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

April 21, 2022

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

Appearances: Daniel Burkhart, Esq., for Complainant
Benjamin D. Cornell, Esq., for Respondent[1]

ORDER ON PENALTIES

This case arises under the employer sanctions provisions under Section 274A of the Immigration and Nationality Act (INA or the Act), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a. Pending before the Court are Complainant's Motion for Summary Decision filed July 22, 2020, seeking $286,356.00 in penalties, and Respondent's Motion for Summary Decision filed July 27, 2020, seeking a recalculation and lowering of the amount of the fines. In an Order dated December 16, 2021, the undersigned bifurcated the issues of liability and penalty and found Respondent liable for failing to prepare and/or present Forms I-9 for 136 employees, in violation of Section 274A(a)(1)(B) of the Act. This Order will address penalties.

The undersigned ordered Respondent to submit supplemental information relevant to the penalty calculation no later than January 6, 2022, and permitted Complainant to submit a response no later than January 17, 2022. The Court did not receive submissions from either party by that deadline. On February 9, 2022, the Court received a "Motion to Extend Filing Deadline for Updated

[1] On February 9, 2022, Respondent, Maverick Construction, LLC, filed a motion to substitute and an entry of appearance for Benjamin D. Cornell, Esq. The Court GRANTS Respondent's motion to substitute. The attorney of record for Respondent is now Benjamin D. Cornell, Esq.

Financial Information (Unopposed)" (hereinafter, Motion to Extend) from Respondent, and "Respondent's Updated Financial Information." The motion represents that Complainant does not oppose the extension.

II. STANDARDS

A. Extension of Time

"OCAHO rules do not provide specific standards for granting extensions [of time.]" *Tingling v. City of Richmond*, 13 OCAHO no. 1324c, 2 (2021) (citations omitted).[2] For situations not provided for in the OCAHO rules, the Federal Rules of Civil Procedure may be used as a general guideline. *Griffin, III v. All Desert Appliances*, 14 OCAHO no. 1370b, 10 n.13 (2021) (citing 28 C.F.R. § 68.1).[3]

Federal Rule of Civil Procedure 6(b)(1) provides: "[w]hen an act may or must be done within a specified time, the court may, for good cause, extend the time . . . on motion after the time has expired if the party failed to act because of excusable neglect." Rule 6(b) "[is] to be liberally construed to effectuate the general purpose of seeing that cases are tried on the merits." *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1258–59 (9th Cir. 2010) (citations omitted).

Courts have applied a four-factor equitable test to determine whether a party's failure to meet a deadline constitutes 'excusable neglect,' examining: "(1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith." *Id.* at 1261 (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993)). A finding of excusable neglect supports the existence of good cause. *See Baldwin v. United States*, 823 F. Supp. 2d 1087, 1113 n.23 (D. N. Mar. I. 2011) (noting good cause standard is less rigorous than excusable neglect) (citations omitted).

---

[2] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

[3] *See* Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2020).

B. Summary Decision

Under the OCAHO rules, the Administrative Law Judge (ALJ) "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c). "An issue of fact is genuine only if it has a real basis in the record" and "[a] genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit." *Sepahpour v. Unisys, Inc.*, 3 OCAHO no. 500, 1012, 1014 (1993) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986), and then citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

"Once the moving party satisfies its initial burden of demonstrating both the absence of a material factual issue and that the party is entitled to judgment as a matter of law, the nonmoving party must come forward with contravening evidence to avoid summary resolution." *United States v. Four Seasons Earthworks, Inc*., 10 OCAHO no. 1150, 3 (2012) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). "[T]he party opposing the motion for summary decision 'may not rest upon the mere allegations or denials' of its pleadings, but must 'set forth specific facts showing that there is a genuine issue of fact for the hearing.'" *United States v. 3679 Commerce Place, Inc.*, 12 OCAHO no. 1296, 4 (2017) (quoting 28 C.F.R. § 68.38(b)). The Court views all facts and reasonable inferences "in the light most favorable to the non-moving party." *United States v. Primera Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994) (citations omitted). Federal Rule of Civil Procedure 56(c) allows an ALJ to consider "admissions on file" for the basis of summary decision. *United States v. St. Croix Pers. Servs., Inc.*, 12 OCAHO no. 1289, 9 (2016) (citations omitted).

C. Civil Money Penalties

The Court assesses civil penalties for paperwork violations in accordance with the parameters set forth in 8 C.F.R. § 274a.10(b)(2) and 28 C.F.R. § 85.5. Complainant has the burden of proof with respect to penalties and "must prove the existence of any aggravating factor by a preponderance of the evidence." *3679 Commerce Place*, 12 OCAHO no. 1296 at 4 (citing *United States v. March Constr., Inc.*, 10 OCAHO no. 1158, 4 (2012), and then citing *United States v. Carter*, 7 OCAHO no. 931, 121, 159 (1997)).

