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

January 6, 2022

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. § 1324A Proceeding OCAHO Case No. 19A00044
R&SL INC., D/B/A TOTAL EMPLOYMENT AND MANAGEMENT (TEAM), Respondent.	)	

Appearances: Ryan A. Kahler, Esq., for Complainant
Eileen M.G. Scofield, Esq., Nowell D. Berreth, Esq., and Debolina Das, Esq., for Respondent

FINAL DECISION AND ORDER

I. BACKGROUND AND PROCEDURAL HISTORY

This case arises under the provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a.

On August 7, 2019, Complainant, the United States Department of Homeland Security, Immigration and Customs Enforcement (ICE) filed a Complaint[1] against Respondent, R&SL Inc., d/b/a Total Employment and Management. *United States v. R&SL Inc.*, 13 OCAHO no. 1333, 1 (2019).[2]

[1] The government served a Notice of Intent to Fine on August 13, 2018, and Respondent timely requested a hearing. Compl. 2.

[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

On September 23, 2019, Respondent filed an Answer and a Motion to Dismiss. *Id.* Complainant filed a Response and a Motion to Amend the Complaint on September 30, 2019. *Id.* Respondent filed a Response to the Motion to Amend the Complaint on October 17, 2019. *Id.*

On November 7, 2019, the Court denied Respondent's Motion to Dismiss and granted Complainant's Motion to Amend Complaint.[3] *Id.* at 5.

On July 24, 2020, Complainant filed a Motion for Summary Decision; Respondent filed a Response on August 24, 2020.[4] *United States v. R&SL Inc.*, 13 OCAHO no. 1333a, at 1.

A. Order on Motion for Summary Decision

On November 25, 2020, the Court issued an Order on Motion for Summary Decision. *Id.* In its decision, the Court held the following:

> Pursuant to Complainant's withdrawal of one violation in Count I, one violation in Count I is DISMISSED. Complainant did not establish that Respondent knowingly hired or continued to employ the remaining employee in Count I. As such, the violations in Count I are DISMISSED.
>
> Pursuant to Complainant's withdrawal of five violations in Count II, five violations in Count II are DISMISSED. ***The Court finds there is an issue of material fact in Count II regarding whether Respondent provided the remaining 512 I-9s to Complainant.***[5]

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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.

[3] "The Amended Complaint asserts that Respondent, a family-owned staffing agency with offices in Oregon and Washington, violated sections 274A(a)(1) and/or (2), and 274(a)(1)(B) of the Immigration and Nationality Act, 8 US.C. §§ 1324A(a)(1) and/or (2) and (a)(1)(B). Complainant seeks $2,691,518.15 in penalties for violations involving 1,853 employees." *United States v. R&SL Inc.*, 13 OCAHO no. 1333a, 1 (2020).

[4] The Court did not consider Complainant's September 14, 2020 Reply as it was filed in derogation of 28 C.F.R. § 68.11(b). *R&SL Inc.*, 13 OCAHO no. 1333a, at 4.

[5] At hearing, the parties noted the Order on Motion for Summary Decision erroneously referenced 512 violations remaining in Count II. Tr. A, 12. Throughout the Order, the number was correctly listed as 513. Additionally, on the first day of the hearing, Complainant withdrew

> Pursuant to Complainant's withdrawal of sixty-one violations in Count III, sixty-one violations in Count III are DISMISSED. Complainant did not establish that Respondent failed to timely prepare two I-9s in Count III. Thus, summary decision is denied as to two violations in Count III, and they are DISMISSED. Complainant established that Respondent failed to timely prepare and/or present 213 violations in Count III. ***As such, Respondent is liable for failing to timely prepare and/or present I-9 forms for 213 employees.***
>
> Complainant established that Respondent failed to ensure proper completion of section 1 and/or properly complete section 2 or 3 for 1,015 I-9 forms in Count IV. ***As such, Respondent is liable for failure to ensure proper completion of section 1 and/or failure to properly complete sections 2 or 3 for 1,015 employees.***[6]
>
> ***There is a genuine issue of material fact as to 177 violations in Count IV***, thus Complainant's motion for summary dismissal is DENIED as to these violations. Complainant failed to establish a substantive violation related to 32 I-9 forms in Count IV. As such, 32 violations in Count IV are DISMISSED.

Id. at 19–20 (emphasis and footnotes added).

Because genuine issues of material fact remained, the Court set the case for hearing.[7] Order Summarizing Prehearing Conference 1–2, Apr. 7, 2021.

B. Hearing on Liability for Remaining Counts and Penalty

On March 24, 2021, the parties submitted Complainant's Witness & Exhibit List and Respondent's Witness and Exhibit List. On April 2, 2021, the parties filed Joint Proposed Stipulations.

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two violations in Count II; specifically, numbers 25 and 162. Tr. A 14–18. Therefore, there are 511 remaining allegations of Count II at issue.

[6] After recalculation, the total number of violations in Count IV is 1,012. The original number provided in the Order on Motion for Summary Decision, 1,015, was a result of an arithmetic error. A further breakdown of the 1,012 violations in Count IV is provided below. Three Forms I-9 that were erroneously labeled as violations are in fact non-violations.

[7] At hearing, the parties presented evidence on 511 alleged violations in Count II and 177 alleged violations in Count IV, and evidence on an appropriate civil penalty.

On June 15 and 17, 2021, the Administrative Law Judge (ALJ) detailed to the case conducted a hearing. Consistent with 28 C.F.R. § 68.48(a), a verbatim transcript was generated, totaling 559 pages.[8] The parties offered 70 evidentiary exhibits, including one joint exhibit - Exhibit A.

1. Complainant's Exhibits

The following exhibits were offered and admitted: Hr'g Exs. G-1, G-1a, G-1b, G-1c, G-2 through G-6, G-6a, G-7, G-9 through G-11, G-13, G-13a, G-14. The exhibits include: an ICE fact sheet published by DHS Public Affairs providing an overview of I-9 inspections; internal memoranda detailing how ICE calculates penalties; subpoenas associated with the inspection in this case; a receipt for Respondent's I-9 forms; Respondent's employee information and tax records; and a penalty calculation sheet.

Complainant provided two affidavits from an ICE Homeland Security Investigations (HSI) auditor; both are dated, signed and sworn under penalty of perjury.[9] Hr'g Exs. G-6 and G-6A. The HSI auditor described the inspection and internal ICE processes with which she complied. Complainant provided a declaration from a Certified Public Accountant (CPA) who opined on evidence presented by Respondent. Hr'g Exs. G-13 and G-13A. Complainant's CPA described concerns with Respondent's CPA's methodology and recommendations. Complainant's CPA's declaration is signed and dated, but not sworn under penalty of perjury.[10]

2. Complainant's Witnesses

The following individuals testified: an HSI auditor (Tr. A, 39–129; Tr. B, 39–53), an HSI Assistant Special Agent in Charge for National Security and Public Safety Investigations (Tr. A, 131–154; Tr. B, 20–31), and a CPA (Tr. B, 203–261).

The HSI auditor testified consistent with her declaration. She described her experience, and her inspection's chronology - detailing interactions with Respondent and the materials Respondent submitted during the inspection. She explained the civil penalty recommendation.

[8] One transcript was prepared per day. Transcript A refers to proceedings held on June 15, 2021 and Transcript B refers to proceedings held on June 17, 2021.

[9] The HSI auditor testified under oath at the hearing and was subject to cross-examination.

[10] Complainant's CPA testified under oath at the hearing and was subject to cross-examination.

The Assistant Special Agent in Charge described his professional experience and his supervisory role relative to the HSI auditor. He confirmed the HSI auditor followed HSI procedures, which included the level of specificity required in the receipt for the I-9 forms.

A CPA from Deva & Associates, PC,[11] an expert witness,[12] testified consistent with his declaration. Complainant's CPA offered testimony rebutting Respondent's assertions about its inability to pay a civil penalty. Complainant's CPA, referencing auditing standards, described the financial data Respondent provided as incomplete and unreliable. In the alternative, Complainant's CPA opined the financial data did not support Respondent's assertion that Respondent would be unable to pay a civil penalty. *See* Tr. B, 224.

3. Respondent's Exhibits

The following exhibits were offered and admitted: Hr'g Exs. R-1 through R-7, R-9 through R-14, R-17, R-19, R-20, R-23 through R-31, R-33 through R-35, R-38 through R-56. The exhibits included: financial documents, an example of Respondent's hiring packet, a settlement agreement related to collateral maters; and a DHS Inspector General Report describing lax worksite enforcement.

Respondent provided a declaration from its owner; it is dated, signed and sworn under penalty of perjury.[13] Hr'g Ex. R-1. The declaration described the company's origins and positive involvement in the community. *Id.* The declaration detailed the current hiring process, and Respondent's efforts to comply with the inspection. *Id.* The owner stated a fine in excess of $275,000 paid over at least 48 months would put him out of business. *Id.*

Respondent provided a declaration from its payroll manager; it is dated, signed, and sworn under penalty of perjury.[14] Hr'g Ex. R-7. She described compliance with HSI inspection requests, and outlined logistical difficulties resulting from Respondent's de-centralized operations. *Id.* She

[11] Deva & Associates contracts with the DHS ICE to provide financial management services, to include accounting, internal audit, financial statement preparation, and forensic financial support services. Tr. B, 207–08, 238.

[12] Respondent stipulated to the witness' qualifications as an expert in financial management services. Tr. B, 203.

[13] Respondent's owner testified under oath at the hearing and was subject to cross-examination.

[14] Respondent's payroll manager testified under oath at the hearing and was subject to cross-examination.

supervised the cross-referencing of names to I-9 forms. *Id.* Utilizing their system, the payroll manager believed Respondent did not miss over 500 forms as Complainant alleges. *Id.*

Respondent provided a declaration from a CPA who opined on Respondent's finances. The declaration is signed, dated and sworn under penalty of perjury.[15] Hr'g Ex. R-12. Respondent also included several signed, unsworn, letters from the CPA wherein he stated the letters should "only be used by Respondent's counsel." Hr'g Exs. R-13; R-14; and R-16. The letters provide civil penalty payment options (maximum payment Respondent could make over a term of months) which varied between letters. *Id.*

4. Respondent's Witnesses

The following individuals testified: Respondent's owner, (Tr. A 182–200; Tr. B, 58–115), Respondent's payroll manager (Tr. A, 203–239), Respondent's accountant (Tr. B, 120–167), and Respondent's expert witness, a CPA (Tr. B, 170–200).
Respondent's owner testified consistent with his declaration. He described the business' origins and ethos, chronicling the company's growth. He described compliance efforts and the financial hardship his company would endure depending on the amount of the civil penalty.

Respondent's payroll manager testified consistent with her declaration. She described the process by which she and her team gathered I-9 forms and checked them against personnel records, placing the forms in boxes and shipping them to the HSI auditor. She anticipated a more detailed receipt, and maintained she did not fail to account for over 500 forms. Specific to Count IV, she provided no additional information about the attesting employee or I-9 forms.

Respondent's accountant testified about Respondent's financial exhibits, explaining their contents relative to the civil penalty. She explained the company's financing, the IRS penalty currently in dispute, and anticipated loan forgiveness for the $1,000,000 federally-backed pandemic business loan. She described the business' profits, expenses, and cash flow as cyclical.

A CPA from Certified Pro Advisors, an expert witness,[16] testified. Respondent retained this CPA after litigation commenced. Respondent's CPA offered testimony and opinion on the financial state of Respondent relative to the civil penalty, focusing on cash flow.

On June 17, 2021, the record was closed pursuant to 28 C.F.R. § 68.49(a). Tr. B, 270–71.

[15] Respondent's CPA testified under oath at the hearing and was subject to cross-examination.

[16] Complainant stipulated to the witness' qualifications as an expert in financial management services. Tr. B, 168, 171.

On August 26, 2021, the Court issued an Order Correcting Hearing Transcripts and Setting Post-Hearing Briefing Schedule.

On September 27, 2021, Complainant filed Complainant's Post-Hearing Brief (C's Brief). On October 27, 2021, Respondent filed Respondent's Post-Hearing Brief (R's Brief). On November 3, 2021, Complainant filed Complainant's Reply to Respondent's Post-Hearing Brief (C's Reply). On November 10, 2021, Respondent filed its Reply to Complainant's Post-Hearing Brief (R's Reply).

This final order is entered pursuant to 28 C.F.R. § 68.52. As required by 28 C.F.R. § 68.52(b), this final order is "based upon the whole record" and "supported by reliable and probative evidence." *E.g., United States v. Fasakin*, 14 OCAHO no. 1375b, 4 (2021) (CAHO order). Moreover, pursuant to the Administrative Procedure Act,[17] the undersigned considered "the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d); *e.g., Fasakin*, 14 OCAHO no. 1375b, at 4.

II. PARTIES' POSITIONS[18]

A. Complainant's Brief

Complainant alleges that Respondent violated § 1324a, noting: "[t]he Court has already found Respondent liable for 213 Count III violations and 1,015 Count IV violations." C's Br. 3. "[T]he evidence and testimony presented at hearing established, similarly, that Respondent should be found liable for the remaining alleged violations at issue, all 511 in Count II and all 177 remaining in Count IV." *Id.*

On liability, Complainant states the HSI auditor and the Assistant Special Agent in Charge (auditor's second level supervisor), testified credibly and they followed all internal agency procedures in conducting the inspection. *Id.* at 5. The supervisor described the HSI auditor as competent and "meticulous." *Id.* (quoting Tr. A, 142). Complainant highlighted the auditor's process in concluding 511 forms were missing, and 177 forms were backdated. *Id.* at 6. On Count II, Complainant argues: "Respondent has presented no evidence that forms I-9 for any of the remaining 511 employees identified in Count II were prepared at any time, let alone presented to Complainant pursuant to the Notice of Inspection or at any later date." *Id.* at 10.

[17] The Administrative Procedure Act applies to OCAHO proceedings. 28 C.F.R. § 68.1; *e.g., A.S. v. Amazon Web Servs., Inc.*, 14 OCAHO no. 1381c, 1–2 (2021) (citing *United States v. Strano*, 4 OCAHO no. 623, 304, 304 (1994)).

[18] This section is a summation of the positions of the parties presented in their post-hearing briefs regarding liability, penalties, and material issues of fact.

On Count IV, Complainant argues the evidence presented on the timing of the attesting employee's name change demonstrate that Complainant met its burden. *See* C's Br. 10.

On penalties, Complainant asserts the following:

> The penalty range in this matter is from $220 to $2,191 for each violation in Counts II and IV (Ex. G-2, at 6), and from $110 to $1,100 for each violation in Count III (*Id.*, at 5). Put another way, the total statutory minimum penalty for those violations either already established or which remain at issue, amounts to [[511+1,192]x$220] + [213x$110] $398,090, and the total statutory maximum penalty amounts to [[511+1,192]x$2,191] + [213x$1,100] $3,965,573.
>
> Complainant has proposed penalties in the amount of $1,457.30 per violation in Counts II and IV, and of $731.50 per violation in Count III (Ex. G-14). Accordingly, the 511 violations in Count II (totaling $744,689.30) combined with 1,192 in Count IV (totaling $1,737,101.60) and 213 in Count III (totaling $155,809.50) amount to a monetary penalty of $2,637,591.40. Less a credit of $102,319.40 as provided by paragraph 7 of the parties' Memorandum of Understanding (Ex. R-17, at 3), the total penalty sought by Complainant comes to $2,535,272.00.

