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

April 28, 2022

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. § 1324a Proceeding OCAHO Case No. 2021A00022
SANJAY JERAM CORPORATION, D/B/A ECONOMY LODGE, Respondent.	)	

Appearances: Adrianne D. Williams, Esq., for Complainant
Michael B. Hamar, Esq., for Respondent[1]

ORDER ON PENALTIES

I. PROCEDURAL HISTORY

On March 1, 2021, the United States Department of Homeland Security, Immigration and Customs Enforcement (ICE), filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against Respondent, Sanjay Jeram Corporation, doing business as Economy Lodge. ICE alleges Respondent violated 8 U.S.C. § 1324a because it failed to prepare and/or present Forms I-9 for ten individuals, and of those ten employees, Respondent failed to timely prepare five of their forms. Compl. 3.

On the same day, OCAHO sent Respondent a Notice of Case Assignment for Complaint Alleging Unlawful Employment (NOCA), a copy of the complaint, and the Notice of Intent to Fine (NIF), via U.S. certified mail. The NOCA directed that an answer was to be filed within 30 days of receipt of the complaint, that failure to answer could lead to default, and that proceedings would

[1] Although Respondent's counsel did not file a formal notice of appearance (NOA) with the Court, Respondent's counsel filed the request for a hearing with the Department of Homeland Security, which "shall be considered a notice of appearance on behalf of the respondent for whom the request was made" pursuant to 28 C.F.R. § 68.33(f).

be governed by Department of Justice regulations.[2] NOCA 1–2. The NOCA and complaint were served on March 4, 2021. Thus, Respondent's answer was due no later than April 5, 2021. *See* 28 C.F.R. §§ 68.9(a), 68.8(a). Respondent did not file an answer.

On May 6, 2021, the Court issued an Order to Show Cause (OTSC) directing Respondent, within 15 days of the OTSC, to file an answer and show good cause for its failure to file a timely answer. OTSC 1. The Court advised that failure to file an answer and show good cause may result in the entry of default judgment against Respondent. *Id.* at 2. Respondent did not file a response or an answer.

On July 30, 2021, Complainant filed a Motion for Default Judgment.

On August 10, 2021, the Court issued an Order bifurcating the proceedings into liability and damages phases. Order 2. The Court entered default judgment as to liability and ordered Complainant to file additional briefing on the penalty assessment within 30 days. *Id.* at 2–3. Complainant filed Complainant's Memorandum Regarding Assessment of Liabilities on September 9, 2021. Complainant did not submit any evidence with this filing.

On October 6, 2021, the Court provided Respondent an opportunity to provide briefing on penalties within thirty days in an Order Inviting Respondent's Filing on Penalties. Respondent did not file a submission.

On February 22, 2022, the Court issued an Order Permitting Complainant Supplement Memorandum with Evidence (Order Permitting Supplement). *United States v. Sanjay Jeram Corp.*, 15 OCAHO no. 1412, 1 (2022).[3] As previously explained, "there must be sufficient evidence in the record before the undersigned enters a judgment on penalties after having entered default as to liability." *Id.* at 2 (citations omitted). Because the record is "devoid of evidence necessary for the undersigned to assess penalties" and Complainant did not provide any evidence, the Court provided Complainant an opportunity to supplement by March 8, 2022. *Id.* at 3. To date, Complainant has not filed a supplement.

II. LACK OF EVIDENCE ON PENALTIES

[2] Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2022).

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

Although OCAHO administrative law judges (ALJs) "may assess penalties de novo, . . . they have frequently 'approved the requested penalty amounts in cases of default when the amount requested was reasonable.'" *United States v. Zuniga Torentino,* 15 OCAHO no. 1397, 4 (2021) (citations omitted). This is particularly true when the government seeks civil monetary penalties at the statutory minimum. *Id.* at 5.