The civil penalties for violations of § 1324a are intended "to set a sufficiently meaningful fine to promote future compliance without being unduly punitive." *Id.* at 7 (citing *United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013)). To determine the appropriate penalty amount, the Court must consider the following the statutory factors: "1) the size of the employer's business, 2) the employer's good faith, 3) the seriousness of the violations, 4) whether or not the individual was an unauthorized alien, and 5) the employer's history of previous violations." *Id.* at 4 (citing 8 U.S.C. § 1324a(e)(5)). The Court considers the facts and circumstances of the individual case

to determine the weight it gives to each factor. *United States v. Metro. Enters*., 12 OCAHO no. 1297, 8 (2017) (citing *United States v. Raygoza*, 5 OCAHO no. 729, 48, 51 (1995)). While the statutory factors must be considered in every case, § 1324a(e)(5) "does not mandate any particular outcome of such consideration, and nothing in the statute or the regulations requires . . . that the same weight be given to each of the factors in every case . . . or that the weight given to any one factor is limited to any particular percentage of the total." *United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6–7 (2011) (citations omitted). Further, the Court may also consider other, non-statutory factors as appropriate in the specific case. *3679 Commerce Place*, 12 OCAHO no. 1296 at 4 (citing *United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000)). Finally, Complainant's "penalty calculations are not binding in OCAHO proceedings, and the ALJ may examine the penalties *de novo* if appropriate." *United States v. Alpine Staffing, Inc.*, 12 OCAHO no. 1303, 10 (2017) (citation omitted).

III. DISCUSSION

A. Motion

Respondent filed an untimely motion for extension; therefore, the issue before the Court is whether Respondent's motion demonstrates excusable neglect (and thus good cause).

In support of its request, Respondent asserts that Complainant does not oppose an extension. Respondent also argues that the prior unavailability of its fourth quarter IRS Form 941 for 2021, and counsel's recent association with the law firm, support the grant of an extension.

The Court applies the *Pioneer* factor test to find that Respondent demonstrated excusable neglect in its untimely extension motion. Respondent prophylactically addressed the danger of prejudice by conferring with Complainant's counsel on February 2, 2022. Complainant does not oppose the extension motion. Respondent's delay of over thirty days is not insignificant. However, Respondent submitted the requested supplemental financial information, including the previously unavailable fourth quarter IRS Form 941 for 2021, simultaneously with its extension motion. The record also does not show evidence of bad faith by Respondent. Accordingly, the Court GRANTS Respondent's Motion to Substitute Counsel and Motion to Extend, and accepts Respondent's supplemental financial information filing.

B. Penalties

Complainant contends that summary decision is appropriate as to the penalties. In the Motion for Summary Decision, Complainant states that it calculated the penalties in accordance with ICE internal methodology set out in the "Substantive Violation Fine Schedule matrix." C's Mot. at 10,

Ex. G-9.[4] According to Complainant, the base fine was calculated by first ascertaining the percentage of violations, which was 100%. *Id.* at 9–10. Therefore, the base fine for each violation was $1,948. *Id.* Complainant then considered the five statutory factors and concluded that the business size and good faith of the business were neutral factors, and the seriousness of the violations was an aggravating factor. *Id.* at 10–13. Complainant asserted that eighty-four of Respondent's employees were unauthorized for employment, and aggravated the fine specifically for those individuals by five percent. *Id.* at 18–19.

Complainant submitted eleven exhibits with its motion, including employee lists and wage information, C's Mot. Ex. G-4–5, communications from Respondent's Office Manager, Ex. G-6–7, the penalty calculation worksheet, Ex. G-9, the Notice of Suspect Documents (NOSD) and supplementary documents, Ex. G-10, and declarations from Complainant's Auditor, Ex. G-8, 11.

Respondent argues in its motion that Complainant's proposed fine is disproportionate given the small size of the business, the lack of prior violations, its good faith in cooperating with the Government and terminating employees as directed, and that the Government did not prove that eighty-four employees were undocumented. R's. Mot. at 2–4. Further, the nonstatutory factor of its inability to pay due to hardship brought on by the pandemic augurs toward a lessening of penalties. *Id.* at 5. Respondent believes a mid-range penalty is more appropriate. *Id.* at 6. Respondent submitted six exhibits, including its Quarterly Unemployment Insurance Tax Summary for the first quarter of 2020, R's Mot. Ex. R-1, Small Business Administration (SBA) Paycheck Protection Program (PPP) information for first five months of 2020, Ex. R-2, a declaration from the owner with attached workers' compensation tax returns, Profit and Loss Comparison from tax years 2017–2019, as well as the IRS Quarterly Federal Tax Return for payroll return for 2019, Ex. R-5. In its supplemental filing, Respondent submitted twelve exhibits, including Form 941 for each quarter of 2021, R's Mot. Ex. R-7–10, 2021 Profit and Loss Statement, Ex. R-11, PPP documents, Ex. R-12–14, Statements of Deposits and Fillings for 2021 and 2022, Ex. R-16–17, and a supplemental declaration from Greg Powers, Ex. R-18.