Id. at 3.

Complainant argues its penalty is reasonable as it:

> falls to just below the 60th percentile between the statutory minimum and statutory maximum amounts… [which is] appropriate due to the high violation percentage, amounting to 43% of all those forms required to be presented, together with the serious nature of so many of the violations, even after accounting for the size of Respondent's business relative to its industry.

C's Br. 4.

Complainant's penalty calculations are in conformity with its agency guidelines. *Id.* at 6.

On penalty, Complainant acknowledges Respondent is a small business, which is mitigating. *Id.* at 11. Complainant recommends history of violations and good/ bad faith be treated as neutral. *Id.* at 12. On seriousness, Complainant determined the proposed penalty was sufficiently aggravated and did not "aggravate"[19] based on this factor, but it explicitly noted the violations

[19] Complainant uses the term "aggravate" to indicate a mathematical calculation of an increase in the proposed penalty figure by a certain percentage, as outlined in its applicable guidance.

were serious. *Id.* at 12–13. Complainant deemed the presence of unauthorized workers factor to be neutral. *Id.* at 13.

Complainant also provides argument related to "non-statutory [civil penalty] factors." C's Br. 13–15. Complainant argues the evidence provided by Respondent on its "ability to pay" does not meet the quantum of credible evidence required for the Court to consider the factor; and even if it does, the evidence does not support the conclusion asserted by Respondent. *Id.* at 14–15.

B. Respondent's Brief

Respondent provides procedural history of the parties' interactions. Respondent engaged Complainant in litigation at the U.S. Court of Appeals for the Ninth Circuit related to securing a hearing before OCAHO. R's Br. 3–4. The parties settled this matter in April 2019. *Id.* at 4.

Respondent argues Complainant has not met its burden on liability. On Count II, Complainant allegedly continued to find additional forms it initially claimed were missing. R's Br 5. Additionally, Respondent highlights instances where the HSI auditor was mistaken. *Id.* at 6. Respondent also argues that the HSI auditor's receipt for "3 large boxes of original Forms I-9" cannot show, with specificity, whether the "missing" forms were included in the shipment, and Complainant failed to identify the missing forms for 22 months. *Id.* at 7–8.

On Count IV, Respondent notes Complainant "changed its procedure to require employees to sign their legal name on Forms I-9" in 2019. *Id.* at 5. Respondent provides *Employer Solutions Staffing Group II, L.L.C. v. Office of the Chief Administrative Hearing Officer*, 883 F.3d 480 (5th Cir. 2016) to assert that employees need not use their legal name when signing the employer attestation as there was no notice requiring such. *Id.* at 10.
On civil penalty, Respondent argues Complainant's proposed penalty is "excessive" and would "put Respondent out of business and cost many hundreds of jobs." R's Br. 12.

On the statutory factors, Respondent concurs its status as a small business merits mitigation. On this factor, Respondent argues for a larger penalty reduction. It cites prior OCAHO case law where an ALJ reduced the base penalty because that respondent was "the type of small business enterprise that should benefit from penalty mitigation and the general public policy of leniency toward small business entities, as set forth in the Small Business Regulatory Enforcement Fairness Act." R's Br. 12 (citing *United States v. Ideal Transp. Co., Inc.,* 12 OCAHO no. 1290 (2016)). Respondent states it has no history of violations, a mitigating factor. *Id.* at 16–17.

Respondent argues its inability to pay a large civil penalty should merit penalty mitigation, noting civil penalties "are intended 'to set a meaningful fine to promote future compliance without being unduly punitive." R's Br. 17 (quoting *United States v. 1523 Ave. J Foods Inc.,* 14 OCAHO no. 1361, 3 (2020)). As a threshold matter, Respondent argues it provided sufficient quantum of evidence on inability to pay, as an expensive "independent audit" is not required to

meet the standard. *See id.* at 18–19. Respondent has "no operating cash," and only has access to expensive financing ("factoring") because of the business' poor financial health. *Id.* at 18. Respondent also notes COVID-19 placed additional stressors on the business and the business undertook additional operating costs in an effort to avoid laying off employees. *Id.* at 19–20.

C. Complainant's Reply

Referencing the testimony of the HSI auditor and the auditor's supervisor, Complainant explains the HSI auditor acted in compliance with agency requirements pertaining to receipt and storage of I-9 forms. C's Reply 2. Complainant notes the number of missing forms dropped from 518 to 511 because of errors or disparities in naming conventions within Respondent's own business records, not because of the HSI auditor. *Id.* at 3. To rebut Respondent's insinuations regarding the storage of the forms, Complainant notes it kept the forms in secure office space. *Id.* at 3–4.

On Count IV, Complainant highlights the attesting employee's own I-9 form and other payroll documents as evidence of the name change timing. C's Reply 5. Complainant notes the Court already concluded this attesting employee backdated forms in other instances (i.e. a propensity argument). *Id.* at 5–6.

On civil penalty, Complainant argues 5% mitigation for Respondent's small business status is prescribed by internal agency guidelines and is, independently, appropriate here. Respondent is small relative to its industry per Small Business Administration guidelines; however, it also has "recent receipts [that] have averaged over $20 million annually[.]" C's Reply 7–8. On good faith, Complainant notes the violation rate is "high" and Respondent backdated forms. *Id.* at 8–9. In discussing seriousness of the violations, Complainant asserts the violations are serious; however, Complainant determined the base fine rate calculated was sufficient; thus, Complainant did not "aggravate" its calculations by 5%. *Id.* at 9. Finally, Complainant notes absence of a history of violations can be neutral or mitigating. The Court has exercised its discretion in the past to treat it as neutral; Complainant requests the Court does so again. *Id.* at 9–10.

On Respondent's inability to pay, Complainant argues Respondent's evidence is insufficient to demonstrate it cannot afford to pay the penalty sought. C's Reply 10. "[C]ontinually plowing virtually all profits into expansion, growing the business into a multi-state operation boasting as many as 1,500 employees at a time, should not shield Respondent from liability for the penalties sought by Complainant in this matter." *Id.* at 12. Complainant concludes its proposed penalty is reasonable and it is amenable to a monthly payment plan. *Id.* at 13.

D. Respondent's Reply

On Count II, Respondent highlights Complainant's unspecific receipt, errors in the audit, time elapsed between collection and counting, method of storage, movement of forms, and change in receipt practice in support of its argument. R's Reply 2–3.

On Count IV, Respondent argues it is "plausible that [the attesting employee] was using (officially or otherwise) her married name at the time she signed the I-9's in question [.]" *Id.* at 4. Respondent argues Complainant's reliance on the date the attesting employee updated her I-9 form is misplaced, as an employee can update an I-9 form at any time. *Id.* at 4–6.

Respondent argues it "cannot afford to pay the over $2,500,000 fine the government seeks," and Complainant mischaracterizes the financial health of Respondent. *Id.* at 7. Respondent recommends the Court not focus on gross receipts or revenue, but rather on net revenue of the business. *Id.* at 9. Respondent also cites the disadvantageous financing methods it utilizes. *Id.*

III. FINDINGS OF FACT

Based on the November 25, 2020 Order on Motion for Summary Decision, the Joint Proposed Stipulations, the hearing exhibits, and the evidence presented at the hearing, the Court makes the following factual findings.[20]

A. Background - Respondent's Business

1. Respondent "is a staffing company duly authorized and registered to do business in the states of Oregon and Washington." Joint Prop. Stipulations 1.
2. Respondent has multiple physical locations in Washington and Oregon. Resp. Mot. Summ. Decision, Ex. R-7, p. 4.
3. Respondent's owner, who testified at hearing, owns 51% of the company and his wife owns the remaining 49%. Tr. B, 108–09.
4. Respondent employs a payroll manager, who was responsible for personnel forms and payroll for the company. Tr. A, 204–05.
5. The payroll manager did not directly assist onboarding employees with I-9 forms; rather, she supervised "administrative assistants" who completed of the forms. Tr. A, 205, 208–09.
6. At the time of inspection, 2016, Respondent had five locations, and at the time of the hearing, 2021, Respondent had seven locations. Tr. A, 196.
7. Respondent has, on average, 500–600 employees ("staff" and "labor "pool"). Tr. B, 83.
8. Respondent has 40–45 "staff" employees. Tr. B, 65.
9. Respondent's business is cyclical, depending on agriculture and aquaculture harvests; labor pool employees reach 1,500 total, peaking in the fall. Tr. B, 98, 102.
10. Respondent has been in business for 26 years. Tr. B, 97.

[20] Facts may appear at multiple locations within the record. Headings in this section are provided as a convenience to the reader and do not preclude the Court from relying on facts in any particular section to conduct analysis or derive conclusions in this case.

11. Respondent retained all staff during the COVID-19 pandemic. Tr. B, 65–66, 139.
12. Respondent added childcare as an employee benefit during the pandemic. Tr. B, 65–66.
13. Respondent owns no real estate. Tr. B, 125.
14. Respondent provides an annual salary of $45,000 to each of its two owners, and the owners have never taken equity out of the company. Tr. B, 109–10.

B. Procedural History - Inspection Process Culminating in Notice of Intent to Fine

15. Homeland Security Investigation (HSI) received anonymous unlawful employment "tips" about Respondent, which resulted in an I-9 inspection. Tr. A, 43.
16. On September 7, 2016, HSI served a Notice of Inspection (NOI)[21] and Immigration Enforcement Subpoena to Appear and/or Produce Records pursuant to 8 U.S.C. § 1225(d) and 8 C.F.R. § 287.4. Hr'g Ex. G-4, pp. 1–7; Joint Prop. Stipulations 1.
17. "All alleged violations . . . involve employees of Respondent who were hired on or after November 6, 1986." Joint Prop. Stipulations 1.
18. "All alleged violations . . . involve individuals who are employees of Respondent on or about September 7, 2016, or had been terminated within the retention period preceding service of the Notice of Inspection (NOI)." Joint Prop. Stipulations 1.
19. The inspection's retention period encompassed: (1) current employees as of September 7, 2016; (2) employees hired after September 7, 2013 (regardless of termination date); and (3) employees terminated after September 7, 2015 (regardless of hire date). Hr'g Ex. G-6, p. 2.
20. The NOI advised Respondent that "[f]ederal regulations require the provision of three days' notice prior to conducting an inspection of an employer's Forms I-9" and ICE "scheduled an inspection of [Respondent's] forms for September 16, 2016." Hr'g Ex. G-4, p. 6.
21. After receiving the NOI, Respondent's payroll manager and owner gathered I-9 forms. Hr'g Ex. R-7, pp. 1–3.
22. Respondent claims it provided over 4,000 I-9 forms in three boxes. Hr'g Ex. R-7, p. 1.
23. The documents produced "in response to the administrative subpoena and NOI were the original documents and/or true and accurate copies thereof." Joint Prop. Stipulations 1.
24. Respondent e-mailed some items deemed responsive to the administrative subpoena on September 20, 2016; however, the submission was not fully responsive. Hr'g Ex. G-6, p. 1.
25. Specifically, Respondent did not initially provide employment termination dates in response to the administrative subpoena. Hr'g Ex. G-6, p. 1.
26. ICE, through the HSI auditor, renewed the request for termination and hire dates for 49 specific employees as Respondent signed I-9 forms on dates that preceded an employee's date of hire. Hr'g Ex. G-6, p. 2.
27. Respondent ultimately complied with the requirements of the NOI. Tr. A, 52.
28. An HSI auditor with 14 years of experience conducted the inspection. Tr. A, 41–42.

[21] "The NOI [can] compel production of the employer's I-9 forms and may request other supporting documentation." *Split Rail Fence Co. v. United States*, 852 F.3d 1228, 1233 (10th Cir. 2017).

29. The HSI auditor worked the inspection alone, from beginning to end. Tr. A, 43.
30. The HSI auditor stored the three boxes containing the original I-9 forms in an empty cubicle in a secure space. Tr. A, 54.
31. On September 20, 2016, ICE provided Respondent with a DHS Form 6051R receipt for the boxes of I-9 forms, which described Respondent's submission as "3 large boxes of Original Forms I-9." Mot. Summ. Decision, Ex. G-5.
32. The receipt form references Handbook 5200-09, which is a legacy US Customs Handbook, a precursor to DHS. Tr. B, 22–23.
33. Handbook 5200-09 does not govern receipts in worksite enforcement cases, rather there is a specific "HSI Worksite Enforcement Guide," which is "law enforcement-sensitive" and not generally available to the public. Tr. B, 23–24.
34. The HSI Worksite Enforcement Guide does not mandate that auditors provide an itemized receipt of received I-9 forms. Tr. B, 25.
35. The DHS Form 6051R receipt is used for both worksite enforcement cases and other, unrelated, DHS matters involving search and seizure of property. Tr. A, 25–26; Tr. B, 25.
36. On May 12, 2017, the HSI auditor sent a Notice of Technical or Procedural Failures with highlighted copies of the I-9 forms with technical errors. Hr'g Ex. G-6, p. 2.
37. The Notice requested clarification on I-9 forms where dates of hire and form completion had discrepancies. Hr'g Ex. G-6, p. 2.
38. On June 27, 2017, Respondent provided corrections to technical errors, but on the date discrepancies, Respondent stated "authorized rep no longer employed;" which the HSI auditor deemed unresponsive. Hr'g Ex. G-6, p. 3.
39. On August 13, 2018, ICE served a Notice of Intent to Fine (NIF) alleging Respondent violated section 274A(a)(1)(A), 274A(a)(2), and 274A(a)(1)(B). Compl. Ex. A.
40. On July 30, 2018, Respondent requested a hearing via email. Compl. Ex. B.
41. On August 7, 2019, ICE filed a Complaint. Compl. 1–4.

C. Facts Pertaining to Count I

42. Respondent used E-Verify for a particular employee and received a Tentative Nonconfirmation (TNC) for him in February 2016 because the employee's social security number did not match his name. Mot. Summ. Decision, Ex. G-6, pp. 2–3; *United States v. R&SL Inc.*, 13 OCAHO no. 1333a, 4, 7 (2020).
43. The social security number on this employee's I-9 form matched the document he provided to verify his employment eligibility. Resp. Mot. Summ. Decision, Ex. G-8, pp. 1–4.
44. On April 16, 2016, Respondent terminated the employee for unrelated reasons. *United States v. R&SL Inc.*, 13 OCAHO no. 1333a, 8 (2020).
45. "Respondent failed to take action required [pursuant to E-Verify guidance] as it did not attempt to notify the employee of the TNC until September 2016, after the employee was terminated." *United States v. R&SL Inc.*, 13 OCAHO no. 1333a, 8 (2020).
46. Respondent did not receive a Final Nonconfirmation as the employee did not contest the TNC. *United States v. R&SL Inc.*, 13 OCAHO no. 1333a, 7–8 (2020).

47. Ultimately, the violation alleged in Count I was dismissed because "Complainant did not establish that Respondent knowingly hired or continued to employ an unauthorized worker." *United States v. R&SL Inc.*, 13 OCAHO no. 1333a, 8 (2020).

