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

May 26, 2022

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

Appearances: Colin W. Maguire, Esq., for Complainant
Anthony Matulewicz, Esq., for Respondent

FINAL ORDER ON PENALTIES

I. INTRODUCTION

This case arises under the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a. On August 21, 2020, Complainant, the United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or the Government), filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO). Complainant alleged that Respondent, Bazan's Enterprises, Inc. d/b/a Taco Ole Mission (Taco Ole Mission), failed to prepare or present Forms I-9 within three days of the Notice of Inspection (NOI) for seventy-one individuals. Complainant also alleged that Respondent hired sixty-one individuals knowing the individuals were unauthorized for employment in the United States.

On December 20, 2021, the undersigned issued an Amended Order on Motion for Summary Decision in *United States v. Bazan's Enters., Inc.*, 15 OCAHO no. 1408 (2021).[1] The

[1] 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

Administrative Law Judge (ALJ) found Respondent liable for seventy-one violations of 8 U.S.C. § 1324a(a)(1)(B), and sixty-one violations of 8 U.S.C. § 1324a(a)(1)(A). The ALJ bifurcated the liability and penalty assessment to permit supplemental briefing by the parties on penalty determination. On December 30, 2021, the Court granted an extension of the filing deadlines for supplemental briefing. On January 24, 2022, Respondent submitted a filing addressing the penalty determination. On February 2, 2022, Complainant filed its response.

This decision addresses the penalty assessment for Respondent.

II. LEGAL STANDARDS

A. Summary Decision

In OCAHO proceedings, the ALJ "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c).[2] OCAHO precedent has held that "[a]n issue of fact is genuine only if it has a real basis in the record" and that a "genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit." *Sepahpour v. Unisys, Inc.*, 3 OCAHO no. 500, 1012, 1014 (1993) (first citing *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)). The Court views all facts and reasonable inferences "in the light most favorable to the non-moving party." *United States v. Primera Enters.*, 4 OCAHO no. 615, 259, 261 (1994) (citations omitted). Federal Rule of Civil Procedure 56(c), a permissible guidance in OCAHO proceedings, *see* 28 C.F.R. § 68.1, allows an ALJ to consider "admissions on file" for the basis of summary decision. *United States v. St. Croix Pers. Servs., Inc.*, 12 OCAHO no. 1289, 9 (2016) (citations omitted).

B. Penalties

After finding liability, the ALJ may examine penalties de novo, as the Government's "penalty calculations are not binding in OCAHO proceedings." *United States v. Alpine Staffing, LLC*, 12 OCAHO no. 1303, 10 (2017) (quoting *United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6 (2011)).

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.

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

1. Paperwork Violations

The Government has the burden of proof with respect to penalties and "must prove the existence of any aggravating factors by a preponderance of the evidence." *United States v. Maverick Constr., LLC*, 15 OCAHO no. 1405, 3 (2021) (quoting *United States v. 3679 Commerce Pl., Inc.*, 12 OCAHO no. 1296, 4 (2017) (citations omitted)). The ALJ must consider the following statutory factors during the penalty assessment stage: 1) the size of the employer's business; 2) the employer's good faith; 3) the seriousness of the violations; 4) whether or not the individual was an unauthorized alien; and 5) the employer's history of previous violations. 8 U.S.C. § 1324a(e)(5); *see also Ice Castles Daycare Too*, 10 OCAHO no. 1142, at 3, 6–7 (noting that neither the statute nor OCAHO regulations require a particular weight or outcome be given to each factor). The ALJ may also consider other nonstatutory factors, such as an inability to pay the penalty, as appropriate in the specific case. *United States v. Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355a, 3 (2020) (citing *3679 Commerce Pl., Inc.*, 12 OCAHO no. 1296, at 4) (citations omitted)). A party seeking consideration of a nonstatutory factor has the burden of proof to show that the factor should be exercised as a matter of equity and warrants a favorable exercise of the Court's discretion. *United States v. Pegasus Family Rest., Inc.*, 12 OCAHO no. 1293, 10 (2016) (citations omitted).

2. Knowing Hire Violations

Civil penalties for knowing hire violations are assessed per the framework set forth in 8 C.F.R. § 274a.10(b)(1)(ii)(A) and 8 C.F.R. § 85.5. The statute does not mandate that the ALJ consider specific factors when setting penalties for knowing hire violations. *United States v. Foothill Packing, Inc.*, 11 OCAHO no. 1240, 12 (2015) (citing 8 U.S.C. § 1324a(e)(4)).

III. POSITIONS OF THE PARTIES

A. Complainant's Position

In support of its penalty determination, Complainant submitted the above-referenced Motion for Summary Decision, with an attached Prehearing Statement. Complainant also filed a response to Respondent's financial information supplemental filing.