1. Statutory Factors

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

a. Size of the Business

[4] Complainant's Motion for Summary Decision and exhibits thereto will be abbreviated as "C's Mot. Ex #." Respondent's Motion for Summary Decision and exhibits thereto will be abbreviated as "R's Mot. Ex. #." Respondent's response to Complainant's Motion for Summary Decision will be cited as "R's Opp."

OCAHO case law instructs that the penalty is generally mitigated when Respondent is a small, family-owned business. *See, e.g.*, *United States v. Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355a, 5 (2020) (citing *Carter*, 7 OCAHO no. 931 at 162). Complainant considered that Respondent employed more than 100 people at the time of the audit, but did not have further evidence beyond its awareness that the payroll was $2–3 million. *See* C's Mot. at 10–11. Complainant stated it could not determine whether Respondent would be considered a small business by the Small Business Administration's standards because it was unaware of Respondent's annual receipts for the 2019 tax year. *Id.* Complainant decided that as an analysis of this factor was not determinative, it treated the factor as neutral. *Id.*

Respondent argues that it is a small business, and the fine should be mitigated. R's Mot. at 3. At the time of the audit, Respondent employed 136 people, ninety-nine of whom were salaried, and thirty-seven of whom were paid hourly. C's Mot. Ex. G-4. By 2020, Respondent employed sixty people due to the pandemic. R's Mot. Ex. R-5. The supplemental information indicates that the company has steadily increased in size, from just under 100 in 2020 to a high of 171 in the third quarter of 2021, falling to 154 in the fourth quarter. R's Mot. Ex. R-7–8, 13, 16. The declaration of Respondent's owner, as well as its Profit and Loss Comparison, indicates that its gross revenues were $7.9 million in 2017, $10.4 million in 2018, and $8.08 million in 2019. R's Mot. Ex. R-5. The Profit and Loss Statement for 2019 shows a net income of $70,000, a reduction of $25,000 from 2018. *Id.* The supplemental information indicates $11.7 million in total income for 2021, but a net income loss of approximately $362,000. R's Mot. Ex. R-11, 18.

OCAHO precedent takes many factors into account when determining the size of a business, such as the number of employees, revenue or income, payroll, nature of ownership, or length of time in business. *Fowler Equip. Co.*, 10 OCAHO no. 1169 at 6–7. According to OCAHO precedent, the "size of the business" is determined based on the business size at the time the ALJ assesses the penalty. *United States v. Niche, Inc.*, 11 OCAHO no. 1250, 10 (2015) (citation omitted). Prior decisions have also considered size fluctuations based on the economy. *United States v. Ketchikan Drywall Servs., Inc.*, 10 OCAHO no. 1139, 26 (2011); *United States v. Occupational Res. Mgmt., Inc.*, 10 OCAHO no. 1166, 26–27 (2013); *Carter*, 7 OCAHO no. 931 at 160–62.

OCAHO case law generally considers businesses with fewer than 100 employees to be a small business. *See Carter*, 7 OCAHO no. 931 at 161–62. In addition, OCAHO ALJs have relied on SBA's definitions of whether a business is considered "small." *See United States v. Pegasus Rest., Inc.*, 10 OCAHO no. 1143, 6 (2012) (citing *United States v. Widow Brown's Inn, Inc.*, 3 OCAHO no. 399, 1, 44 (1992), and then citing *United States v. Tom & Yu, Inc.*, 3 OCAHO no. 445, 521, 524 (1992)). Respondent asserts in its reply that it would be considered a residential construction company for new residential construction, for which annual receipts of $39.5 million or less would place it in the small category (Sector 23 – construction, New Single-family Housing Construction). R's Reply at 2; *see also* U.S. SMALL BUS. ADMIN., TABLE OF SMALL BUSINESS SIZE STANDARDS MATCHED TO NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM CODES (2019) (hereinafter SBA SMALL BUSINESS TABLE). Complainant asserts that Respondent would fall within the

subsector for specialty trade contractors. (Sector 23 – construction, subsector 238 – Specialty Trade Contractors, Framing Contractors). C's Mot. at 11; R's Mot. Ex. R-5. A company in this subsector is considered "small" when the annual receipts are less than $16.5 million. SBA SMALL BUSINESS TABLE. In his declaration, Mr. Powers asserts that the company is a "framing contractor" whose primary customer is a large residential developer. R's Mot. Ex. R-5.