D. Fact Pertaining to Count II

48. Respondent provided original I-9 forms to ICE, citing the three-day deadline as rationale for why they did not photocopy the forms before sending them. Resp. Mot. Summ. Decision, Ex. R-7, p. 2.
49. Respondent had individuals at each location manually compile original I-9 forms, which Respondent consolidated at its main location in Moses Lake, WA. Resp. Mot. Summ. Decision, Ex. R-7, pp. 1–2.
50. Respondent's owner personally drove to all five locations to retrieve the original I-9 forms and brought them to the main office, a process which took him an entire day. Tr. A, 192.
51. After receiving the NOI, the payroll manager created a checklist of alphabetized employee names to account for I-9 forms. Resp. Mot. Summ. Decision, Ex. R-7, p. 2.
52. The payroll manager had five other individuals assisting her by cross-checking I-9 forms against the list of employee names. Tr. A, 213.
53. Respondent sent the I-9 forms in three boxes, and received a receipt, which identified the submission to ICE as "3 large boxes" of I-9 forms. Resp. Mot. Summ. Decision, Ex. R-7, p. 2, Ex. R-8.
54. After arriving at HSI, the I-9 forms never left HSI secured offices. Tr. A, 54–55.
55. The boxes were marked with Respondent's and the HSI auditor's name. Tr. A, 54.
56. In reference to the receipt, DHS policy did not require an itemized receipt, and it was not the HSI auditor's practice to provide an itemized receipt. Tr. A, 56.
57. After issuing the receipt in this case, the HSI auditor changed her receipt practice, making the contents more detailed; however, she did this on her own initiative, and "out of an abundance of caution." Tr. A, 57.
58. Respondent did not request an itemized receipt. Tr. A, 57.
59. On an unknown date, and at Respondent's request, HSI scanned all the I-9 forms, placed them on a CD, and mailed the CD to Respondent. Tr. A, 59.
60. The HSI auditor did not personally scan all the I-9 forms; rather, she "supervised" the scanning of the I-9 forms. Tr. A, 59.
61. The HSI auditor indicated one to two years elapsed between receipt of the three boxes and the scanning of the forms. Tr. A, 105.
62. The HSI auditor took the I-9 forms to a different cubicle to scan them. Tr. A, 125.
63. In conducting the inspection, the HSI auditor used Respondent's quarterly tax reports with employee names to determine the number of anticipated I-9 forms. Mot. Summ. Decision, Ex. G-9, pp. 1–650.
64. The HSI auditor concluded initially that 518 I-9 forms were missing. Hr'g Ex. G-6, p. 3.
65. The HSI auditor created a spreadsheet of missing forms. Tr. A, 62; Hr'g Ex. G-1A, pp. 6–24.

66. The Complaint initially alleged failure to prepare/present 518 I-9 forms. Compl. Ex. A Attach., pp. 1–14.
67. ICE lowered the number of failure to prepare/present violations to 513 due to errors in naming conventions. Mot. Summ. Decision, Ex. G-6, p. 3; *see* Joint Prop. Stipulations 1.
68. At hearing, ICE lowered the number of failure to prepare/ present violations to 511. Tr. A, 18.
69. The number of "missing" forms decreased over time because the auditor reviewed the list, and found that some social security numbers were not exact matches, but were off by only one digit and were likely a clerical error. Tr. A, 65.

E. Facts Pertaining to Count III

70. The HSI auditor reviewed payroll documents and quarterly reports, matching employee start dates with I-9 form preparation dates. Mot. Summ. Dec., Ex. G-7, G-10 p. 1–1019.
71. In 213 instances, Respondent did not complete an I-9 form within one day (section 1), or within three days (section 2). *United States v. R&SL Inc.*, 13 OCAHO no. 1333a, 11–12 (2020) (citing Violations Chart in the Appendix).

F. Facts Pertaining to Count IV

72. "[V]isual inspection of the I-9 forms reveal 1,015 I-9's contain at least one substantive violation, including but not limited to, a missing or blank I-9 page, no employee attestation in section 1, no employer attestation in section 2, no check mark indicating work authorization status in section 1, no alien number listed or apparent, no section 3 reverification for employees whose work authorization expired, untimely completion of section 2 because the employer backdated the section 2 attestation, no or invalid List A, B, and/or C documents, and complete or partial missing expiration dates or documents in section 2." *United States v. R&SL Inc.*, 13 OCAHO no. 1333a, 12 (2020) (citing Violations Chart in the Appendix).
73. A breakdown of the 1,224 I-9 forms listed under Count IV reveals: 1,012 I-9 forms contain at least one substantive violation,[22] 35 I-9 forms that did not contain a violation, and 177 I-9

[22] There are multiple I-9 forms with several violations per form; however, each I-9 form is only "counted" as one violation. *See United States v. Super 8 Motel & Villella Italian Rest.*, 10 OCAHO no. 1191, 16 (2013) (citing *Occupational Res. Mgmt., Inc.*, 10 OCAHO no. 1166, 16 n.13 (2013) ("[a]n employer is liable for only one violation per I-9, despite the presence of other violations.")).

forms for which there was a genuine issue of material fact.[23] The breakdown of the violations, non-violations, and issues of material fact are as follows:

Introductory Paragraph (not paragraphs 1-12)

22 instances of a missing or blank I-9 form pages or sections;[24]

116 instances of no employee attestation in section 1;[25]

13 instances of no employer attestation in section 2;[26]

218 instances of no check mark indicating work authorization status in section 1;[27]

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[23] The Court categorized the I-9 forms based on the Findings Column of the Appendix of the Order on Motion for Summary Decision. This recalculation revealed a minor arithmetic error in the Order on Motion for Summary Decision, which is now updated in this Final Order.

[24] The violations relating to missing or blank I-9 form pages or section correspond to the following employees' I-9s: 39, 248, 476, 539, 576, 622, 634, 703, 704, 709, 716, 727, 742, 806, 810, 847, 883, 922, 988, 1057, 1128, and 1217.

[25] The violations relating to no employee attestation correspond to the following employees' I-9 forms: 2, 24, 25, 32, 37, 44, 64, 75, 83, 84, 95, 99, 107, 117, 129, 136, 158, 163, 165, 167, 173, 182, 184, 191, 209, 220, 249, 256, 262, 272, 281, 288, 333, 361, 366, 382, 384, 408, 410, 424, 447, 468, 525, 533, 542, 543, 557, 572, 573, 582, 585, 595, 612, 658, 681, 687, 691, 756, 759, 761, 767, 775, 776, 798, 799, 815, 818, 827, 833, 834, 842, 870, 899, 913, 923, 924, 934, 935, 937, 960, 963, 966, 971, 976, 977, 980, 985, 987, 1011, 1013, 1014, 1027, 1028, 1031, 1040, 1044, 1046, 1047, 1052, 1078, 1101, 1109, 1110, 1114, 1118, 1120, 1153, 1173, 1181, 1187, 1192, 1197, 1201, 1208, 1216, and 1221.

[26] The violations relating to no employer attestation correspond to the following employees' I-9 forms: 17, 109, 434, 452, 548, 556, 822, 885, 900, 1000, 1067, 1103, and 1205.

[27] The violations relating to no check mark indicating work authorization status correspond to the following employees' I-9 forms: 6, 10, 13, 19, 20, 21, 23, 28, 33, 48, 49, 58, 59, 62, 72, 78, 80, 82, 87, 88, 93, 94, 103, 106, 121, 134, 135, 153, 154, 155, 161, 164, 166, 169, 170, 174, 176, 179, 185, 190, 192, 193, 198, 207, 213, 216, 224, 234, 236, 242, 264, 265, 266, 269, 274, 276, 284, 290, 292, 295, 298, 302, 311, 314, 320, 325, 338, 344, 345, 347, 358, 363, 365, 370, 388, 409, 429, 432, 439, 443, 445, 448, 460, 466, 467, 471, 474, 492, 508, 509, 510, 514, 519, 522, 523, 524, 529, 534, 552, 561, 584, 591, 600, 604, 609, 611, 620, 621, 623, 626, 630, 631, 639, 641, 643, 648, 649, 653, 656, 659, 660, 661, 674, 686, 690, 692, 694, 698, 705, 708, 722, 723, 734, 736, 738, 739, 743, 746, 747, 749, 750, 752, 762, 763, 766, 780, 782, 823, 828, 829, 830,

74 instances of no alien number listed or apparent;[28]

9 instances of no section 3 reverification for employees whose work authorization expired;[29]

11 instances of untimely completion of section 2 (not including the instances of employer backdating);[30]

260 instances of no or invalid List A, B, and/or C documents;[31]

831, 832, 843, 845, 848, 850, 853, 856, 859, 860, 862, 863, 893, 903, 904, 908, 914, 920, 931, 942, 943, 950, 953, 956, 958, 964, 967, 970, 974, 981, 984, 989, 1004, 1005, 1007, 1009, 1015, 1019, 1021, 1024, 1026, 1029, 1034, 1036, 1056, 1059, 1060, 1061, 1062, 1063, 1092, 1100, 1112, 1116, 1139, 1140, 1141, 1154, 1156, 1159, 1167, 1169, 1170, 1175, 1176, 1207, and 1215.

[28] The violations relating to no alien number correspond to the following employees' I-9 forms: 12, 34, 55, 57, 60, 61, 63, 71, 105, 113, 127, 187, 189, 215, 223, 238, 245, 258, 261, 271, 309, 313, 318, 336, 379, 381, 389, 413, 464, 465, 477, 478, 480, 505, 506, 511, 516, 518, 540, 598, 603, 615, 633, 635, 644, 646, 647, 675, 677, 700, 701, 725, 732, 735, 809, 835, 836, 839, 890, 909, 930, 946, 948, 955, 990, 1017, 1022, 1065, 1113, 1122, 1145, 1172, 1211, and 1212.

[29] The violations relating to no section 3 reverification correspond to the following employees' I-9 forms: 186, 197, 208, 449, 472, 481, 583, 592, and 1008.

[30] The violations relating to untimely completion of section 2 (not including backdating employer's attestation) correspond to the following employees' I-9 forms: 339, 425, 654, 707, 728, 817, 928, 1035, 1064, 1098, and 1142.

[31] The violations relating to no or invalid List A, B, and/or C documents correspond to the following employees' I-9 forms: 1, 8, 9, 43, 50, 52, 67, 81, 85, 92, 98, 102, 108, 116, 118, 119, 138, 142, 147, 160, 162, 183, 194, 203, 205, 222, 225, 226, 246, 251, 252, 253, 257, 260, 263, 268, 275, 277, 278, 279, 285, 287, 289, 291, 294, 301, 303, 304, 310, 316, 322, 324, 326, 327, 328, 329, 330, 332, 340, 343, 346, 348, 350, 351, 352, 355, 356, 357, 362, 369, 376, 377, 383, 386, 394, 396, 400, 407, 411, 412, 420, 428, 430, 431, 435, 436, 437, 438, 442, 444, 451, 454, 455, 456, 457, 461, 483, 485, 486, 488, 489, 491, 494, 499, 502, 503, 504, 515, 528, 532, 537, 538, 545, 546, 547, 551, 555, 567, 570, 571, 574, 581, 590, 594, 596, 599, 602, 614, 628, 632, 636, 638, 642, 652, 657, 665, 667, 670, 673, 683, 695, 696, 702, 711, 731, 740, 760, 764, 765, 768, 770, 771, 786, 788, 789, 796, 801, 808, 811, 813, 824, 826, 838, 841, 851, 855, 857, 861, 864, 866, 868, 869, 872, 875, 876, 881, 889, 894, 895, 905, 906, 917, 918, 926, 936, 938, 940, 944, 951, 952, 961, 969, 973, 975, 978, 979, 982, 983, 992, 993, 994, 996, 1002, 1003, 1012, 1018, 1020, 1023, 1032, 1038, 1041, 1043, 1045, 1054, 1058, 1069, 1072, 1074, 1076, 1077,

59 instances of incomplete or partial missing expiration dates;[32]

27 instances of incomplete or partial missing document numbers for documents in section 2;[33]

Paragraph 1: Checked Wrong Box or Multiple Boxes in Section 1

14 instances of an I-9 form with a checkmark indicating the employee is both a U.S. citizen and Lawful Permanent Resident;[34]

26 instances of an I-9 form indicating the employee is a U.S. citizen but provided a Lawful Permanent Resident card in section 2;[35]

1 instance of an I-9 form with a checkmark indicating the employee is both a U.S. citizen and non-citizen national in section 1;[36]

1081, 1086, 1087, 1089, 1094, 1095, 1102, 1104, 1107, 1111, 1117, 1119, 1124, 1125, 1126, 1127, 1129, 1131, 1132, 1135, 1138, 1146, 1148, 1152, 1155, 1160, 1162, 1166, 1174, 1182, 1183, 1185, 1186, 1190, 1194, 1200, 1206, 1210, 1213, and 1222.

[32] The violations relating to incomplete or partial missing expiration dates correspond to the following employees' I-9 forms: 7, 26, 27, 35, 56, 68, 91, 96, 124, 126, 143, 196, 255, 312, 334, 353, 359, 390, 391, 392, 405, 406, 415, 417, 426, 459, 487, 497, 536, 554, 560, 577, 597, 607, 613, 624, 719, 754, 757, 769, 791, 794, 871, 873, 886, 892, 910, 954, 998, 999, 1066, 1079, 1084, 1096, 1121, 1123, 1134, 1149, and 1151.

[33] The violations relating to incomplete or partial missing document numbers correspond to the following employees' I-9 forms: 73, 101, 202, 229, 240, 259, 296, 300, 308, 331, 342, 349, 419, 490, 493, 526, 564, 606, 608, 655, 744, 774, 929, 1042, 1048, 1073, and 1202.

[34] The violations relating to checking both U.S. Citizen and Lawful Permanent Resident correspond to the following employees' I-9 forms: 172, 267, 323, 414, 473, 484, 495, 500, 507, 569, 720, 797, 821, and 1099.

[35] The violations relating to checking U.S. Citizen but providing a Lawful Permanent Resident card correspond to the following employees' I-9 forms: 11, 18, 36, 237, 335, 380, 393, 402, 441, 453, 550, 616, 617, 629, 640, 664, 745, 755, 779, 814, 1033, 1050, 1051, 1147, 1164, and 1224.

[36] The violation relating to checking both U.S. citizen and non-citizen national box corresponds to the following employee's I-9 form: 921.

7 instances of when the employee checked the non-citizen national box, but provided a Lawful Permanent resident card;[37]

1 instance of when the employee checked Lawful Permanent Resident but provided a U.S. passport in section 2;[38]

Paragraph 2: Backdated I-9s and Lack of Printed Name of Employer Representative

123 instances of an I-9 form not timely completed because the section 2 attestation date predated the hire date of the employer representative who signed section 2;[39]

2 instances of an I-9 form that lacked the printed name of the employee who signed section two, and that signature did not appear on other I-9s;[40]

Paragraph 3: Section 2 Attestation Signed With Signature Stamp

24 instances of improper completion of section 2 attestation because employer representative signed section 2 with a stamp;[41]

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[37] The violations relating to checking non-citizen national box but provided a Lawful Permanent Resident card correspond to the following employees' I-9 forms: 210, 211, 337, 401, 427, 513, and 733.

[38] The violation relating to checking Lawful Permanent Resident but provided a U.S. passport corresponds to the following employee's I-9 form: 231.