In this case, Complainant has sought a penalty in the higher end of the range, and OCAHO caselaw has held "that penalties approaching the maximum permissible fine amount should be reserved for the most egregious violations." *United States v. Fowler Equip. Co., Inc.*, 10 OCAHO no. 1169, 6 (2013) (citation omitted). Because of the lack of evidence, the Court cannot find that the Complainant's penalty is reasonable and must make the determination *de novo*. In the prior Order Permitting Supplement, the undersigned cited *Monge v. Portofino Ristorante,* 751 F. Supp. 2d 789, 794 (D. Md. 2010), which indicated that such an exercise without evidence is impermissible. However, there is a meaningful difference between a speculative calculation of damages and a calculation of a required penalty, which has a minimum and maximum amount imposed by statute and regulation. Moreover, the Court finds that *Monge* prohibits reliance on Complainant's bare assertions unsupported by evidence. Nevertheless, the Court is able to comply with § 1324a(e)(5) and give due consideration to the statutory factors to make its *own* determination of penalties appropriate for the case with the record as presently developed.

In prior cases, this Court has started with a base penalty in the middle of the range, and aggravated and mitigate the penalty based upon the factors presented. *See United States v. 1523 Ave. J Foods, Inc.*, 14 OCAHO no. 1361, 6 (2020). The Court will proceed in a similar manner in this case. The Court notes the approach taken in *United States v. Continental Sports Corp.*, 5 OCAHO no. 799, 626, 632 (1995), where "the record d[id] not disclose facts not reasonably anticipated by INS in assessing the penalty," thus the court stated it had "no reason to increase the penalty beyond the amount assessed by [Complainant]." In deciding not to aggravate the factor of presence of unauthorized workers, the court noted that complainant only asserted argument and did not provide documentary evidence of unauthorized workers. *Id.* at 635.

Here, because Complainant has the burden to "prove the existence of any aggravating factor by a preponderance of the evidence[,]" *Sanjay Jeram Corp.*, 15 OCAHO no. 1412, at 2 (citation omitted), and Complainant has failed to provide evidence to meet its burden, the Court will not aggravate factors based purely on Complainant's argument. *See Cont'l Sports Corp.*, 5 OCAHO no. 799, at 635 (declining to aggravate factor without evidence).

III. CIVIL MONEY PENALTIES

Civil money penalties are assessed for paperwork violations in accordance with 28 C.F.R. §§ 68.52, 85.5. The civil penalties for violations of § 1324a are intended "to set a sufficiently meaningful fine to promote future compliance without being unduly punitive." *United States v. 3679 Com. Place, Inc.*, 12 OCAHO no. 1296, 7 (2017) (citation omitted). To determine the appropriate penalty amount, "the following statutory factors must be considered: 1) the size of the employer's business, 2) the employer's good faith, 3) the seriousness of the violations, 4) whether or not the individual was an unauthorized alien, and 5) the employer's history of

previous violations." *Id.* at 4 (citing § 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., Inc.*, 12 OCAHO no. 1297, 8 (2017) (citation omitted). 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).

A. Statutory Factors

Having provided the parties an opportunity to brief the issue of penalties after an entry of default on liability, the Court now gives due consideration to the five statutory factors to determine the penalty amount pursuant to § 1324a(e)(5). *See United States v. Cruz*, 3 OCAHO no. 453, 595, 595, 598–600 (1992); *United States v. Kampe*, 3 OCAHO no. 462, 669, 669–72 (1992).

First, there is no evidence in the record indicating the size of Respondent's business, such as number of employees. Therefore, the Court will neither aggravate nor mitigate based on this factor.

Second, the record is silent as to Respondent's good faith. "OCAHO precedent reflects that the principal focus in assessing good faith must be on what steps the employer took *before* the investigation to ascertain what the law is and to follow it." *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 10 (2010). Here, the Court has no basis to determine what steps Respondent undertook prior to the investigation to ascertain what the law is and to comply with it as Complainant did not provide such and Respondent elected not to file any submissions. Notwithstanding the lack of good faith, there is no indication that Respondent acted in bad faith. Therefore, the Court treats the good faith factor as neutral.