Respondent is not a family-owned business and currently has well over 100 employees. The 2019 financial information indicated that Respondent's employees and business had fluctuated to the point where it might have qualified as a small business, but the more recent financial information demonstrates that in terms of employees, the business would not be considered small. It would appear, from the company's characterization of its business, that the company would be considered a specialty trade contractor. However, the record is scant on this point. Regardless of whether the respondent is classified as a specialty trade contractor, the net income still falls within the SBA standards for small. The business is a corporation, but has not been in business for a lengthy period of time. This is a close case, but given the current number of employees, and a sizable revenue level, the Court will not mitigate based upon the size of the business.

b. Good Faith

Complainant treated the good faith factor as neutral. Respondent argues that good faith should be a mitigating factor because there was no culpable behavior, and Respondent began a robust compliance program once Complainant brought the deficiencies in its verification program to its attention. R's Mot. at 3–4. The good faith analysis primarily focuses 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. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 10 (2010) (citations omitted); *United States v. New China Buffet Rest.*, 10 OCAHO no. 1133, 5 (2010) (citations omitted). It appears that Complainant did not take any steps to comply before the investigation. A low compliance rate, alone, does not warrant a finding of bad faith, however. *Metro. Enters*., 12 OCAHO no. 1297 at 15 (citing *New China Buffet Rest.*, 10 OCAHO no. 1133 at 6 (internal citations omitted)). "[T]here must be some evidence of culpable conduct beyond the mere failure to comply[.]" *United States v. Siam Thai Sushi Rest.*, 10 OCAHO no. 1174, 4 (2013) (citation omitted). Additionally, Complainant bears the burden of proving by a preponderance of the evidence that an employer lacked good faith. *See United States v. Metro. Warehouse, Inc*., 10 OCAHO no. 1207, 6 (2013). While Respondent admits it did nothing prior to the investigation to ascertain the requirements of the law, there is no additional evidence of bad faith and Complainant did not seek to prove it did. Because the focus is on the company's conduct before the investigation, "subsequent attempts at compliance have minimal bearing on an analysis of its good faith because conduct occurring after the investigation is over is ordinarily outside the permissible scope of consideration." *Snack Attack Deli, Inc.*, 10 OCAHO no. 1137 at 10; *see also United States v. Felipe, Inc.*, 1 OCAHO no. 93, 626, 634 (1989) (ignorance and mistake do not suffice to show good faith where reasonable care and diligence are required). The fact that Respondent was

unaware of its obligations does not equate to good faith. Complainant appropriately treated the factor as neutral.

c. Seriousness of the Violations

Complainant treated the seriousness of the violations as an aggravating factor. Respondent admits that the violations are serious but argues that Respondent was unaware of the requirement. R's Mot. at 3. Complainant has the burden to prove that an aggravation of the penalty is warranted, and in this case, the Court finds that it has met its burden. *See 3679 Commerce Place*, 12 OCAHO no. 1296 at 4. OCAHO case law states that "a failure to complete any Forms I-9 whatsoever fundamentally undermines the effectiveness of the employer sanctions statute and should not be treated as anything less than serious." *United States v. Morgan's Mexican & Lebanese Foods, Inc.*, 8 OCAHO no. 1013, 239, 247 (1998) (citations omitted); *Siam Thai Sushi Rest.*, 10 OCAHO no. 1174 at 4. This Court considers the percentage of violations in this factor and will take the 100 percent violation into account here. Contrary to Respondent's arguments, ignorance of the law has no bearing on this determination. *See United States v. Keegan Variety, LLC*, 11 OCAHO no. 1238, 5 (2014) ("[I]gnorance of the law is not an affirmative defense.").

d. Employment of Unauthorized Workers

Complainant determined that eighty-four of Respondent's employees were unauthorized for employment and aggravated the penalty as to those employees. Respondent argues that Complainant did not meet its burden to show that the employees were not authorized for employment, that no-match results in Department of Homeland Security (DHS) or Social Security Administration (SSA) databases are not sufficient to prove that an individual is unauthorized, citing to *U.S. v. Ketchikan Drywall Servs*, 10 OCAHO no. 1139 (2011). R's Mot. at 4.

"It is well-established in OCAHO case law that significant database discrepancies with adequate evidentiary support, particularly when unrebutted, can support a finding that aggravation of a civil money penalty is warranted due to the presence of unauthorized aliens." *Metro. Enters.*, 12 OCAHO no. 1297 at 17 (citation omitted); *see also Split Rail Fence Co. v. United States*, 852 F.3d 1228, 1242 (10th Cir. 2017); *Mester Mfg. Co. v. INS*, 879 F.2d 561, 566 (9th Cir. 1989) (finding legacy INS reliance on a computer search of its record system, revealing an employee's documentation was false, sufficient to establish a prima facie showing before the ALJ); *cf. United States v. New El Rey Sausage Co., Inc.*, 1 OCAHO no. 66, 390, 420 n.16 (1989), *aff'd*, 925 F.2d 1154 (9th Cir. 1991); *United States v. Horno MSJ, Ltd.*, 11 OCAHO no. 1247, 11–14 (2015).

In this case, Complainant's auditor provided an affidavit stating that he submitted 102 of the company's employee names and Social Security numbers (SSN) gleaned from the documents provided by Respondent to the Social Security Administration's Office of Inspector General (SSA OIG). C's Mot. Ex. G-8. According to the affidavit, the SSA OIG auditor reported that seventy of the employees were using SSN of a different individual, of whom eleven were deceased. *Id.*

Fifteen of the employees were using SSN that had never been issued by the SSA. *Id.* The auditor reported that a check was done for two individuals using an opensource website, www.ssn-check.org, as well as a check of the USCIS Central Index System (CIS) and the Thomson Reuters CLEAR database, and the individuals' SSN returned no results. *Id.* A check of the CLEAR database revealed that a third individual's SSN had been issued to someone else. *Id.* Neither the SSA OIG's report nor the results of the subsequent checks were submitted by Complainant. It is unclear who performed the subsequent checks.