[39] The violations relating to untimely completion because the section 2 attestation date predated the hire date of the employer representative correspond to the following employees' I-9 forms: 4, 5, 15, 29, 30, 41, 45, 46, 47, 53, 54, 66, 76, 79, 89, 90, 100, 104, 120, 123, 130, 133, 140, 141, 144, 145, 148, 159, 178, 181, 188, 200, 204, 221, 227, 235, 243, 244, 247, 254, 273, 280, 286, 306, 307, 317, 321, 341, 354, 360, 364, 368, 373, 450, 462, 475, 482, 496, 517, 530, 535, 563, 565, 593, 601, 618, 625, 651, 672, 713, 717, 718, 729, 737, 773, 778, 784, 787, 800, 802, 804, 805, 825, 852, 854, 878, 887, 902, 912, 915, 939, 941, 947, 949, 957, 965, 986, 995, 1025, 1030, 1049, 1070, 1075, 1082, 1083, 1108, 1137, 1143, 1165, 1168, 1171, 1177, 1179, 1180, 1184, 1193, 1195, 1198, 1199, 1203, 1214, 1218, and 1220.

[40] The violations relating to the lack the printed name of the employee who signed section two, and that signature did not appear on other I-9s correspond to the following employees' I-9 forms: 114 and 137.

Paragraph 4: Issuing Authority and Document Description for List B or C Documents

4 instances of incomplete or improper document description and/or issuing authority;[42]

Paragraph 5: List B document Not Issued by State or Outlying Possession of United States

No violations

Paragraph 6: List B Documents Allegedly Issued After Section 2 Completed

No violations

Paragraph 7: Section 3 Reverification

No violations

Paragraph 8: Undated Signatures in Sections 1 and/or 2

No violations

Paragraph 9: Social Security Number in Section 1 Mismatch

No violations

Paragraph 10: Missing Section 1 or Illegible Section 1

No violations

Paragraph 11: Section 1 Allegedly Missing Signatures or Printed Names

No violations

Paragraph 12: Employer Representative's Name Change

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[41] The violations relating to a stamped employer attestation correspond to the following employees' I-9 forms: 16, 97, 132, 151, 219, 418, 553, 568, 580, 586, 706, 721, 753, 837, 865, 919, 962, 1088, 1097, 1105, 1144, 1150, 1189, and 1196.

[42] The violations relating to incomplete or improper document description and/or issuing authority correspond to the following employees' I-9 forms: 125, 404, 846, and 925.

1 instance of E.B. signing an I-9 form in "2013" with a name she acquired at a later date (2015) (i.e. backdating[43]).[44]

74. Of the 1,012 I-9 forms with deficiencies outlined above, 124 forms *also* contained backdating at section 2.[45]
75. Attesting employee E.B./E.E. signed many Forms I-9 on behalf of Respondent (employer attestation). *United States v. R&SL Inc.*, 13 OCAHO no. 1333a, 18 (2020).
76. This attesting employee changed her name in October 2015 (from E.B. to E.E), a change reflected in her own I-9 form (updated on October 24, 2015). *United States v. R&SL Inc.*, 13 OCAHO no. 1333a, 18 (2020); Mot. Summ. Decision, Ex. G-7b pp. 1–2; Tr. A, 80.
77. On October 24, 2015, attesting employee driver's license with the new name of [E.E.] was issued by the state of Washington. Tr. A, 77.
78. Washington state employment security reports show the attesting employee's name as [E.B.] in the 3rd quarter of 2015 and [E.E] in the fourth quarter of 2015. Tr. A, 79–80, 234.
79. One I-9 prepared in 2013 was signed as E.E. not E.B. (E.B. would have been her legal name in 2013). *United States v. R&SL Inc.*, 13 OCAHO no. 1333a, 19 (2020).
80. Attesting employee E.E/E.B. did not begin employment with Respondent until after 2013. *United States v. R&SL Inc.*, 13 OCAHO no. 1333a, 18–19 (2020).
81. There are 177 I-9 forms with employer attestation portions signed from 2014 through September 2015 (prior to the name change according to Respondent's business records) where employee E.B./E.E. signed as E.E. (even though her name change occurred after the dates on the forms). *United States v. R&SL Inc.*, 13 OCAHO no. 1333a, 19 (2020).

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[43] "Generally, OCAHO has found that an employer backdated I-9s when the signature in section 2 predates the employment of the employee who purportedly signed it on that date, or when the dates on the Form I-9 predate that version of the form." *United States v. R&SL Inc.*, 13 OCAHO no. 1333a, 18 (2020) (first citing *United States v. Schaus*, 11 OCAHO no.1239, 8 (2014); and then citing *United States v. Immaculean Cleaning Servs.*, 13 OCAHO no. 1327, 9 (2019)).

[44] The violation relating to E.B. signing in "2013" with her "new" last name (acquired in 2015) corresponds to the following employee's I-9: 152.

[45] For example, the Appendix of the Order on the Motion for Summary Judgment listed the finding for Employee No. 4 as "Section 2 not timely completed. [Employer representative B.F.] signed section 2 in 11/2014, but she did not appear on payroll until 7/2016." *United States v. R&SL Inc.*, OCAHO Case No. 19A00055 App. 55 (Nov. 25, 2020) (Order on Motion for Summary Judgment). The finding for Employee No. 1025 states "Section 2 not timely completed. [Employer representative L.P.] signed section 2 on 4/1/15, she was not rehired until 6/2015." *United States v. R&SL Inc.*, OCAHO Case No. 19A00055 App. 163 (Nov. 25, 2020) (Order on Motion for Summary Judgment).

82. As to the analysis of these 177 forms, the HSI auditor reviewed the personnel documents of the attesting employee, noting she used the name [E.B.] when hired. Tr. A, 77.
83. Employee E.B/E.E. backdated the 177 I-9 forms contested at hearing.

G. Facts Pertaining to Civil Penalty Assessment – Statutory Factors

84. Respondent "qualifies as a small business in its industry pursuant to the U.S. Small Business Administration's Table of Small Business Size Standards." Joint Prop. Stipulations 1.
85. Respondent "is not and has not been the subject of any previous violations of INA § 274A." Joint Prop. Stipulations 1.
86. Respondent utilizes a standardized hiring packet, which includes the Form I-9; it trains and monitors processes associated with Forms I-9; and it "met with INS years ago" to discuss Forms I-9. Hr'g Ex. R-1 pp. 1–2, R-10.

H. Facts Pertaining to Civil Penalty Assessment – Legal Fees (Non-Statutory Equity Factor)

87. Respondent expended $102,319.40 in legal fees related to securing a hearing before an OCAHO ALJ. Tr. B, 12; *see* Hr'g Ex. R-17.
88. In a Memorandum of Understanding, Complainant agreed to "discount any proposed fine to account for [Respondent's] legal fees." Hr'g Ex. R-17, p. 3.
89. In its penalty calculation and recommendation, Complainant's referenced "a credit of $102,319.40." C's Br. 3.
90. At hearing, Respondent identified the legal fees as a non-statutory factor for consideration. Complainant did not object to the Court's consideration of the expended legal fees for this reason. Tr. A, 268, 270.
91. Complainant did reduce its proposed penalty amount, consistent with the terms of the Memorandum of Understanding. C's Br. 3.

I. Facts Pertaining to Civil Penalty Assessment – Inability to Pay (Non-Statutory Equity Factor)

92. Respondent does not utilize traditional lending from a bank. Tr. B, 73–74.
93. Respondent's owner mortgaged his personal residence to fund his business. Tr. B, 113.
94. Respondent is re-paying this mortgage-derived loan with interest. Tr. B, 128, 163.
95. Respondent's owner liquidated a personal retirement account to fund the business previously; Respondent is in the process of repaying this loan. Tr. B, 146.

96. Respondent uses "factoring" (through Tri-Com Funding), which entails Respondent providing invoices, and receiving 85% of the invoice funds from the factoring service provider. Tr. B, 75, 127.
97. Respondent uses funds from factoring to cover expenses, like payroll. Tr. B, 76.
98. Respondent financed two new locations by using assets it already owned; profits generated by these locations only sustain operations at the locations. Tr. B, 111–12.
99. Respondent employs an accountant (a CPA), whose annual salary is $50,000. Tr. B, 142.
100. Respondent received a $1,000,000.00 "payroll protection plan (PPP) loan"[46] from the Small Business Administration, administered by a local bank. Tr. B, 129, 153.
101. PPP loan terms dictate the loan covers only qualifying payroll, payroll taxes, and employee insurance expenses. *See generally* Tr. B, 120–67.
102. Per Respondent's accountant, Respondent complied with PPP loan terms. Tr. B, 143–44.
103. Respondent's accountant has not yet submitted the PPP loan forgiveness application to the SBA; however, she anticipates the SBA will forgive the loan. Tr. B, 144.
104. The PPP loan is a non-recurring liability. *See* Tr. B, 142–43.
105. Respondent's 2016 tax filing garnered an IRS penalty of $272,000.00. Tr. B, 129, 223.
106. Respondent's accountant is contesting this IRS civil penalty. Tr. B, 130.
107. Respondent may be liable for some, all, or none of the IRS penalty. *See* Tr. B, 221–23.
108. Respondent's IRS penalty ($272,000.00) is a non-recurring expense. Tr. B, 233.
109. Respondent retains consulting legal services, and always has some legal fees; however, this matter generated the 2020 legal fees ($274,995.00). Tr. B, 138–39; Hr'g Ex. R-52, p. 2.
110. Respondent's legal fees incurred after the onset of present litigation are a non-recurring expense. Those fees total $92,000.00 (2018), $360,000.00 (2019), $422,000.00 (2020), and $300,000.00 for the first six months of 2021. Tr. B, 233–34.
111. The American Institute of Certified Public Accountants (AICPA) provides standards for auditing, attestation, and consulting engagements for CPA's. Tr. B, 192.
112. Based on Respondent's exhibits, to include the term of payment, a CPA cannot provide a maximum dollar amount that Respondent would be "able" to pay. Tr. B, 224.
113. Generally accepted accounting principles (GAAP) are utilized to account for transactions; GAAP does not account for how funds "should" be managed. Tr. B, 227.
114. A business looking to demonstrate a lack of funds can report accelerated expenses and report reduced or delayed revenues, which is still consistent with GAAP. Tr. B, 228.
115. From 2019 to 2020, Respondent's payroll increased from $850,000.00 to $1,100,000.00, and in the first half of 2021, payroll costs were on pace to exceed 2020; however, during that same time, revenue did not increase at the same rate (increasing only by 10% to 12% during the same period). Tr. B, 229.
116. Respondent reported non-recurring expenses that diminished gross profits in 2019 to 2021, which skewed both net income and cash flow. Tr. B, 232, 234.

[46] The "Paycheck Protection Program" is an SBA-backed loan that helps businesses keep their workforce employed during the COVID-19 pandemic. The SBA has a loan forgiveness program for certain eligible borrowers. *See generally* Tr. B, 120–67.

117. Respondent's financial shortfalls were temporary and not recurring in nature as demonstrated by Respondent's 2020 tax return. Tr. B, 235.
118. Respondent's financial records show that it is growing, as gross receipts and gross profit increased from 2018 to the present. Tr. B, 236.

IV. LAW & ANALYSIS

Evidence should be reliable, probative and substantial. 5 U.S.C. § 556(d); *see also* 28 C.F.R. § 68.52(b).

A. Evaluation of the Evidence Presented at Hearing

At the outset, the Court must carefully analyze the evidence (documentary and testimonial) presented by the parties at hearing. The Court must ensure the evidence is sufficiently reliable, and then it must consider what weight, if any, to assign the evidence based on its probative value.

1. Legal Standard – Evaluating Documentary Evidence (Reliability)

The proponent of documentary evidence must "authenticate a document by evidence sufficient to demonstrate that the document is what it purports to be[.]" *United States v. Carpio-Lingan*, 6 OCAHO no. 914, 1, 5 (1997) (citations omitted).

Generally, documentary evidence that is complete, signed, sworn under penalty of perjury, dated, authenticated, laid down with foundation contain sufficient indicia of reliability. *See United States v. Psychosomatic Fitness LLC*, 14 OCAHO no. 1387a, 5–7 (2021); *United States v. Bhattacharya*, 14 OCAHO no. 1380a, at 4–5 (2021) (finding that documents that previously "contained no markings indicating what they were attached to, or indication of when or whether they were filed" were authenticated and reliable only when a declaration was provided identifying the documents, describing the chain of custody, and explaining the context in which the documents were presented). Affidavits are reliable if "they are sworn and signed by the affiants . . . contain facts that would be admissible in evidence . . . rely on personal knowledge . . . [and] show that the affiants are competent to testify to the matters stated therein." *Nickman v. Mesa Air Grp.*, 9 OCAHO no. 1113, 14 (2004).

2. Legal Standard – Credibility (Reliability of Testimonial Evidence)

In assessing the reliability of testimonial evidence, and ultimately, the probative value of that evidence, the Court must consider whether witnesses have testified credibly.

> OCAHO case law illustrates some of the factors relevant to assessing the credibility of witnesses in OCAHO proceedings. *See, e.g.*, *United States v.*

> *Kurzon,* 3 OCAHO no. 583, 1829, 1842–43 (1993) ("However, as to Respondent's testimony, I have found the record to be rife with examples of Respondent's incredulous testimony, inconsistencies, suspicious memory lapses and blame shifting, leading me to find that Respondent's testimony was not credible."). In finding witnesses not credible, OCAHO ALJs have cited shifting and inconsistent answers, *see United States v. DeLeon Valenzuela*, 8 OCAHO no. 1004, 10 (1998); repeatedly responding to questions by testifying that the witness does not know, does not remember, or does not understand, *see id.* at 11; testifying in a vague and evasive manner, *see id.*; demonstrably false statements, *see id.* at 12; discrepancies between hearing testimony and other record documents, *see Kurzon,* 3 OCAHO no. 583, at 1858–60; a variety of excuses or justifications for inconsistent information, *see id.*; and incorrect or inconsistent information provided by a witness in forms or proceedings unrelated to the central claims in the case, *see id.*

Fasakin, 14 OCAHO no. 1375b, at 12.

3. Legal Standard – Expert Witnesses

"[T]he Federal Rules of Evidence will be a general guide to all proceedings held pursuant to these rules." 28 C.F.R. § 68.40(a). Federal Rule of Evidence 702 provides that a "witness who is qualified as an expert by knowledge, skill, experience, training, or education" may provide opinion testimony if:

> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the expert has reliably applied the principles and methods to the facts of the case.

Conversely, Federal Rule of Evidence 701 provides that lay witness opinion testimony is limited to:

> (a) rationally based on the witness's perception;
> (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
> (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

Expert witness testimony "results from a process of reasoning which can be mastered only by specialists in the field;" while lay witness testimony "results from a process of reasoning familiar

in everyday life[.]" *Joshua David Mellberg LLC v. Will*, 386 F. Supp. 3d 1098, 1101 (D. Ariz. 2019) (citations omitted). "Expert opinion testimony is relevant if the knowledge underlying it has a valid connection to the pertinent inquiry . . . it is reliable if the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant discipline." *Primiano v. Cook*, 598 F.3d 558, 565 (9th Cir. 2010).

4. Legal Standard – Evaluating Weight of Evidence (Probative Value)

"Probative value is determined by how likely the evidence is to prove some fact[.]" *United States v. Bensimon*, 172 F.3d 1121, 1126 (9th Cir. 1999) (quoting *Am. Home Assurance Co. v. Am. President Lines*, 44 F.3d 774, 779 (9th Cir. 1994)). Federal Rule of Evidence 401 provides the test for relevance; "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." *United States v. Rose Acre Farms, Inc.*, 12 OCAHO no. 1285, 8 (2016).