Third, Complainant asserts aggravation based on the seriousness of the violations. Mem. Assess. Penalties 5. Complainant charges Respondent with ten violations of failure to prepare and/or present Forms I-9. Compl. 3. But of those ten forms that Complainant alleges were not prepared and/or presented, Complainant also alleged that five of those forms were not timely prepared. *Id.* Thus, five forms were charged with two different violations. 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) (citation omitted). As such, the Court does not consider a penalty for the additional five violations.[4] Therefore, the Court will

[4] Moreover, as a practical concern, the Court is unable to assess the penalty range for violations of failure to timely prepare as the penalty range depends upon the date of occurrence, which in turn, depends upon the date of hire. *See, e.g., United States v. Curran Eng'g Co, Inc.*, 7 OCAHO no. 975, 874, 897 (1997) (A timeliness violation is "frozen in time" at the point when the

issue penalties for the ten violations of failure to prepare and/or present, as opposed to the additional five violations of failure to timely prepare.

"[F]ailure to prepare and/or present a Form I-9 is among the most serious of paperwork violations." *United States v. Alpine Staffing, Inc.*, 12 OCAHO no. 1303, 18 (2017) (citing *Super 8 Motel*, 10 OCAHO no. 1191, at 14). Although Complainant did not provide evidence for this factor, the record (specifically the August 10, 2021 Order establishing liability) is sufficient such that the Court will aggravate the ten violations of failure to prepare and/or present for seriousness.

Fourth, the record does not clarify whether Respondent employed unauthorized employees. A lack of unauthorized employees "may be treated as neutral, under the rationale that 'compliance with the law is the expectation, not the exception.'" *United States v. Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355a, 7 (2020) (quoting *United States v. Romans Racing Stables, Inc.*, 11 OCAHO no. 1232, 5 (2014)). Accordingly, the undersigned treats this factor as neutral.

Fifth, the record is absent as to Respondent's history of previous violations. "OCAHO case law makes it clear that having no history of previous violations should be treated as a neutral factor, rather than a mitigating factor, because 'compliance with the law is the expectation, not the exception.'" *Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355a, at 7 (first quoting *Alpine Staffing, Inc.*, 12 OCAHO no. 1303, at 18–19; and then quoting *Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, at 9). Thus, the Court treats this factor as neutral.

B. Penalty Amount

The applicable penalty range depends on the date of the violations and the date of assessment. *See* 28 C.F.R. § 85.5. "[T]he date of assessment is the date that ICE serves the NIF on a respondent." *United States v. Farias Enters. LLC*, 13 OCAHO no. 1338, 7 (2020). Here, Complainant served the NIF on September 21, 2020. Compl. Ex. A.

For violations that occur after November 2, 2015, the adjusted penalty range in § 85.5 applies. *See id.* For civil penalties assessed between June 19, 2020 and December 13, 2021, as this penalty was, the minimum penalty for each violation is $234, and the maximum penalty is $2,332. *Id.*

"OCAHO case law has long recognized that there is no single preferred method of calculating penalties. . . . The primary focus is on the reasonableness of the result achieved . . . ." *Fowler Equip. Co. Inc.*, 10 OCAHO no. 1169, at 4 (citations omitted).

Complainant seeks a civil monetary penalty of $1,948 for each violation. Compl. Ex. A. But "[p]enalties assessed at the upper-range to the maximum penalty amount should be reserved for the most serious and egregious violations." *United States v. Niche, Inc.*, 11 OCAHO no. 1250,

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employer "fail[s] to complete, or to ensure completion, of an I-9 form by the date that the completion is required."); *United Sates v. WSC Plumbing, Inc.*, 9 OCAHO no. 1061, 11–12 (2000). The record does not contain the dates of when the failures to timely prepare accrued.

13 (2015) (citation omitted). Complainant did not present any evidence of the kind of serious and egregious factors that warrant such a fine. The Court declines to adopt Complainant's proposed penalty. *See Alpine Staffing, Inc.*, 12 OCAHO no. 1303, at 10 (citation omitted) ("ICE's penalty calculations are not binding in OCAHO proceedings, and the ALJ may examine the penalties *de novo* if appropriate.").

Using the mid-range penalty as a base, the Court aggravates based on the seriousness of the violations. As such, the Court imposes a fine of $1,350 for each of the ten violations of failure to prepare and/or present. Thus, the final penalty amount is $13,500.