Subsequently, a Notice of Suspect Document was issued, alerting Respondent to these findings and informing it that unless the workers listed in the NOSD provided valid documentation, they would be considered unauthorized. *Id.;* C's Mot. Ex. G-10. It appears that the company provided additional documentation for fifteen individuals, and after Complainant "conducted further verification of new information" its conclusion still stood that the individuals were unauthorized. *Id.* Complainant subsequently concluded that one individual had employment authorization. *Id.* In a supplemental declaration, the auditor indicated that a check of CIS for one individual (Count 1, 9) revealed that the individual belonging to the SSN used by this person had been ordered removed from the United States and his appeal to the Board of Immigration Appeals had been dismissed in 2018. C's Mot. Ex. G-11.

Respondent provided an affidavit from the owner and a series of emails to the auditor in which Respondent indicates that of the eighty-four employees listed in the NOSD, fifty to sixty were no longer employed, and it sent a memorandum to its employees who were on the list and still employed requesting certain documents. R's Mot. Ex. 4–5. Some of the employees did not return to work, and the company provided the supplemental documents for those who provided it. *Id.*

Generally, OCAHO ALJs have found the evidentiary proof to be sufficient for Complainant to meet its burden of proof on employee's employment authorization status when Complainant submitted both a declaration as well as the search results. *See United States v. Visiontron Corp.,* 13 OCAHO no. 1348, 9 (2020) (submitting declaration from auditor of database mismatches, along with a copy of the database); *Horno MSJ, Ltd*., 11 OCAHO no. 1247 at 10–15 (submitting printout of CIS database search). In other cases, OCAHO ALJs have credited an auditor's declaration where the declarant described the database searches he or she conducted with specificity. *See, e.g.*, *United States v. Exec. Cleaning Servs. of Long Island Ltd*., 13 OCAHO no. 1314, 4–5 (2018) (Complainant submitted declaration of auditor, who described how he performed a search in three government databases and that the worker's name did not match with an alien number or work authorization card issued by USCIS); *United States v. Imacuclean Cleaning Servs., LLC*, 13 OCAHO no. 1327, 11–12 (2019) (Complainant provided auditor's declaration, who described how he ran employee names and A-numbers through several databases, and the database results showed specific individuals to have restricted or expired visas insufficient to authorize employment).

However, where Complainant's sole evidence in support of aggravation for this factor is a vague, generalized, and conclusory declaration, the declaration, standing alone, is insufficient to meet the Government's burden. *Metro Enters.*, 12 OCAHO no. 1297 at 18.

In this case, for eighty-four individuals, Complainant relied solely on its auditor's declaration, who was in turn citing to another auditor's findings. C's Mot. Ex. G-10. Those findings were not provided, nor was any information included regarding the search, how it was performed, and how reliable the findings are. It is well established that reliable, relevant hearsay evidence may be admitted in OCAHO's proceedings, which extends to affidavits provided to support a motion for summary decision. *Diaz v. Pac. Mar. Ass'n*, 9 OCAHO no. 1108, 4 (2004) (citations omitted). However, the affiant must be competent to testify to the matters stated in the affidavit. 28 C.F.R. § 68.38(b). Affidavits must be factual and based on personal knowledge of the affiant. *See* Fed. R. Civ. Proc. 56(c)(4). Affidavits that merely state conclusions, rather than facts, are insufficient, and affidavits that contain legal conclusions are thus substantively deficient. *Diaz*, 9 OCAHO no. 1108 at 5 (citing, *inter alia*, *Orsini v. O/S Seabrook O.N.*, 247 F.3d 954, 960 n.4 (9th Cir. 2001)); *Wicker v. Oregon ex rel. Bureau of Labor*, 543 F.3d 1168, 1177–78 (9th Cir. 2008).

Therefore, if the affidavit addresses matters that are outside the personal knowledge or competence of the affiant, such matters will be given no weight. In this case, the search was conducted by the SSA OIG, not the affiant. The affidavit is lacking in any detail as to how it was conducted, and provides no indication of how the DHS auditor is competent to testify to the truth of the SSA OIG's search. Therefore, it is insufficient, standing alone, to meet the government's burden.

Further, significant concerns have also been expressed in the case of mismatches found in searches of SSA databases. *Aramark Facility Servs. v SEIU, Local 1877*, 530 F.3d 817, 825 (9th Cir. 2008) ("SSN mismatches could generate a no-match letter for many reasons, including typographical errors, name changes, compound last names . . . and inaccurate or incomplete employer records. By SSA's own estimates, approximately 17.8 million of the 430 million entries in its database . . . contain errors, including about 3.3 million entries that mis-classify foreign-born U.S. citizens as aliens."); *see also* Safe-Harbor Procedures for Employers Who Receive a No-Match Letter, 74 Fed. Reg. 51447 (Oct. 7, 2009) (noting that SSA finds millions of SSN mismatches each year, including for reasons other than immigration status).