5. Analysis - Complainant's Evidence

a. Reliability of Documentary Evidence

Upon examination, none of Complainant's evidence raises concerns of reliability. The HSI auditor's declaration is dated, signed, and sworn under penalty of perjury. Complainant's CPA's declaration was not sworn to under penalty of perjury; however, the contents of the document can be given full weight as the author of the declaration testified credibly (further discussed below) under oath to the facts, calculations, and opinions contained in the declaration.

b. Reliability of Testimonial Evidence (Credibility)

Like Complainant and Respondent, the Court finds the Assistant Special Agent in Charge and Complainant's CPA's testified credibly. The Assistant Special Agent in Charge was consistent with the record, and with other witnesses who testified under oath. The information he offered was sufficiently detailed and plausible. Similarly, Complainant's CPA testified consistent with information contained in the record; his testimony was plausible and sufficiently detailed.

Respondent only identified the HSI auditor as raising credibility concerns. Tr. B, 268–69. While Respondent's counsel does not address the issue in its initial post-hearing brief, they provide additional argument in their Reply. Respondent concedes Complainant followed ICE procedures for the receipt; however, Respondent argues that the procedures are "substandard;" and following a substandard practice impugns the credibility of the HSI auditor. R's Reply 3.

The HSI auditor is credible. She did not provide a detailed receipt; however, she testified honestly and consistently on that point. Tr. A, 55–57. She suffered no memory lapses and did

not shift blame. *See id.* She accurately described agency policy she followed. She confirmed the receipt issued "does not have a list of every single I-9 [form]." *Id.* at 55–57, 89.

All of Complainant's witnesses testified credibly. The Court gives their testimony full weight.

c. Probative Value of Evidence Presented by Complainant

Complainant's evidence pertaining to receipt of I-9 forms (declaration and testimony) is highly probative. The HSI auditor provides relevant evidence as to the manner and method by which ICE received the forms. As to the backdated forms, she explains how she pinpointed the name change of E.E./E.B. based on personnel records, which was key to her determination.

Similarly, Complainant's CPA, who offered testimony and a written explanation, rendered an opinion on certain financial matters that proved highly relevant, and is thus determined to be quite probative in the Court's analysis. Complainant's CPA reliably applied standardized accounting principles and methodologies, and his resulting testimony was very useful. He skillfully recognized gaps in the financial data, which would preclude certain conclusions, and he offered his specialized knowledge in accounting and financial practices in a manner that assisted the Court in understanding the financial data evidence.

6. Analysis - Respondent's Evidence

a. Reliability of Documentary Evidence

Respondent's declarations were dated, signed, and sworn under penalty of perjury. The financial and personnel information provided had indicia of reliability (appeared to be derived from accounting or personnel management software); and the information contained therein was incorporated into the sworn testimony of Respondent's witnesses, who were subject to cross-examination. The settlement agreement was a fully executed copy. Respondent's exhibits originating from Complainant (like U.S. Citizenship and Immigration Services E-Verify User Manual and Office of the Inspector General (OIG) ICE Guidance Needs Improvement to Deter Illegal Employment) are true and accurate based on the formatting. Additionally, Complainant does not raise reliability issues. Respondent's CPA provided letters to Respondent's counsel and Respondent entered these into the record. These letters were unsworn and the documents were not prepared for the purposes of presentation at hearing. These documents, in isolation, would be of limited reliability; however, Respondent's CPA adopted contents of these letters during testimony; thus the information contained therein is reliable.

b. Reliability of Testimonial Evidence (Credibility)

Respondent's four witnesses testified credibly. All witnesses were consistent with information contained in the record, and with their own sworn declaration, if applicable. Each witness

testified candidly; and provided plausible accounts of what transpired, to the best of their recollection, during the inspection process and as the litigation began. No witnesses were evasive. Complainant did not raise issues of credibility at hearing or in its post-hearing filings.

The Court will give the testimony of Respondent's witnesses full weight.

c. Probative Value of Evidence Presented by Respondent

In considering Respondent's documentary evidence, the record contains several documents generated by components of DHS, like U.S. Citizenship and Immigration Services E-Verify User Manual, and OIG ICE Guidance Needs Improvement to Deter Illegal Employment. While these documents are reliable, their relevance to the issues before the Court is limited. *See Rose Acre Farms, Inc.*, 12 OCAHO no. 1285, at 8 (finding that evidence not relied upon by expert witnesses or relied upon to prove one's case is not relevant).

Here, the factual issues that required additional development at hearing pertain to whether a certain number of I-9 forms were placed in a box (or not), and whether a specific employer representative timely executed I-9 forms with whatever name she chose to use that day or whether she used her legal name, but backdated otherwise untimely completed forms. General assessments of areas for improvement for ICE and an E-Verify manual shed virtually no light on the issues before the Court, thus the probative value of these exhibits is low.

Respondent's documentary evidence related to non-statutory factors of inability to pay is highly probative. Accounting and financial information provided by Respondent is multi-year and highly detailed, thus providing a sufficiently complete and clear description of the financial state of Respondent. Similarly, Respondent's submission of an executed settlement agreement discussing legal fees related to securing a hearing before an ALJ is highly probative as it explains the genesis of the additional costs incurred by Respondent in order to secure a statutory right.

The owner provided probative evidence related to Count II as he testified about the process by which he assisted in gathering I-9 forms; however, he lacked personal knowledge about the process by which I-9 forms were cross-checked and shipped to ICE. On Count IV, he had no information on the timing of E.B./E.E's name change. On the civil penalty, the owner provided his assessment of his company's inability to pay based on his understanding of the company's cash flow and use of factoring. The owner's assessment of his company's inability to pay was probative, but ultimately less probative than the documentary evidence submitted with the complete financial figures and the testimony of Respondent's accountant.
Respondent payroll manager provided highly probative evidence on Count II. She testified about her checklist of alphabetized employees generated from the company's payroll system and the manner by which she and her team checked names against the I-9 forms, which they placed in the three boxes shipped to ICE. As to the issue of backdating, the payroll manager had little to offer in the form of probative testimony. She indicated employee E.B./E.E. was her subordinate

and the payroll manager was unaware of the exact date of the name change, estimating spring of 2015. Tr. A, 222. The payroll manager was also unaware that E.B./E.E. had updated her own I-9 form in October 2015. Tr. A, p. 223.

Respondent's accountant testified about the financial state of Respondent relative to its proposed inability to pay. While the accountant had similar background to the other testifying CPAs, she testified as a fact witness. In that capacity, she provided foundational and contextual information for the financial records she generated, which were admitted as evidence. The accountant's testimony was highly probative as she provided additional evidence to further the Court's understanding of Respondent's financial state.

Respondent's CPA, who offered testimony and a written explanation (which he functionally adopted in his sworn testimony), rendered an opinion on financial matters. Respondent's CPA testified credibly and the evidence he provided was reliable; however, it was not particularly relevant to the multi-faceted analysis required to assess Respondent's inability to pay. Consequently, his opinion had less probative value to the Court. Specifically, Respondent's CPA framed his opinion as "determining what the business's available cash is to write a check," analyzing and explaining cash flow against liability. Tr. B, 176. To provide his opinion, Respondent's CPA utilized a balance sheet, which he described as a "snapshot;" he did not provide an audit or attestation services. Tr. B, 180, 192.

B. Burdens of Proof and Production in Establishing Liability and Civil Penalty Assessment

Having determined the reliability and probative value of the evidence, the Court can now determine whether Complainant met its burden in establishing liability for the remaining alleged violations in Count II and Count IV.

1. Legal Standard – Burdens of Proof and Production – Liability and Civil Penalty Assessment

As the Court outlined in its November 25, 2020 Order on Motion for Summary Decision:

> "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 eligibility verification requirements." . . . Employers must prepare and retain Forms 1-9 for employees hired after November 6, 1986, and employers must produce the I-9s for government inspection upon three days' notice.

R&SL Inc., 13 OCAHO no. 1333a, at 3 (citing *United States v. Metro. Enters., Inc.*, 12 OCAHO no. 1297, 5, 7 (2017)).

"The burden of proof as to liability and as to the existence of any aggravating factors to increase the penalty always rests with the government in cases arising under 8 U.S.C. § 1324a." *United States v. Durable, Inc.*, 11 OCAHO no. 1231, 5 (2014) (affirmance by CAHO) (citing *United States v. Clean Sweep Janitor Serv.*, 11 OCAHO no. 1226, 2 (2014)). A complainant must "produce evidence which shows [the respondent violated § 1324a] . . . . [The r]espondent may also present rebuttal evidence. Ultimately, all the evidence must preponderate in [the c]omplainant's favor in order for it to prevail upon its claims." *United States v. Applied Comput. Tech.*, 2 OCAHO no. 367, 524, 534 (1991) (modification by CAHO on other grounds).

"Under Supreme Court law, when evidence is in equipoise, the burden of persuasion determines the outcome." *Marinelarena v. Sessions*, 869 F.3d 780, 789 (9th Cir. 2017). Thus, "the party who bears the burden of proof loses if the record is inconclusive on the crucial point." *Id.* (citations omitted). "[U]nder the Administrative Procedure Act, the burden of proof encompasses the burden of persuasion; when the evidence is evenly balanced, the party with the burden must lose[.]" *Id.* (citing *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 272–81 (1994)).

2. Analysis - Liability for Remaining Allegations in Count II

The record clearly demonstrates that Respondent timely sent, and Complainant received, three large boxes. The potential liability for Count II rests, critically, in the content of the three boxes. Complainant, who bears the burden, presents credible witness testimony that the HSI auditor completed her process in accordance with regulation and policy, and at the conclusion of the HSI auditor's process, the three boxes were allegedly missing 511 I-9 forms.

Respondent provides its own credible witness testimony that the payroll manager, completing her process utilizing payroll records and checking each individual name, did in fact place all required I-9 forms in the three boxes, to include the 511 I-9 forms at issue.

At some point, Complainant's auditor transferred the I-9 forms to a different cubicle, and she had the assistance of another individual who scanned the individual I-9 forms. Tr. A, 54–55, 125–26. Thus, she did not singularly have physical control of the I-9 forms at all times.

The payroll manager compiled the I-9 forms from the five physical locations, and she had the assistance of others when checking the I-9 forms against payroll records. Tr. A, 212–13. Thus, she did not singularly have physical control of the I-9 forms at all times.

Neither the auditor nor the payroll manager conducted an individualized I-9 form count at either the time of packaging or opening the boxes. Neither Complainant nor Respondent produced

contemporaneous documentary records as to the number of I-9 forms,[47] or even the number of pieces of paper in the boxes.

Complainant produced evidence that tends to show Respondent failed to present the 511 I-9 forms; however, Respondent rebutted that evidence (with credible evidence of its own) effectively. Ultimately, this record is one in which the evidence is "in equipoise" and thus, Complainant as "the party who bears the burden of proof loses[.]" *See Marinelarena*, 869 F.3d at 789. "[W]hen the evidence is evenly balanced, the party with the burden must lose[.]" *Id.* In accordance with settled legal precedent and the Administrative Procedure Act, the Court must and does conclude that Complainant has not met its burden because the evidence is evenly balanced.

Therefore, Respondent is not liable for the 511 forms at issue in Count II.

3. Analysis - Liability for Remaining Allegations in Count IV

As outlined above, the record demonstrates that employee E.B/E.E. changed her name from E.B. to E.E. Specifically, the Court relies on Respondent's own payroll records, the employee's own I-9 form, and the state of Washington's Employment Security reports. Complainant provides evidence demonstrating the name change occurred in October 2015 (updating her I-9 form and the state of Washington employment security reports).

Complainant also highlights that E.B./E.E. as the attesting individual, signed many I-9 forms on behalf of Respondent. At issue in the hearing were 177 of those forms, which E.B./E.E. signed from 2014 through September 2015. These forms were all signed as "E.E." even though the employee, at that time, was legally known as "E.B." Complainant concluded the backdated

[47] Complainant's receipt, while useful in demonstrating the arrival of a specific number of boxes, has little utility to the Court as the issue here is the number of forms in those boxes. Testimony suggests that the receipt's level of specificity was consistent with Complainant's internal policy.

Indeed, it would have been a labor-intensive process for one auditor to account for thousands of I-9 forms by herself. However, on balance, Complainant also valued each of those forms at $1,457.30 per form, and thus valued the missing I-9 forms in this case at $744,680.30. If the boxes contained the cash equivalent, it seems unfathomable that such a receipt from the federal government would be sufficient.

Ultimately, the decision to account for these valuable pieces of paper in a more detailed fashion (or not) in future inspections is squarely within the purview and discretion of the Department of Homeland Security.

forms were created well after each onboarding employee's start date. E.E. executed the forms after October 2015, and her use of E.E. (vice E.B.) was an oversight on her part.

The evidence provided supports Complainant's theory of backdating and it meets the preponderant evidence standard.[48] Much like the analysis for Count II, the Court now turns to examine whether Respondent has effectively rebutted this evidence.

On this point, and in contrast to Count II, Respondent provides no additional evidence to rebut Complainant's evidence. Indeed, the testifying witnesses (Respondent's owner and payroll manager) were asked about employee E.B./E.E., and they had no additional evidence.

Instead, Respondent provides only argument for the Court's consideration, but argument is not evidence. *See United States v. Moreland*, 622 F.3d 1147, 1162 (9th Cir. 2010). Respondent argues the record supports the proposition that the I-9 forms could have been completed in a timely fashion, and E.E./E.B. could have used both names interchangeably during her employment with Respondent. Respondent offers a Fifth Circuit case, *Employer Solutions*, 833 F.3d 480, and asserts this case stands the proposition that an attesting employee can provide a name of their choosing on the I-9 form.

The factual record simply does not support Respondent's argument. Neither the owner, nor the payroll manager (E.B/E.E's supervisor) knew E.B/E.E. to use E.E. and E.B. interchangeably, or, more critically, use E.E. beginning in 2014 as Respondent's counsel has suggested.

In tethering their argument to *Employer Solutions*, Respondent misses the critical point in dispute. *Employer Solutions* provides guidance on whether the individual signing the attestation has to be the same individual who also reviewed the documents, *see* 833 F.3d at 491, not whether a singular individual can use whatever name suits them on a particular day.

Even assuming, arguendo, that *Employer Solutions* stands for the proposition that one can use names interchangeably when completing the attestation section of an I-9 form, the issue here is when the I-9 forms were executed, not the propriety of using different names when completing the attestation section. Ultimately, Respondent's arguments asserting hypothetical facts not in evidence do not rebut the actual evidence provided by Complainant.

Complainant met its burden of proof and has demonstrated that E.E./E.B. backdated the 177 forms at issue in Count IV.

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[48] Complainant also makes a propensity argument. The Court need not to address the propensity argument because Complainant successfully met its burden based on the evidence in the record related to the timing of the name change and the erroneous use of the new name on "older" forms.

C. Employer Verification Requirements

With the universe of violations established at Counts III and IV, the Court now categorizes the violations or affirms their prior categorization determined in the Order on Motion for Summary Decision.