In its Motion for Summary Decision, Complainant moves the Court to order penalties totaling $431,609, and for Respondent to "cease and desist" from the Notice of Intent to Fine (NIF) violations. Mot. Summ. Dec. 2. Complainant's brief contains factual allegations about Respondent's corporate structuring, including the existence of a "cash basis" payroll not reflected in traditional accounting. *See id.* at 3, 6–7. Complainant contends that the attached affidavits tend to show that Respondent did not have an I-9 program in place, did not use standard accounting

deductions for employees, and treated unauthorized workers poorly. *See id.* at 3–4, Attach. B–D. Complainant also discusses state criminal charges against E.B. III, a senior level employee of Respondent. *Id.* at 3–4.

Complainant then argues for its proposed penalty assessment for both the paperwork and knowing hire violations under the 8 U.S.C. § 1324a(e)(5) factors. Complainant asserts that the size of Respondent's business is an aggravating factor, as it is not actually a small business of less than 100 employees. *See id.* at 6–7. Complainant treats the history of violations as neutral; however, Complainant asks the Court to infer a "history of deception and illegal activity related to [Respondent's] hiring practices." *See id.* at 3, 7. For the good faith factor, Complainant claims that Respondent cannot demonstrate good faith when it did not have an I-9 program in place before the DHS investigation, and warrants aggravation based on bad faith. *See id.* at 7–8. Complainant argues that the nature of the violations are inherently serious. *See id.* at 8–9. Finally, Complainant maintains that the high percentage of unauthorized aliens supports penalty aggravation. *Id.* at 9. Complainant also asks the Court to consider the poor treatment of undocumented workers as a basis for aggravation. *See id.* at 8–9.

In response to Respondent's supplemental filing, Complainant reiterates its penalty positions and presents new arguments in response to Respondent's recent financial information.[3] *See* Supp. Resp. 1–4. Complainant asserts that Respondent's financials "trend" toward pre-COVID levels, and that Respondent is already receiving government support through forgivable Paycheck Protection Program (PPP) loans and related Economic Injury Disaster Loans (EIDL). *See id.*

B. Respondent's Position

Respondent did not submit a Motion for Summary Decision or an Opposition to Complainant's Motion for Summary Decision. Still, Respondent's answer, prehearing statement, and supplemental filing provide Respondent's defenses to the proposed penalty assessment.[4]

Respondent argues that the proposed penalty is "excessive and not within the spirit of 8 CFR § 274." *See* Answer 1–3 (seeking a "fair and equitable penalty"); Supp. Filing 1–2 (requesting that the Court "enter a realistic and fair fine"). Respondent points to its good faith efforts to comply with ICE during and after the investigation, its business size, and a lack of violation history as

[3] Complainant's supplemental filing asserts that Respondent is not presently complying with I-9 requirements. Supp. Resp. 3–4. However, the Court specifically limited the scope of the Government's response to Respondent's financial information. *Bazan's Enters., Inc.*, 15 OCAHO no. 1408, at 6. The Court therefore will not consider this argument.

[4] The Court previously found Respondent did not raise cognizable Constitutional arguments in its defense. *Bazan's Enters., Inc.*, 15 OCAHO no. 1408, at 5.

warranting mitigation. S*ee* Answer 1–3. Respondent maintains that the proposed fine "would force Respondent to go bankrupt." *Id.* at 1–2; Supp. Filing 1–2.

IV. EVIDENCE

A. Evidence in OCAHO Proceedings

The "strict technical rules of evidence are somewhat relaxed" in administrative proceedings. *See United States v. Bhattacharya*, 14 OCAHO no. 1380a, 4 (2021) (affirmance by CAHO) (quoting *United States v. Tinoco-Medina*, 6 OCAHO no. 890, 720, 738 (1996)); *United States v. Carpio-Lingan*, 6 OCAHO no. 914, 4–5 (1997) (noting more flexible evidentiary standards in administrative proceedings) (citing the Administrative Procedure Act, 5 U.S.C. § 551 et seq.).

OCAHO regulations provide that "[u]nless otherwise provided by the statute or these rules, the Federal Rules of Evidence [FRE] will be a general guide to all proceedings[.]" 28 C.F.R. § 68.40(a). The OCAHO rule on evidence states that all "relevant material and reliable evidence is admissible[.]" 28 C.F.R. § 68.40(b); *see also United States v. R&SL, Inc.*, 13 OCAHO no. 1333b, 24, 26 (2022) (citations omitted). Specific to a motion for summary decision, the OCAHO rules provide that any affidavits "shall set forth such facts as would be admissible in evidence in a proceeding subject to 5 U.S.C. 556 and 557[.]" 28 C.F.R. § 68.38(b).