The auditor did cite with specificity to databases that were searched for three individuals, but the declaration does not indicate who did the search, and no search results were provided. Further, it appears that evidence was submitted in response to the NOSD in the case of fifteen individuals, but Complainant's auditor does not acknowledge this fact. Complainant has not sufficiently supported its claim that eighty-four individuals did not have employment authorization. Accordingly, this factor is treated as neutral.

e. History of Violations

Complainant treated the history of violations as neutral. The record does not indicate that Respondent has a previous history of violations. The general viewpoint in OCAHO case law is that not violating the law in the past does not, on its own, necessarily provide adequate grounds for mitigation. *See United States v. DJ Drywall, Inc.*, 10 OCAHO no. 1136, 12 (2010) ("[N]ever having violated the law before is not necessarily grounds for leniency, and the company has offered no evidence or argument that such leniency is warranted in this case."); *New China Buffet Rest.*, 10 OCAHO no. 1133 at 6 ("[A]s ICE correctly points out, never having violated the law before does not necessarily warrant additional leniency, and it is still appropriate to treat this factor as a neutral one."); *see also United States v. Red Coach Rest., Inc.*, 10 OCAHO no. 1200, 4 (2013) (affirmance by the CAHO).

Respondent, correctly, directs the Court to contrary precedent where the absence of a violation was treated as mitigating. *See Snack Attack Deli, Inc.*, 10 OCAHO no. 1137 at 11 (finding the absence of prior violations would, under the circumstances of that case, "point to mitigation"); *United States v. Riverboat Delta King, Inc.,* 5 OCAHO no. 738, 126, 131 (1995).

Here, Respondent had been in business for three years prior to the investigation. It stands to reason that the lack of a history of previous violations is properly treated as a neutral factor because Respondent has simply not been in business long enough to draw any conclusions in this regard.

2. Non-Statutory Factor

Respondent contends that the Court should mitigate the penalties based on disproportionality of the fine to the size of the employer,[5] as well as economic hardship and its inability to pay the penalty. "A party seeking consideration of a non-statutory factor, such as ability to pay the penalty, bears the burden of proof in showing that the factor should be considered as a matter of equity, and that the facts support such a favorable exercise of discretion." *United States v. Pegasus Family Rest., Inc.*, 12 OCAHO no. 1293, 10 (2016) (citing *United States v. Buffalo Transp., Inc*., 11 OCAHO no. 1263, 11 (2015) (internal citation omitted)).

Respondent argues that it has demonstrated a substantial reduction in operations during the COVID-19 pandemic and concomitant recession. R's Mot. Ex. 5. Its workforce was reduced from 110 in 2019 to 60 in 2020. *Id.* It demonstrated a decline in revenues to $8.08 million in 2019 from $10.4 million in 2018 and projected less for 2020. R's Mot. at 5. The net income for 2019 was $70,000. *Id.* Absent a reduction in the penalty, Respondent indicates it is at risk of closure. *Id.* In its supplement, Respondent submitted another affidavit from its owner, Greg Powers, who states that maintaining operations during the ongoing COVID-19 has been a struggle. R's Mot. Ex. R-

[5] The undersigned will give weight to the size of Respondent only as a statutory factor. *See United States v. Psychosomatic Fitness, LLC*, 14 OCAHO no. 1387a, 12 n.4 (2021) (finding that Congress "already required [the ALJ] to consider 'the general public policy of leniency toward small entities' with the statutory factor of 'size of business.'") (citations omitted).

18. Mr. Powers states that it received PPP loans, without which it would not have survived. *Id.* He concedes that while revenues increased in 2021, the Company lost $362,257.73, with $1.6 million being withheld as taxes owed to the Internal Revenue Service. *Id.*; *see also* R's Mot. Ex. R-11 (Profit & Loss Statement showing a total job income of $11.7 million, but negative $362,257.73 in Net Income). Mr. Powers concludes that the penalty proposed by Complainant will result in the closure of his company. R's Mot. Ex. R-18.

As of the time of the most recent evidence provided, it appears a high proposed penalty will further contribute to the company's income losses, and that Respondent was able to continue to operate solely because of the Paycheck Protection Program. The Profit & Loss Statement confirm that much of the firm's revenues go to meet payroll expenses. The Company demonstrated that it operates within a very thin margin, and accordingly a large penalty would likely cause Respondent to have difficulty meeting its obligations, resulting in significant harm to the business. The Court will mitigate the fine based on the most recent evidence submitted by Respondent.