1. Legal Standard – Failure to Timely Prepare/ Present I-9 Forms (Count III)

As the Court outlined in its November 25, 2020 Order on Motion for Summary Decision:

> An employer must ensure that an employee completes section 1 of the 1-9 on the date of hire and the employer must complete section 2 of the 1-9 within three days of hire. *United States v. A&J Kyoto Japanese Rest.*, 10 OCAHO no. 1186, 5 (2013); 8 C.F.R. § 274a.2(b)(1)(A), (ii)(B). Employers must retain an employee's 1-9 for three years after the date of hire or one year after the date of termination, whichever is later. § 274a.2(b)(2)(i)(A).

R&SL Inc., 13 OCAHO no. 1333a, at 3.

2. Legal Standard – Failure Ensure Proper Completion of Sections 1, 2, and 3 of the I-9 Forms (Count IV)

As the Court outlined in its November 25, 2020 Order on Motion for Summary Decision:

> "Failures to satisfy the requirements of the employment verification system are known as 'paperwork violations,' which are either 'substantive' or 'technical or procedural.'" *Metro. Enters., Inc.*, 12 OCAHO no. 1297, at 7 (citing Memorandum from Paul W. Virtue, INS Acting Exec. Comm'r of Programs, *Interim Guidelines: Section 274A(b)(6) of the Immigration & Nationality Act Added by Section 411 of the Illegal Immigration Reform & Immigrant Responsibility Act of 1996* (Mar. 6, 1997) (Virtue Memorandum)). OCAHO is not bound by the Virtue Memo. *United States v. PM Packaging, Inc.*, 11 OCAHO no. 1253, 7 (2015) (citing *United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1071, 12 (2001).

R&SL Inc., 13 OCAHO no. 1333a, at 3.

Backdating by the attesting employee (which is Section 2 of the Form I-9) is the factual matter issue that remained before the Court prior to hearing. *Id.* at 19. Having determined that the attesting employee did in fact backdate the 177 I-9 forms at issue, the Court must now set forth applicable legal standards and then analyze these violations.

"Section 2 of the I-9 form is the 'Employer Review and Verification' section and is the very heart of the verification process initiated by Congress in IRCA. Failure to complete any part of section 2, including an employer's failure to sign his or her name is . . . a serious violation." *United States v. Acevedo*, 1 OCAHO no. 95, 647, 651 (1989). Failure to "attest to the examination of an employee's employment verification documents . . . is a serious substantive error." *United States v. Senox Corp.*, 11 OCAHO no. 1219, 8 (2014) (citing *United States v. New Outlook Homecare, LLC*, 10 OCAHO no. 1210, 2 (2014)).

3. Analysis –Failure to Timely Prepare and Present I-9 Forms (Count III)

As the Court outlined in its November 25, 2020 Order on Motion for Summary Decision, "The evidence shows that for the 213 I-9s at issue . . . the employees began working and receiving wages prior to completing section 2 of the I-9." *R&SL Inc.*, 13 OCAHO no. 1333a, at 11.

4. Analysis – Failure to Ensure Proper Completion of Sections 1, 2, and 3 of the I-9 Forms (Count IV)

The Court already determined liability for 1,012 violations of Count IV, stating:

> [A] visual inspection of the I-9s reveals that [1,012] I-9s contain at least one substantive violation, including but not limited to, a missing or blank I-9 page, no employee attestation in section 1, no employer attestation in section 2, no check mark indicating work authorization status in section 1, no alien number listed or apparent, no section 3 reverification for employees whose work authorization expired, untimely completion of section 2 because the employer backdated the section 2 attestation, no or invalid List A, B, and/or C documents, and complete or partial missing expiration dates or document numbers for documents in section 2.

R&SL Inc., 13 OCAHO no. 1333a, at 12.[49]

In the Order on Motion for Summary Judgment, the Court singled out one violation of the 1,012 wherein E.B. had signed the employer attestation with her new last name in 2013 despite the evidence showing that the other forms she signed in 2013 were with her original last name "and some of those signatures predated her employment with Respondent." *R&SL Inc.*, 13 OCAHO no. 1333a, at 19.

[49] Several I-9 forms had multiple deficiencies; however, "[a]n employer is liable for only one violation per I-9, despite the presence of other violations." *Super 8 Motel & Villella Italian Rest.*, 10 OCAHO no. 1191, at 16 (citations omitted).

In addition to the 1,012 violations, the Court has now determined liability for an additional 177 violations in Count IV of backdating. The number of violations from Count IV are as follows: 1,011 violations for failure to ensure proper completion (as identified in the Order on Motion for Summary Judgement) and 178 violations of backdating (1 from the Order on Summary Judgment and 177 from the hearing).

Backdating is a substantive violation. In some instances, it is a compounding of an untimely prepared I-9 coupled with a lack of candor, and in other instances it is a complete fabrication (i.e. were the employment documents ever presented and verified at all?).

The record here does not provide complete insight into the nature and circumstances surrounding the violations of backdating, only that it occurred between October 2015 and September 2016. Some instances of backdating occurred over a year after an employee was onboarded, calling into question whether Respondent permitted an individual to work for that entire time without ever meeting its employer verification requirements under the INA. Alternatively, the record sheds no light on whether Respondent actually verified employment eligibility timely, but simply failed to document it (or whether it never did and the entire form is a fabrication).

While there are unanswered questions in the record, this record does permit the conclusion that backdating was systemic for the attesting employee, and for Respondent generally, given the other instances of backdating in the record. The record also supports the conclusion that the number of backdated forms is significant in volume. Section 2 sits at the heart of the verification process, Respondent's decision to backdate and subvert the whole purpose of Section 2 is true cause for concern.

D. Civil Money Penalty

After identifying and categorizing the quantity and kinds of violations, the Court must now make a determination as to civil penalty.

1. Legal Standard – Establishing the Penalty

The applicable penalty range depends on the date of the violations and the date of assessment. *See* 28 C.F.R. § 68.52(c)(8); 28 C.F.R. § 85.5. When a violation occurs after November 2, 2015, and the penalty is assessed between January 30, 2018 and June 19, 2020, the minimum penalty is $224 and the maximum is $2,236. § 85.5. "[T]he assessment date is the date that ICE serves the NIF on a respondent." *United States v. Farias Enters. LLC*, 13 OCAHO no. 1338, 7 (2020).

"An employer is liable for only one violation per I-9, despite the presence of other violations." *Super 8 Motel & Villella Italian Rest.*, 10 OCAHO no. 1191, at 16 (citing *Occupational Res. Mgmt., Inc.*, 10 OCAHO no. 1166, at 16 n.13).

OCAHO case law has long recognized:

> there is . . . no single method mandated for calculating civil money penalties for violations of 8 U.S.C. § 1324a(a)(1)(B). *See United States v. Senox Corp.*, 11 OCAHO no. 1219, 4 (2014); *see also United States v. The Red Coach Rest., Inc.*, 10 OCAHO no. 1200, 3 (2013) (affirmance by the CAHO noting decisions using varied approaches to calculating penalties); *cf. United States v. Int'l Packaging, Inc.*, 12 OCAHO no. 1275a, 6 (2016) (noting that nothing in 8 U.S.C. § 1324a(e)(5) requires the five statutory factors to be considered exclusively on a binary scale); *United States v. Romans Racing Stables, Inc.*, 11 OCAHO no. 1232, 5 (2014) (affirmance by the CAHO) (noting that a failure to affirmatively establish a statutory factor as aggravating does not require that the factor necessarily be treated as mitigating).

United States v. Alpine Staffing, Inc., 12 OCAHO no. 1303, 10 (2017).
The primary focus for assessing penalties is "the reasonableness of the result achieved[.]" *United States v. Fowler Equip. Co. Inc.*, 10 OCAHO no. 1169, 4 (2013). "The civil penalties for violations of § 1324a are intended 'to set a meaningful fine to promote future compliance without being unduly punitive.'" *1523 Ave. J Foods Inc.*, 14 OCAHO no. 1361, at 3 (quoting *United States v. 3679 Com. Place, Inc.*, 12 OCAHO no. 1296, 7 (2017)).

2. Legal Standard - Statutory Penalty Factors

Regarding penalties, Complainant has the burden of proof "as to the existence of any aggravating factors to increase the penalty[.]" *Durable*, 11 OCAHO no. 1231, at 5. "[O]nce the government has introduced evidence related to a given factor, the burden of production shifts to the respondent to introduce evidence of its own to controvert the government's evidence." *Id.* (citations omitted). "If the respondent fails to introduce any such evidence [on penalties], the unrebutted evidence introduced by the government may be sufficient to satisfy its burden of proof on that element." *Id.* (citation omitted).

In assessing an appropriate penalty, the Court must consider following statutory factors: 1) the size of the employer's business;[50] 2) the employer's good faith;[51] 3) the seriousness of the

[50] Although "[p]rior ALJs have considered the 'general public policy of leniency toward small entities' . . . as a non-statutory factor[,]" the undersigned finds that Congress already requires her to consider this policy with the statutory factor of business size. *Psychosomatic Fitness LLC*, 14 OCAHO no. 1387a, at 12 n.4 (citations omitted); *see generally United States v. Pegasus Fam. Rest.*, 12 OCAHO no. 1293, 10 (2016) (citation omitted) ("[I]t is well-settled that prior OCAHO ALJ decisions do not necessarily bind a different ALJ in a future case."). "Therefore, the undersigned will give weight to the small size of Respondent's business only as a statutory factor." *Psychosomatic Fitness LLC*, 14 OCAHO no. 1387a, at 12 n.4.

violations;[52] 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).

"ICE's penalty calculations are not binding in OCAHO proceedings, and the ALJ may examine the penalties de novo if appropriate." *Alpine Staffing, Inc.*, 12 OCAHO no. 1303, at 10 (citing *United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6 (2011)).

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[51] 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. Exec. 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).

Backdating may be indicative of bad faith; however, generally backdating alone does not warrant finding of bad faith. *See United States v. Holtsville 811 Inc.*,11 OCAHO no. 1258, 8 (2015); *United States v. Imacuclean Cleaning Servs., LLC*, 13 OCAHO no. 1327, 9 (2019); *United States v. Integrity Concrete, Inc.*, 13 OCAHO no. 1307, 13 (2017); *United States v. Metro. Warehouse, Inc.*, 10 OCAHO no. 1207, 7 (2013); *United States v. Speedy Gonzalez Constr., Inc.* 11 OCAHO no. 1243, 6 (2015); *United States v. Visiontron Corp.*, 13 OCAHO no. 1348, 7 (2020).

"[T]he absence of bad faith does not show good faith." *United States v. Visiontron Corp.*, 13 OCAHO no. 1348, 8 (2020) (citing *United States v. Guewell*, 3 OCAHO no. 478, 814, 820 (1992)).

[52] Given that "not all violations are equally serious[,]" "the seriousness of violations may be evaluated on a continuum[.]" *Senox Corp.*, 11 OCAHO no. 1219, at 9 (citations omitted). "[V]iolations for failure to prepare I-9 forms . . . are more serious than are the paperwork violations . . . because the failure to prepare the forms completely subverts the purpose of the law." *Id.* (citing *United States v. Skydive Acad. of Hi. Corp.*, 6 OCAHO no. 848, 235, 246 (1996)); *see also Speedy Gonzalez Constr., Inc.*, 11 OCAHO no. 1243, at 5) (citation omitted) (holding that failure to ensure proper completion of Forms I-9 are serious but somewhat less serious than failure to prepare).

"Enhancement based on the seriousness of the violation would thus be appropriate for… backdating the [I-9] forms . . . ." *United States v. Stanford Sign and Awning, Inc.*, 10 OCAHO no. 1152, 6 (2012).

Backdating I-9 forms is a "very serious violation." *Occupational Res. Mgmt., Inc.*, 10 OCAHO no. 1166, at 27–28; *see United States v. Alvand, Inc.*, 2 OCAHO no. 352, 378, 402 (1991) (CAHO modified on other grounds) (treating backdating as a serious violation).

> Although 8 U.S.C. § 1324a(e)(5) "requires due consideration of the enumerated factors, it does not mandate any particular outcome of such consideration, and nothing in the statute or the regulations requires in OCAHO proceedings either 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."

Id. (quoting *Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, at 6–7).

The weight placed on each factor varies depending on the facts of case. *Alpine Staffing, Inc.*, 12 OCAHO no. 1303, at 10 (citing *United States v. Raygoza,* 5 OCAHO no. 729, 48, 51 (1995)). The failure to establish the aggravation of a statutory factor does not require mitigation of that factor. *Id.* (citing *Romans Racing Stables, Inc.*, 11 OCAHO no. 1232, at 5). Indeed, the statute does not require a mathematical offsetting, rather it requires the Court give each statutory factor "due consideration." 8 U.S.C. § 1324a(e)(5).

3. Analysis - Statutory Penalty Factors

a. Business Size

Both Complainant and Respondent characterize Respondent as a small business, thus making mitigation appropriate for this factor. C's Br. 11; R's Br. 12. Based on the position of the parties, the Court mitigates the penalty based on this factor.

b. History of Previous Violations

Complainant asserts Respondent has no history of violations; Respondent concurs. C's Br. 12; R's Br. 16. Complainant argues this factor be treated as neutral and Respondent argues it is mitigating. C's Br. 12; R's Br. 16. While there is nothing in the record to suggest Respondent has violated the INA previously, there is also nothing in the record to suggest it has ever been inspected. "Compliance with the law is the expectation. Indeed, '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.'" *Psychosomatic Fitness, LLC*, 14 OCAHO no. 1387a, at 12 (quoting *United States v. New China Buffet Rest.,* 10 OCAHO no. 1133, 6 (2010)). Thus, the Court will treat the history of violations as a neutral factor. *See id.* (citation omitted).

c. Good Faith

Complainant recommends the Court evaluate the "good faith" factor as neutral, noting that the nature of the violations and the backdating, in particular, should preclude an evaluation of the factor as mitigating. C's Br. 13. Complainant concedes "[a] low compliance rate, alone, does not warrant a finding of bad faith." *Id.* (*United States v. Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355a, 5 (2020)). Respondent asserts that it acted in good faith, citing its training program and other efforts to ensure compliance; ultimately concluding its efforts demonstrate good faith warrant penalty mitigation. R's Br. 15.

On backdating, a review of the record is cause for real concern. As captured in Count IV, Respondent's attesting employee backdated a significant number of I-9 forms, subverting the very purpose of the whole verification system.

Further, the practice of backdating was not limited to just one isolated incident or individual: 124 I-9 forms displayed instances of employer representatives backdating forms (as determined in the Order on MSD).[53] The Court therefore concludes that backdating was systemic. Systemic backdating is a window into Respondent's disregard for the for employment verification provisions of 8 U.S.C. § 1342a, which is especially troubling when the record also demonstrates that, through their own training and processes, Respondent clearly had knowledge of the standards and requirements. *See* R's Br. 15; Hr'g Exs. R-33, R-34, R-35; Tr. B, 78–79.
Ultimately, in this case, Respondent faced a decision: Respondent could date the I-9 forms accurately, but reveal the I-9 forms were completed untimely, or Respondent could falsely date the I-9 forms to make them appear timely completed (thereby minimizing or avoiding liability). Respondent chose the latter, less candid approach, and did so more than 178 times.