IV. ADDITIONAL REQUESTS FOR RELIEF

In addition to civil money penalties, Complainant seeks a cease and desist order. Compl. 4. However, § 1324a only provides a cease and desist order for "violations which refer to the hiring, recruiting, and referral violations and not to violations of the employment verification system." *United States v. Gutierrez*, 3 OCAHO no. 554, 1513, 1515 (1993) (CAHO order) (citation omitted); *see* § 1324a(e)(4); *see also United States v. Alicia M. Vasquez*, 15 OCAHO no. 1403, 2–3 (2021) (citation omitted). Here, liability was found for failure to prepare and/or present and failure to timely prepare. Therefore, a cease and desist order is inappropriate in the instant case.

Further, Complainant requests Respondent be ordered to "comply with the requirements of Section 274A(b) of the Immigration and Nationality Act, as amended [8 U.S.C. § 1324a(b)], with respect to individuals hired (or recruited or referred for employment for a fee) during a period of three years[.]" Compl. 4. OCAHO precedent establishes that OCAHO "is without statutory authority to order a party to comply with the requirements of the employment verification system for a period of up to three years, where the only violations alleged are paperwork violations." *Gutierrez*, 3 OCAHO no. 554, at 1515. Of course, Respondent continues to be at risk of liability for any compliance failures, but Complainant's specific request is denied.

In light of the foregoing, the Court DENIES Complainant's Motion for Default Judgement as MOOT.

V. CONCLUSION

The Court has given each statutory factor due consideration. The final penalty amount for the ten violations of § 1324a(b) is $13,500.

VI. FINDINGS OF FACT

1. On September 21, 2020, the Department of Homeland Security, Immigration and Customs Enforcement, served Sanjay Jeram Corporation, doing business as Economy Lodge with a Notice of Intent to Fine.

2. On March 1, 2021, the Department of Homeland Security, Immigration and Customs Enforcement, filed a Complaint with the Office of the Chief Administrative Hearing Officer.

3. Sanjay Jeram Corporation, doing business as Economy Lodge, failed to prepare and/or present Forms I-9 for ten employees.

VII. CONCLUSIONS OF LAW

1. Sanjay Jeram Corporation, doing business as Economy Lodge, 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. Sanjay Jeram Corporation, doing business as Economy Lodge, is liable for ten violations of § 1324a(a)(1)(b).

4. In light of the ten established violations of failure to prepare and/or present, the Court finds that aggravation of the penalty based on seriousness is warranted. *United States v. Alpine Staffing, Inc.*, 12 OCAHO no. 1303, 18 (2017).

5. The penalties in this case are assessed when the Department of Homeland Security, Immigration and Customs Enforcement serves the Notice of Intent to Fine. *United States v. Farias Enter. LLC*, 13 OCAHO no. 1338, 7 (2020).

6. Because the Notice of Intent to Fine was served on September 21, 2020, the minimum penalty for each violation is $234, and the maximum penalty is $2,332. *See* 28 C.F.R. § 85.5.

7. Because Complainant has the burden to "prove the existence of any aggravating factor by a preponderance of the evidence[,]" *United States v. Sanjay Jeram Corp.*, 15 OCAHO no. 1412, 2 (2022) (citation omitted), and Complainant has failed to provide evidence to meet its burden, the Court will not aggravate factors based purely on Complainant's argument. *See United States v. Continental Sports Corp.*, 5 OCAHO no. 799, 626, 635 (1995) (declining to aggravate factor without evidence).

8. 8 U.S.C. § 1324a only provides a cease and desist order for "violations which refer to the hiring, recruiting, and referral violations and not to violations of the employment verification system." *United States v. Gutierrez*, 3 OCAHO no. 554, 1513, 1515 (1993) (CAHO order) (citation omitted); *see* § 1324a(e)(4); *see also United States v. Alicia M. Vasquez*, 15 OCAHO no. 1403, 2–3 (2021) (citation omitted).

9. OCAHO precedent establishes that OCAHO "is without statutory authority to order a party to comply with the requirements of the employment verification system for a period of up to three years, where the only violations alleged are paperwork violations. *United States v. Gutierrez*, 3 OCAHO no. 554, 1513, 1515 (1993) (CAHO order) (citation omitted).

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

SO ORDERED.

Dated and entered on April 28, 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) (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.