C. Penalty Range

The applicable penalty range depends on the date of the violations and the date of assessment. *See* 8 C.F.R. § 274a.10(b)(2); 28 C.F.R. § 85.5. For violations that occur after November 2, 2015, the adjusted penalty range as set forth in § 85.5 applies. *See* 28 C.F.R. § 85.5. When a violation occurs after November 2, 2015, and the penalty is assessed after January 29, 2018, but before June 19, 2020, the minimum penalty is $224 and the maximum is $2,236. Civil Monetary Penalties Inflation Adjustment, 83 Fed. Reg. 3944, 3947 (Jan. 29, 2018).

Generally, paperwork violations are "continuous" violations until they are corrected or until the employer is no longer required to retain the Form I-9 pursuant to IRCA's retention requirements. *See* 8 C.F.R. § 274a.2(b)(2)(i)(A); *United States v. Curran Eng'g, Co.*, 7 OCAHO no. 975, 874, 895 (1997); *see also United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1061, 11 (2000). "A verification failure occurs not at a single moment in time, but rather throughout the period of noncompliance." *United States v. WSC Plumbing, Inc*., 9 OCAHO no. 1071, 9 (2001).

The record reflects that the charges are continuing violations that were assessed when the Notice of Intent to Fine was served, on July 16, 2018. Compl. Ex. A at 2. The range is thus $224–$2,236.

Complainant proposed a base penalty of $1,948 based upon the percentage of violations compared to the number of employees, or 100 percent in this case. It increased all the fines for seriousness by 5 percent, or $97.40, for a total of $2,045.40 per individual, and increased the fine for the eighty-four individuals it found were unauthorized by another 5 percent, or $97.40, for a total fine for those individuals of $2,142.980.

This Court begins with a mid-range penalty of $1,290, and adjusts up or down based upon the factors. In this case, the Court adjusts upward based upon the seriousness of the offense. This

upward adjustment is partially mitigated based upon ability to pay. The Court will impose a penalty of $1,350 per violation.

IV. CONCLUSION

The Court finds there is no genuine issue of material fact. Complainant's Motion for Summary Decision relating to penalties is GRANTED IN PART, and Respondent's Motion for Summary Decision relating to penalties is GRANTED IN PART. The Court orders Respondent to pay $183,600 in penalties for failing to prepare and/or present Forms I-9 for 136 employees, in violation of Section 274A(a)(1)(B) of the Act. The parties are free to establish a payment schedule to mitigate the impact of the penalty on Respondent's operations.

V. FINDINGS OF FACT

1. This Order incorporates the findings of facts in the December 16, 2021, order on Summary Decision.

2. Maverick Construction, LLC is not a family-owned business and currently has well over 100 employees.

3. Maverick Construction, LLC had been in business three years prior to the Department of Homeland Security investigation.

4. At the time of the Department of Homeland Security audit, Maverick Construction, LLC employed 136 individuals, ninety-nine of whom were salaried and thirty-seven of whom were paid hourly.

5. In 2020, Maverick Construction, LLC employed sixty workers due to the pandemic.

6. Maverick Construction, LLC employed between 60 to 171 persons from 2019 to the third quarter of 2021, and employed 154 in the fourth quarter of 2021.

7. Maverick Construction, LLC reported a gross revenue of $7.9 million in 2017, $10.4 million in 2018, and $8.08 million in 2019.

8. Maverick Construction, LLC showed a net income of $70,000 in 2019, a reduction of $25,000 from 2018.

9. Maverick Construction, LLC indicated a total income of $11.7 million for 2021, but a net loss of $362,257.73.

10. Maverick Construction, LLC was able to continue to operate during the pandemic solely because of the Paycheck Protection Program.

11. The Profit & Loss Statement from Maverick Construction, LLC confirms that much of the firm's revenues go to meet payroll expenses.

12. Maverick Construction, LLC took no steps before the Department of Homeland Security audit to ascertain its employment authorization verification requirements.

13. Maverick Construction, LLC has a 100 percent violation rate in its failure to prepare or present Forms I-9 for the 136 employees in the Department of Homeland Security audit.

14. The Department of Homeland Security provided an affidavit from its auditor. The affidavit stated the auditor submitted 102 of the company's employee names and Social Security numbers gleaned from documents provided by Maverick Construction, LLC to the Social Security Administration's Office of Inspector General.

15. The affidavit submitted by the Department of Homeland Security's auditor is accorded no weight because it cited to the findings of an auditor from the Social Security Administration's Office of the Inspector General, but did not include that report, nor was any information included regarding the search, how it was performed, how reliable the findings are, and how the affiant is competent to testify to the truth of the Social Security Administration Office of the Inspector General's search.

16. The auditor cited with specificity to databases that were searched for three individuals, but the declaration does not indicate who did the search, and no search results were provided.

17. Significant concerns have been expressed in the case of mismatches found in searches of Social Security Administration databases.

18. Maverick Construction, LLC does not have a history of violations.

VI. CONCLUSIONS OF LAW

1. This Order incorporates the conclusions of law in the December 16, 2021, order on Summary Decision.

2. Maverick Construction, LLC, is not a small business within the meaning of 8 U.S.C. § 1324a(e)(5), given its current number of employees and sizable revenue level, and does

not warrant mitigation based on this factor. *See Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355a (2020) (citing *United States v. Carter*, 7 OCAHO no. 931, 121, 162 (1997)).