Under the circumstances of these facts, and on this record, the Court could conclude that Respondent acted in bad faith, which would aggravate the penalty; however, the Court is also mindful of the burdens of proof at the civil penalty phase. Here, Complainant has recommended this factor be treated as neutral, C's Br. 12, thus signaling Complainant's conclusion that it did not or would not meet its burden to aggravate this statutory factor. The Court will defer to Complainant's assessment relative to the burden of proof and will treat this factor as neutral. Backdated forms will not have their penalty aggravated based on the bad faith factor, but they also will not have their penalty mitigated.

d. Seriousness of Violations

As to the seriousness of the violations, Complainant notes the sheer volume and the nature of the violations (failure to prepare, untimely preparation, and backdating). C's Br. 12–13. Because of the formulaic approach taken by Complainant, it elected to "remove [its] 5% aggravation" from

[53] The Court characterized 123 of those 124 I-9 form violations as: "Section 2 not timely completed." These Count IV violations are therefore characterized only untimely section 2 completions for the purposes of the civil penalty calculation.

its calculation; however, it noted that its "[a]greement to remove the 5% aggravation does not serve to indicate [the violations] are not serious." *Id.* Respondent elected to provide no argument on this statutory factor. R's Br. 16.

The Court concurs with Complainant's assessment as to the seriousness of the violations. Bearing in mind seriousness is evaluated on a continuum, the Court concludes the backdating violations (178 of the charged violations in Count IV) in this case are more serious than violations involving untimely completion (Count III). When faced with the prospect of either backdating or candidly (but untimely) completing I-9 forms, Respondent should have selected the latter option. Respondent will not be rewarded in the penalty for selecting the former. "One of the principal reasons for imposing civil money penalties is their deterrent effect on the offending employer: a meaningful penalty enhances the probability of future compliance. A greater penalty is warranted in light of the need to deter future violations of the same character." *United States v. Jonel, Inc.*, 8 OCAHO no. 1008, 21 (1998).

The Court considers the totality of the circumstances with respect to the backdating, and the volume of violations in determining the propriety of treating this statutory factor as aggravating. While this factor is aggravating, the Court will take a tailored approach in its penalty assessment that reflects the continuum approach referenced above, noting such an approach is consistent with prior OCAHO case law. *See Senox Corp.*, 11 OCAHO no. 1219, at 9.

e. Presence of Unauthorized Workers

As to the presence of unauthorized workers, Complainant argues this factor is neutral, as "compliance with the law is expected." C's Br. 14 (citing *Romans Racing Stables, Inc.,* 11 OCAHO no. 1232, at 5)). Respondent does not provide an explicit recommendation as to this factor. R's Br. 17. Compliance with the law is the expectation – this factor will be treated as neutral. *See Psychosomatic Fitness LLC*, 14 OCAHO no. 1387a, at 14.

4. Legal Standard - Non-Statutory Penalty Factors

In addition to the statutory factors, the Court may consider other "non-statutory" factors. "[T]here is no reason that additional considerations cannot be weighed separately." *Integrity Concrete, Inc.*, 13 OCAHO no. 1307, at 18 (quoting *United States v. M.T.S. Serv. Corp.*, 3 OCAHO no. 448, 527, 531 (1992)). "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 *United States v. Buffalo Transp., Inc.*, 11 OCAHO no. 1263, 10 (2015)).

OCAHO routinely considers "inability to pay" as a non-statutory factor. *See Psychosomatic Fitness LLC*, 14 OCAHO no. 1387a, at 10 (citing *Imacuclean Cleaning Servs., LLC*, 13 OCAHO no. 1327, at 4). "To establish inability to pay, the employer should provide 'detailed financial

statements so that the Court can consider the "complete picture of [the business's] financial health."'" *Id.* (citations omitted).

If a respondent provides a sufficient quantum of evidence on a non-statutory factor, then "as a matter of equity, the ALJ may weigh the facts to determine whether discretion warrants adjustment of the fine." *Integrity Concrete, Inc.*, 13 OCAHO no. 1307, at 18 (citations omitted). "[P]enalties are not meant to force employers out of business or result in the loss of employment for workers." *Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355a, at 7 (quoting *United States v. Two for Seven, LLC*, 10 OCAHO no. 1208, 8–9 (2014)).

"[I]t is well established in our case law that a corporation's ability to demonstrate tax losses does not necessarily establish either a company's poor financial condition or its inability to pay." *United States v. Mott Thoroughbred Stables, Inc.*, 11 OCAHO no. 1233, 5 (2014) (citing *United States v. Bus. Teleconsultants, Ltd.*, 3 OCAHO no. 565, 1622, 1629 (1993)).

5. Analysis of Non-Statutory Penalty Factors

Here, Respondent asserts two non-statutory equity factors for the Court's consideration: it expended funds in an effort to secure its statutory right to a hearing (legal fees); and it is unable to pay the fine proposed by Complainant. Each factor is analyzed separately below, first looking at whether Respondent met its burden in showing the factor should be considered and next whether the evidence provided augurs in favor of mitigating the penalty further.

a. Legal Fees

Respondent expended $102,319.40 in legal fees to secure a hearing before an OCAHO ALJ, and Respondent identified these legal fees as a non-statutory factor for the Court's consideration as a matter of equity. Complainant did not object to consideration of legal fees for this purpose. Tr. A, 270.

"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." *Integrity Concrete, Inc.*, 13 OCAHO no. 1307, at 17 (citation omitted). In addition to Complainant's concession that the legal fees exist, Respondent also provides an executed settlement agreement (entitled Memorandum of Understanding) referencing those fees.

Respondent has met its burden with respect to the quantum of evidence required for the Court to consider this non-statutory factor.

Additionally, the Court notes Complainant did not oppose consideration of this non-statutory equity factor. Respondent should not have to expend funds to gain access to a statutorily-

provided right to a hearing. As a matter of equity, the expenditure of legal fees merits mitigation of the penalty.

b. Inability To Pay

i. Discussion of Quantum of Evidence

Respondents submitted documentary evidence, testimony, and expert testimony related to its finances. Witness testimony was consistent with the financial documentary evidence, which was reliable and highly detailed. While there were some documents demonstrating indicia of unreliability in isolation, the information contained in those documents was incorporated into credible witness testimony. Respondent provided sufficient evidence for consideration the non-statutory factor of inability to pay. A discussion of whether, if at all, this evidence further mitigates the penalty follows.

ii. Evaluation of Evidence

As a starting presumption, a business who has violated the INA will pay the civil penalty initially assessed by the Court. The initial penalty amount may be reduced if a business establishes its inability to pay. Here, the evidence presented by Respondent does not demonstrate its inability to pay.

Respondent frames its presentation around its cash flow and its use of expensive financing, known as "factoring." Cash flow is a relevant data-point, but in this case, it is not an analysis-dispositive factor. When earnings are cyclical, cash flow can look different at different times of year. *See* Tr. B, 230–32. For example, for this Respondent, the business follows the peaks and surges of the local agricultural and aquaculture seasons. Tr. B, 98, 102.

As Complainant's CPA explained, cash flow can be skewed by non-recurring expenses (as was the case here). In examining cash flow for this Respondent, the Court notes that Respondent lists a PPP loan of $1,000,000 as a liability, even though, according to Respondent's accountant, the loan will be forgiven. Tr. B, 129, 144, 153. Additionally, this loan (even if not forgiven) is a non-recurring liability. *See* Tr. B, 142–43. Similarly, a $272,000 tax penalty is listed as a liability, even though the IRS may reduce the penalty. *See* Tr. B, 129–30. Additionally, this penalty (even if not reduced) is a non-recurring liability. Tr. B, 233. Finally, Respondent has non-recurring legal fees generated by the present litigation, which will likely decrease at the conclusion of the case. *Id.* at 233–34. Just as tax losses alone cannot establish inability to pay, cash flow data alone cannot establish inability to pay.

While the financial landscape of each business is unique, in this instance, the Court relies on several other data points to form its conclusion. The Court considers the cyclical nature of

Respondent's business. Consequently, the Court determines gross receipts and gross profits have significant utility to a better, trend-oriented analysis. Gross receipts and gross profits increased from 2018 to present. The Court also considered Respondent's expansion to additional locations during the pendency of Complainant's inspection and this instant litigation.

Upon consideration of the evidence, Respondent has not demonstrated an inability to pay, and thus, the Court will not mitigate the penalty based on this proposed non-statutory factor.

E. Penalty Calculation

The Court now turns to the penalty amount and provides rationale for its penalty calculation.

Within the universe of untimely or incorrectly completed I-9 forms in this case, the Court carves out those forms which were backdated by employee E.B./E.E. as meriting further penalty consideration.

Timely completion of I-9 forms is the standard. An employer who has failed to timely complete an I-9 form in many instances has a choice – to, with full candor, complete the form and date it on the day of completion; or to backdate the form to make it appear timely completed. The first option will undoubtedly generate a civil penalty upon inspection. The second option, which lacks candor, could result in no penalty should the auditor not catch the backdated forms upon inspection.

Employers should be encouraged to act with candor. This final order presents an opportunity to impress upon this Respondent, the importance of candor in the I-9 form process. Accordingly, backdated forms (in Count IV) will merit a higher civil penalty than the untimely completed forms (in Count III).

The Court has given "due consideration" to the statutory factors at § 1324a(e)(5), and appropriate weight to the non-statutory factors presented by the parties. It now imposes the following civil penalties:

For 213 Count III violations, $731.50 per violation;
For 178 Count IV Backdated Forms violations, $1,457.30 per violation; and
For 1,011 Count IV Failure to Ensure Proper Completion violations, $1,100.00 per violation.

V. CONCLUSION

Respondent is not liable for any violations in Count I or Count II. As to Count III, Respondent is liable for failure to ensure timely prepare and/or present Forms I-9 for 213 employees. As to Count IV, Respondent is liable for 1,011 violations of failure to ensure proper completion of Section 1, 2, or 3 and 178 violations of back-dating.

Respondent is directed to pay civil penalties in the total amount of $1,527,308.90.

The parties are free to establish a payment schedule as appropriate.

VI. CONCLUSIONS OF LAW[54]

1. Respondent, R&SL d/b/a Total Employment and Management (TEAM), 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. Respondent is liable for 1,402 violations of 8 U.S.C. § 1324a(a)(1)(B).

A. Procedural Legal Conclusions/Burdens of Proof

4. As required by 28 C.F.R. § 68.52(b), this final order is "based upon the whole record" and "supported by reliable and probative evidence." *E.g.*, *United States v. Fasakin*, 14 OCAHO no. 1375b, 4 (2021) (CAHO order).
5. Pursuant to the Administrative Procedure Act, the undersigned considered "the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d).
6. "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 eligibility verification requirements." *United States v. Metro. Enters., Inc.*, 12 OCAHO no. 1297, 7 (2017).
7. "[T]he government has the burden of proof with respect to the penalty" and it must prove the existence of any aggravating factor by the preponderance of the evidence. *United States v. March Constr., Inc.*, 10 OCAHO no. 1158, 4 (2012); *United States v. Niche, Inc.*, 11 OCAHO no. 1250, 6 (2015).
8. "The burden of proof as to liability and as to the existence of any aggravating factors to increase the penalty always rests with the government in cases arising under 8 U.S.C. § 1324a." *United States v. Durable, Inc.*, 11 OCAHO no. 1231, 5 (2014) (affirmance by CAHO) (citing *United States v. Clean Sweep Janitor Serv.*, 11 OCAHO no. 1226, 2 (2014)).
9. The complainant must "produce evidence which shows [the respondent violated § 1324a] . . . . [The r]espondent may also present rebuttal evidence. Ultimately, all the evidence must preponderate in [the c]omplainant's favor in order for it to prevail upon its claims."

[54] Conclusions of law section contains legal conclusions from both the Order on Summary Decision and this Final Order.

United States v. Applied Comput. Tech., 2 OCAHO no. 367, 524, 534 (1991) (modification by CAHO on other grounds).

10. "Under Supreme Court law, when evidence is in equipoise, the burden of persuasion determines the outcome." *Marinelarena v. Sessions*, 869 F.3d 780, 789 (9th Cir. 2017).
11. "The party who bears the burden of proof loses if the record is inconclusive on the crucial point." *Marinelarena v. Sessions*, 869 F.3d 780, 789 (9th Cir. 2017) (citations omitted).
12. "[U]nder the Administrative Procedure Act, the burden of proof encompasses the burden of persuasion; when the evidence is evenly balanced, the party with the burden must lose[.]" *Marinelarena v. Sessions*, 869 F.3d 780, 789 (9th Cir. 2017) (citing *Dir., Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 272–81 (1994)).

B. Evaluation of Evidence

13. The Court must ensure the evidence is sufficiently reliable, and then it must consider what weight, if any, to assign the evidence based on its probative value.
14. The proponent of documentary evidence must "authenticate a document by evidence sufficient to demonstrate that the document is what it purports to be[.]" *United States v. Carpio-Lingan*, 6 OCAHO no. 914, 1, 5 (1997) (citations omitted).
15. Generally, documentary evidence that is complete, signed, sworn under penalty of perjury, dated, authenticated, laid down with foundation contain sufficient indicia of reliability. *See United States v. Psychosomatic Fitness LLC*, 14 OCAHO no. 1387a, 5–7 (2021); *United States v. Bhattacharya*, 14 OCAHO no. 1380a, at 4–5 (2021).
16. Affidavits are reliable if "they are sworn and signed by the affiants… contain facts that would be admissible in evidence . . . rely on personal knowledge . . . [and] show that the affiants are competent to testify to the matters stated therein." *Nickman v. Mesa Air Grp.*, 9 OCAHO no. 1113, 14 (2004).
17. In evaluating witness credibility, ALJ's may consider: "incredulous testimony, inconsistencies, suspicious memory lapses and blame shifting . . . shifting answers . . . testifying in a vague and evasive manner . . . [and] demonstrably false statements." *United States v. Fasakin*, 14 OCAHO no. 1375b, 4 (2021) (CAHO order) (citations omitted).
18. The Assistant Special Agent in Charge testified credibly.
19. The HSI auditor testified credibly.
20. Complainant's CPA testified credibly.
21. Respondent's business owner testified credibly.
22. Respondent's payroll manager testified credibly.
23. Respondent's accountant testified credibly.
24. Respondent's CPA testified credibly.
25. Expert witness testimony "results from a process of reasoning which can be mastered only by specialists in the field" while lay witness testimony "results from a process of reasoning familiar in everyday life[.]" *Joshua David Mellberg LLC v. Will*, 386 F. Supp. 3d 1098, 1101 (D. Ariz. 2019) (citations omitted).

26. "Expert opinion testimony is relevant if the knowledge underlying it has a valid connection to the pertinent inquiry . . . it is reliable if the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant discipline." *Primiano v. Cook*, 598 F.3d 558, 565 (9th Cir. 2010).
27. Federal Rule of Evidence 401 provides the test for relevance; "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." *United States v. Rose Acre Farms, Inc.*, 12 OCAHO no. 1285, 8 (2016).
28. "Probative value is determined by how likely the evidence is to prove some fact[.]" *United States v. Bensimon*, 172 F.3d 1121, 1126 (9th Cir. 1999) (quoting *Am. Home Assurance Co. v. Am. President Lines*, 44 F.3d 774, 779 (9th Cir. 1994)).
29. Complainant's evidence pertaining to receipt of I-9 forms is highly probative.
30. Complainant's CPA provided highly probative evidence pertaining to Respondent's inability to pay.
31. General assessments of areas for improvement for ICE and an E-Verify manual shed virtually no light on the issues before the Court, thus the probative value of these exhibits is low.
32. Respondent's documentary evidence related to non-statutory factors of inability to pay is highly probative.
33. Respondent's submission of an executed settlement agreement discussing legal fees related to securing a hearing before an ALJ is highly probative.
34. Respondent's owner provided probative evidence related to Count II as he testified about the process by which he assisted in gathering I-9 forms.
35. Respondent's owner's assessment of his company's inability to pay was probative, but ultimately less probative than the documentary evidence submitted with the complete financial figures and the testimony of Respondent's accountant, both of which were highly probative.
36. Respondent payroll manager provided highly probative evidence on Count II.
37. Respondent's CPA provided relevant, but not particularly probative evidence for the Court's consideration.
38. As to the issue of backdating, the payroll manager had little to offer in the form of probative testimony.

