. Sols. Grp. Int'l, LLC*, 12 OCAHO no. 1288, 8 (2016) (finding Respondent's contention that "it was specifically targeted by ICE and not selected at random," in violation of its "equal protection rights" an insufficient defense); *c.f. United States v. C & K Metals, Inc.*, 6 OCAHO no. 845, 211–14 (1996) (finding no Fourth Amendment challenge specifically described).

The Court finds that Respondent has not raised cognizable Constitutional challenges to the employer verification requirements statutory scheme at 8 U.S.C. § 1324a, nor to Complainant's prosecution under the statute.

D. 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 Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355, at 8–9 (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)).

Complainant's Motion for Summary Decision and Respondent's Prehearing Statement both rely on Taco Ole Mission financial and business information predating the COVID-19 pandemic. *E.g.*, Mot. Summ. Dec., at 6–7, Attach. A (arguing that Respondent utilizes a "cash basis" payroll scheme, based on a 2018 HSI audit, thus affecting penalty assessment); Resp't Prehr'g Stmt, 1–2, R-1–R-8 (presenting 2016–2019 financial data to support its argument on the proposed fine being "excessive").

In light of the ongoing COVID-19 national emergency and corresponding business impacts, the Court asks Respondent to submit updated financial information relevant to the penalty determination. The government may file a response addressing the financial information only. The Court will assess the penalties in a subsequent order.

Respondent should submit the supplemental information no later than December 27, 2021. The government may submit a response no later than January 7, 2022.

IV. CONCLUSION

The undersigned GRANTS IN PART Complainant's motion for summary decision and finds that Respondent is liable for seventy-one violations of § 274A(a)(1)(B) and sixty-one violations of § 274A(a)(1)(A).

The issues of liability and penalty assessment are bifurcated. The Respondent should submit supplemental financial information to address the penalties no later than December 27, 2021, and the government may file a response no later than January 7, 2022.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. On September 26, 2018, the Department of Homeland Security, Immigration and Customs Enforcement, served Bazan's Enterprises, Inc. d/b/a Taco Ole Mission, with a Notice of Intent to Fine.

2. On August 21, 2020, Department of Homeland Security, Immigration and Customs Enforcement, filed a complaint with the Office of the Chief Administrative Hearing Officer.

3. On December 8, 2020 Bazan's Enterprises, Inc. d/b/a Taco Ole Mission admitted to all allegations in the Complaint through its Answer.

4. Bazan's Enterprises, Inc. d/b/a Taco Ole Mission, failed to prepare or present Forms I-9 for seventy-one employees.

5. Bazan's Enterprises, Inc. d/b/a Taco Ole Mission hired sixty-one employees with knowledge that the sixty-one individuals were unauthorized to work in the United States at the time of hire.

B. Conclusions of Law

1. Bazan's Enterprises, Inc. d/b/a Taco Ole Mission is an entity within the meaning of 8 U.S.C. § 1324a(a).

2. Bazan's Enterprises, Inc. d/b/a Taco Ole Mission is liable for seventy-one violations of 8 U.S.C. § 1324a(a)(1).

3. Bazan's Enterprises, Inc. d/b/a Taco Ole Mission is liable for sixty-one violations of 8 U.S.C. § 1324a(a)(2).

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).

ENTERED:

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Honorable Jean King
Chief Administrative Law Judge

DATE: December 20, 2021