3. The fact that Maverick Construction, LLC was unaware of its employment verification obligations does not equate to good faith. *See United States v. Felipe, Inc.*, 1 OCAHO no. 93, 626, 634 (1989).

4. While the good faith analysis primarily focuses 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, a low compliance rate, alone does not warrant a finding of bad faith. In the absence of the Department of Homeland Security demonstrating culpable conduct beyond the mere failure of compliance, the good faith factor is appropriately treated as neutral. *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 10 (2010); *United States v. New China Buffet Rest.*, 10 OCAHO no. 1133, 5 (2010); *United States v. Siam Thai Sushi Rest.*, 10 OCAHO no. 1174, 3–4 (2013).

5. The "failure to complete any Forms I-9" by Maverick Construction, LLC "fundamentally undermines the effectiveness of the employer sanctions statute and should be not treated as anything less than serious." *See Morgan's Mexican & Lebanese Foods, Inc.*, 8 OCAHO no. 1013, 239, 247 (1998); *United States v. Siam Thai Sushi Restaurant*, 10 OCAHO no. 1174, 4 (2013). The Department of Homeland Security has met its burden of proof on aggravation of the penalty for seriousness.

6. Ignorance of the law by Maverick Construction, LLC has no bearing on the determination of the seriousness of the violations. *See United States v. Keegan Variety, LLC*, 11 OCAHO no. 1238, 5 (2014).

7. Generally, OCAHO ALJs have found the evidentiary proof to be sufficient for the Department of Homeland Security to meet its burden of proof to show an employee's employment authorization status when the Department of Homeland Security submitted both a declaration as well as the search results. *United States v. Visiontron Corp.*, 13 OCAHO no. 1348, 9 (2020); *United States v. Horno MSJ, Ltd.*, 11 OCAHO no. 1247, 10–15 (2015).

8. OCAHO ALJs have credited an auditor's declaration regarding employment authorization when the declarant described the databases he or she conducted with specificity. *See United States v. Exec. Cleaning Servs. of Long Island Ltd.*, 13 OCAHO no. 1314, 4–5 (2018); *United States v. Imacuclean Cleaning Servs., LLC*, 13 OCAHO no. 1327, 11–12 (2019).

9. Where, as here, the Department of Homeland Security's sole evidence in support of aggravation for the presence of unauthorized workers is a vague, generalized, and

conclusory declaration, the declaration, standing alone, is insufficient to meet the Department of Homeland Security's burden. *United States v. Metro Enters.*, 12 OCAHO no. 1297, 18 (2017). The court thus treats this factor as neutral.

10. Maverick Construction, LLC's lack of history of violations is appropriate to treat as a neutral factor; never having violated the law before is not necessarily grounds for mitigation. *See United States v. DJ Drywall, Inc.*, 10 OCAHO no. 1136, 12 (2010); *United States v. New China Buffet Rest.*, 10 OCAHO no. 1133, 6 (2010).

11. The undersigned gives weight to the size of Respondent only as a statutory factor. *See United States v. Psychosomatic Fitness, LLC*, 14 OCAHO no. 1387a, 12 n.4 (2021).

12. Maverick Construction, LLC demonstrated that it operates within a very thin margin, and accordingly a large penalty may result in significant harm to the business. The Court mitigates the fine based on Maverick Construction, LLC's most recent evidence.

13. The Court assesses penalties for paperwork violations in accordance with the parameters set forth in 8 C.F.R. § 274a.10(b)(2) and 28 C.F.R. § 85.5. Civil Monetary Penalties Inflation Adjustment, 83 Fed. Reg. 3944 (Jan. 29, 2018).

14. The charges are continuing violations that were assessed when the Notice of Intent to Fine was served, on July 16, 2018. *See United States v. Curran Eng'g Co.*, 9 OCAHO no. 1061, 11 (2000). The penalty range is thus $224–$2,236 per violation.

15. This Court begins with a mid-range penalty of $1,290, and adjusts up or down based on the factors. This Court adjusts upward based on seriousness, which is partially mitigated based upon Maverick Construction, LLC's ability to pay. The Court will impose a penalty of $1,350 per violation.

To the extent that any statement of fact is deemed to be a conclusion of law or any conclusion of law is deemed to be a statement of fact, the same is so denominated as if set forth as such.

SO ORDERED.

Dated and entered on April 21, 2022.

Jean C. King
Chief Administrative Law Judge

Appeal Information

This order shall become the final agency order unless modified, vacated, or remanded by the Chief Administrative Hearing Officer (CAHO) or the Attorney General.

Provisions governing administrative reviews by the CAHO are set forth at 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. pt. 68. Note in particular that a request for administrative review must be filed with the CAHO within ten (10) days of the date of this order, pursuant to 28 C.F.R. § 68.54(a)(1).

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

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