C. Count I

39. 8 U.S.C. § 1324a(a)(2) makes it "unlawful for a person or other entity . . . to hire or continue to employ [an] alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment."
40. Knowing "includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition." 8 C.F.R. §

274a.1(l)(1); *see United States v. Foothill Packing, Inc.*, 11 OCAHO no. 1240, 8–9 (2015).

41. "Constructive knowledge" must be narrowly construed. *Aramark Facility Servs. v. Serv. Emps. Int'l. Union, Loc. 1877*, 530 F.3d 817, 825 (9th Cir. 2008); *Collins Foods Int'l, Inc. v. INS*, 948 F.2d 549, 554–55 (9th Cir. 1991).
42. The IRCA "is delicately balanced to serve the goal of preventing unauthorized alien employment while avoiding discrimination against citizens and authorized aliens, and the doctrine of constructive knowledge has great potential to upset that balance and it should not be expansively applied." *Collins Foods Int'l, Inc. v. INS*, 948 F.2d 549, 554–55 (9th Cir. 1991).
43. A social security mismatch alone is not evidence that an employee is unauthorized to work in the United States. *United States v. SKZ Harvesting, Inc.*, 11 OCAHO no. 1266, 16 (2016).
44. Social security no-match letters can be generated "for many reasons, including typographical errors, name changes, compound last names prevalent in immigrant communities, and inaccurate or incomplete employer records." *Aramark Facility Servs. v. Serv. Emps. Intern.*, 530 F.3d 817, 821 (9th Cir. 2008).
45. Similar to the no-match letters in *Aramark Facility Services v. Service Employees International Union, Local 1877*, 530 F.3d 817, 821 (9th Cir. 2008), the E-Verify Manual explains that a TNC with the SSA can result for a variety of reasons.
46. Complainant did not establish that Respondent knowingly hired or continued to employ the remaining employee in Count I.
47. The violations in Count I are DISMISSED.

D. Count II

48. Employers must retain an employee's I-9 for three years after the date of hire or one year after the date of termination, whichever is later. 8 C.F.R. § 274a.2(b)(2)(i)(A).
49. Complainant produced evidence that tends to show Respondent failed to present the 511 I-9 forms; however, Respondent rebutted that evidence (with credible evidence of its own) effectively.
50. Ultimately, this record is one in which the evidence is "in equipoise" and thus, Complainant, "the party who bears the burden of proof loses[.]" *See Marinelarena v. Sessions*, 869 F.3d 780, 789 (9th Cir. 2017) (citations omitted).
51. Respondent is not liable for the 511 forms at issue in Count II.
52. Pursuant to Complainant's withdrawal of five violations in Count II at summary decision, five violations in Count II are DISMISSED.
53. At hearing, Complainant withdrew two additional violations from Count II; thus, those two violations are DISMISSED.

E. Count III

54. Employers must prepare and retain Forms I-9 for employees hired after November 6, 1986, and employers must produce the I-9s for government inspection upon three days' notice. *United States v. Metro. Enters., Inc.*, 12 OCAHO no. 1297, 7 (2017) (citing 8 C.F.R. § 274a.2(b)(2)(ii)).
55. An employer must ensure that an employee completes section 1 of the I-9 on the date of hire and the employer must complete section 2 of the I-9 within three days of hire. *United States v. A&J Kyoto Japanese Rest.*, 10 OCAHO no. 1186, 5 (2013); 8 C.F.R. § 274a.2(b)(1)(A), (ii)(B).
56. At summary decision, Complainant did not establish Respondent failed to timely prepare two I-9s in Count III.
57. Pursuant to Complainant's withdrawal of sixty-one violations in Count III, sixty-one violations in Count III are DISMISSED.
58. Complainant established that Respondent failed to timely prepare and/or present 213 violations in Count III.
59. Respondent is liable for failing to timely prepare and/or present I-9 forms for 213 employees.

F. Count IV

60. "A person or entity must attest under penalty of perjury on a Form I-9 that it has verified that an individual employee is not an unauthorized alien, and such attestation is manifested by either a handwritten or an electronic signature." *United States v. Agri-Systems*, 12 OCAHO no. 1301, 13 (2017) (citing 8 U.S.C. § 1324a(b)(1)(A)).
61. A stamp is not a handwritten signature.
62. When the employer representative fails to print their name in section two, the signature does not appear on other I-9s, and there is no indication who the signatory in section 2 is, the violation can be classified as substantive. *United States v. Agri-Systems*, 12 OCAHO no. 1301, 13 (2017).
63. "Section 2 of the I-9 form is the 'Employer Review and Verification' section and is the very heart of the verification process initiated by Congress in IRCA. Failure to complete any part of section 2, including an employer's failure to sign his or her name is . . . a serious violation." *United States v. Acevedo*, 1 OCAHO no. 95, 647, 651 (1989).
64. Generally, OCAHO has found that an employer backdated I-9s when the signature in section 2 predates the employment of the employee who purportedly signed it on that date, or when the dates on the Form I-9 predate that version of the form. *United States v. Schaus*, 11 OCAHO no. 1239, 8 (2014*); United States v. Imacuclean Cleaning Servs.*, 13 OCAHO no. 1327, 9 (2019).
65. Based on the evidence of the representatives' hire dates, they could not have signed section 2 of these I-9s on the dates purported because they did not work for Respondent on those dates.
66. Backdating is a substantive violation.

67. Failure to "attest to the examination of an employee's employment verification documents . . . is a serious substantive error." *United States v. Senox Corp.*, 11 OCAHO no. 1219, 8 (2014) (citing *United States v. New Outlook Homecare, LLC*, 10 OCAHO no. 1210, 2 (2014)).
68. The evidence provided supports Complainant's theory of backdating and it meets the preponderant evidence standard.
69. While there are unanswered questions in the record, the record does permit the conclusion that backdating was systemic for the attesting employee (and for Respondent generally, given the other instances of backdating in the record) and the number of violations are significant in volume.
70. Ultimately, Respondent's arguments asserting hypothetical facts not in evidence do not rebut the actual evidence provided by Complainant.
71. *Employer Solutions Staffing Group II, L.L.C. v. Office of the Chief Administrative Hearing Officer* provides guidance on whether the individual signing the attestation has to be the same individual who also reviewed the documents, not whether a singular individual can use whatever name suits them on a particular day. *See* 883 F.3d 480, 491 (5th Cir. 2016)
72. E.E./E.B. backdated the 177 forms contested at hearing in Count IV.
73. Respondent is liable for backdating 178 I-9 forms in total (1 from the Order on Summary Judgment and 177 from the hearing).
74. At summary decision, Complainant failed to establish a substantive violation related to 35 I-9 forms in Count IV.
75. An employer may not be held liable for a technical or procedural violation without notice and an opportunity to correct it. *United States v. Forsch Polymer Corp.*, 10 OCAHO no. 1156, 3 (2012); *see* 8 U.S.C. § 1324a(b)(6).
76. Several I-9 forms had multiple deficiencies; however, "[a]n employer is liable for only one violation per I-9, despite the presence of other violations." *United States v. Super 8 Motel & Villella Italian Rest.*, 10 OCAHO no. 1191, 16 (2013) (citations omitted).
77. It is a substantive violation when the box(es) checked in section 1 are contradictory. *United States v. Ketchikan Drywall Servs.*, 10 OCAHO no. 1139, 15 (2011).
78. A U.S. Department of Labor Job Corps ID is a valid List B document because an employee can present an "[i]dentification card issued by federal, state, or local government agencies or entities. If the identification card does not contain a photograph, identifying information shall be included such as: name, date of birth, sex, height, color of eyes, and address[.]" 8 C.F.R. § 274a.2(b)(1)(v)(B)(v).
79. At summary decision, Complainant established that Respondent failed to ensure proper completion of section 1 and/or properly complete section 2 or 3 for 1,011 I-9 forms in Count IV.
80. Respondent is liable for a total of 1,189 violations in Count IV.

G. Civil Penalty

81. The complainant has the burden of proof "as to the existence of any aggravating factors to increase the penalty[.]" *United States v. Durable, Inc.*, 11 OCAHO no. 1231, 5 (2014) (affirmance by CAHO).
82. There is no single method mandated for calculating civil money penalties for violations of 8 U.S.C. § 1324a(a)(1)(B). *United States v. Alpine Staffing, Inc.*, 12 OCAHO no. 1303, 10 (2017) (citations omitted).
83. 8 U.S.C. § 1324a(e)(5) requires "due consideration of the enumerated factors, it does not mandate any particular outcome of such consideration, and nothing in the statute or the regulations requires in OCAHO proceedings either 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. Alpine Staffing, Inc.*, 12 OCAHO no. 1303, 10 (2017) (citations omitted).
84. The failure to establish the aggravation of a statutory factor does not require mitigation of that factor. *United States v. Alpine Staffing, Inc.*, 12 OCAHO no. 1303, 10 (2017) (citations omitted).
85. "The civil penalties for violations of § 1324a are intended 'to set a meaningful fine to promote future compliance without being unduly punitive.'" *United States v. 1523 Ave. J Foods Inc.*, 14 OCAHO no. 1361, 3 (2020).
86. Congress already requires the Court to consider general public policy of leniency toward small entities' within the statutory factors, therefore the undersigned will give weight to the small size of Respondent's business only as a statutory factor. *United States v. Psychosomatic Fitness LLC*, 14 OCAHO no. 1387a, 12 n.4 (2021).
87. The Court mitigates the penalty based on the small business size.
88. The Court will treat the history of violations as a neutral factor.
89. Backdating may be indicative of bad faith; however, generally backdating alone does not warrant finding of bad faith. *See United States v. Holtsville 811 Inc.*, 11 OCAHO no. 1258, 8 (2015); *United States v. Imacuclean Cleaning Servs.*, LLC, 13 OCAHO no. 1327, 9 (2019); *United States v. Integrity Concrete, Inc.*, 13 OCAHO no. 1307, 13 (2017*); United States v. Metro. Warehouse, Inc.*, 10 OCAHO no. 1207, 7 (2013); *United States v. Speedy Gonzalez Constr., Inc.*, 11 OCAHO no. 1243, 6 (2015); *United States v. Visiontron Corp.*, 13 OCAHO no. 1348, 7 (2020).
90. "[T]he absence of bad faith does not show good faith." *United States v. Visiontron Corp.*, 13 OCAHO no. 1348, 8 (2020) (citing *United States v. Guewell*, 3 OCAHO no. 478, 814, 820 (1992)).
91. The Court found systemic backdating, which is a window into Respondent's disregard for the for employment verification provisions of 8 U.S.C. § 1324a; a determination which is especially troubling when the record also demonstrates that, through their own training and processes, Respondent clearly had knowledge of the standards and requirements.
92. Under the circumstances of these facts, and on this record, the Court could conclude that Respondent acted in bad faith, which would aggravate the penalty; however, the Court is also mindful of the burdens of proof at the civil penalty phase.

93. Complainant recommended good faith be treated as neutral, thus signaling Complainant's conclusion it did not or would not meet its burden to aggravate this statutory factor.
94. The Court will defer to Complainant's assessment relative to the burden of proof and will treat the good faith factor as neutral.
95. Backdated forms will not have their penalty aggravated based on the bad faith factor, but they also will not have their penalty mitigated.
96. While there is nothing in the record to suggest Respondent has violated the INA previously, there is also nothing in the record to suggest it has ever been inspected.
97. "Compliance with the law is the expectation. Indeed, '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. Psychosomatic Fitness LLC*, 14 OCAHO no. 1387a, 12 (2021) (citations omitted).
98. Given that "not all violations are equally serious[,]" "the seriousness of violations may be evaluated on a continuum[.]" *United States v. Senox Corp.*, 11 OCAHO no. 1219, 9 (2014) (citations omitted).
99. Backdating I-9 forms is a "very serious violation." *Occupational Res. Mgmt., Inc.*, 10 OCAHO no. 1166, at 27–28; *see United States v. Alvand, Inc.*, 2 OCAHO no. 352, 378, 402 (1991) (CAHO modified on other grounds) (treating backdating as a serious violation).
100. The Court concludes violations charged as backdating (178 violations in Count IV) in this case are more serious than violations involving untimely completion (Count III).
101. When faced with the prospect of either backdating or candidly (but untimely) completing I-9 forms, Respondent should have selected the latter option. Respondent will not be rewarded in the penalty for selecting the former.
102. "One of the principal reasons for imposing civil money penalties is their deterrent effect on the offending employer: a meaningful penalty enhances the probability of future compliance. A greater penalty is warranted in light of the need to deter future violations of the same character." *United States v. Jonel, Inc.*, 8 OCAHO no. 1008, 21 (1998).
103. "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.'" *United States v. Integrity Concrete, Inc.*, 13 OCAHO no. 1307, 17 (2017) (quoting *United States v. Buffalo Transp., Inc.*, 11 OCAHO no. 1263, 10 (2015)).
104. As to the legal fees, Respondent has met its burden with respect to the quantum of evidence required for the Court to consider this non-statutory factor.
105. Respondent should not have to expend funds to gain access to a statutorily-provided right to a hearing.
106. As a matter of equity, the Court considers the expenditure of the identified legal fees.
107. Respondent provided sufficient evidence for consideration the non-statutory factor of inability to pay.
108. The evidence presented by Respondent does not demonstrate its inability to pay.
109. Cash flow is a relevant data-point, but in this case, it is not an analysis-dispositive factor.

110. Cash flow can be skewed by non-recurring expenses (as was the case here).
111. Just as tax losses alone cannot establish inability to pay, cash flow data alone cannot establish inability to pay.
112. The Court determines gross receipts and gross profits have significant utility to a trend-oriented analysis - these increased from 2018 to present. The Court also considered Respondent's expansion to additional locations during the pendency of Complainant's inspection and this instant litigation.
113. The Court will not mitigate the penalty based on the proposed non-statutory factor of inability to pay.
114. Within the universe of untimely or incorrectly completed I-9 forms in this case, the Court carves out those forms which were backdated by employee E.B./E.E. as meriting further penalty consideration.
115. Timely completion of I-9 forms is the standard.
116. An employer who has failed to timely complete an I-9 form in many instances has a choice – to, with full candor, complete the form and date it on the day of completion; or to backdate the form to make it appear as if it was timely completed. The first option will undoubtedly generate a civil penalty upon inspection. The second option, which lacks candor, could result in no penalty should the auditor not catch the backdated forms.
117. Employers should be encouraged to act with candor.
118. This final order presents an opportunity to impress upon this Respondent, the importance of candor in the I-9 form process. Accordingly, backdated forms (in Count IV) will merit a higher civil penalty than the untimely completed forms (in Count III).

SO ORDERED.

Dated and entered on January 6, 2022.

_____
Honorable Andrea R. Carroll-Tipton
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.