The OCAHO rules adopt, almost verbatim, the due process safeguard of FRE 403. *Compare* 28 C.F.R. § 68.40(b) *with* Fed. R. Evid. 403. Both § 68.40(b) and FRE 403 emphasize that the Court may exclude relevant evidence if unfair prejudice, confusion of the issues, or needless presentation of cumulative evidence substantially outweigh its probative value. *See id.* Prejudice may be "unfair" if it unduly suggests a decision on an improper basis, such as an emotional one, or on impermissible character evidence under FRE 404. *See* Wright & Miller, 22A Fed. Prac. & Proc. Evid., Rule 403 (2d ed.) (2021); Mueller & Kirkpatrick, 1 Fed. Evid. § 4:38 (4th ed.) (2021).

B. Complainant's Evidence

In support of its Motion for Summary Decision, Complainant presented four exhibits, stylized as "attachments": the 2018 Report of Investigation (ROI) and authenticating affidavit of Homeland Security Investigations (HSI) auditor Maria Zamora (Attachment A); the 2019 ROI and authenticating affidavit of HSI agent Jason Psneck, with two unsigned probable cause documents (Attachment B); the 2018 sworn statement of employee H.C.C. (Attachment C); and the 2018 sworn statements of employees J.J.R.C. and J.P. (Attachment D). In its response to Respondent's supplemental filing, Complainant attached a website printout describing Respondent as the recipient of PPP loans.

Respondent presents a general objection to Complainant's Motion for Summary Decision evidence on relevance and ethics grounds. *See* Resp't Prehr'g Stmt. 2–3. Respondent does not appear to raise any evidentiary challenges to Attachment A. The Court finds that Attachment A is facially relevant, since it discusses the DHS investigation leading up to the OCAHO proceedings, contains sufficient indicia of reliability, and is not unfairly prejudicial. Rather, the Court interprets Respondent's objection as relating to potential relevance and prejudice with Attachment B, potential relevance and prejudice with Attachment C, and potential relevance with Attachment D.[5]

1. Attachment B

Attachment B describes a criminal investigation regarding an alleged assault by E.B. III against three employees at Taco Ole culminating in charges of sexual assault and terroristic threats. Complainant describes E.B. III as either the son of the shareholder, the owner, or the manager of the restaurant in the ROI. Mot. Summ. Dec. 3, Attach. B. The ROI alleges that one of the victims lacked employment authorization, and E.B. III was aware of that fact. *Id.*

Complainant argues generally that the allegations bear on the "seriousness" factor, but does not explain how. *See* Mot. Summ. Dec. 8–9. "Evidence is relevant if it has any tendency to make the existence of a fact more or less probable than it would otherwise be without the evidence, and the fact is of consequence in determining the action." Fed. R. Evid. 401. In considering the "seriousness" factor, the ALJ examines whether the company's failure to prepare or present I-9 forms is a serious violation such that the penalty should be aggravated. In analyzing the factor, OCAHO precedent dictates that the judge "analyze[s] the specific violation, i.e. whether or not an I-9 form was filled out and presented; and if so, what is wrong with the form and what are the circumstances of that particular wrong." *United States v. Felipe, Inc.*, 1 OCAHO no. 93, 626, 636–37 (1989). The circumstances in the case of a failure to prepare or present appear to be primarily the fact of the violation, and in some cases have included the degree of seriousness as compared to other violations present in the case, the length of the delay in preparing the Form I-9, or the number or percentage of violations. *See, e.g.*, *United States v. Siam Thai Sushi Rest.*, 10 OCAHO no. 1174, 4 (2013); *United States v. Big Bear Market*, 1 OCAHO no. 48, 285, 315 (1989); *United States v. Valdez*, 1 OCAHO no. 91, 598, 621 (1989). Nothing in Attachment B bears on any of these circumstances.

The allegations that abuse occurred are extremely troubling, but do not bear upon the lack of the existence of the I-9s, how long the failure had persisted, or the number or percentage of violations here.[6] Such allegations are more appropriately pursued in other forums. Even in prior cases where

[5] The Court notes that Attachments C and D have English translations that do not comport with 28 C.F.R. § 68.7(e). Respondent has not specifically objected to the translations and accordingly, the Court will not reject the translations.

[6] The Court is cognizant that the underlying aim of IRCA is to deter illegal immigration by imposing a duty on employers to verify the employment eligibility of employees to ensure that a

criminal charges were found relevant, OCAHO has still limited consideration of this evidence. For example, in *United States v. Tinoco-Medina*, the ALJ allowed evidence of Respondent's criminal record when an arrest directly lead to the civil document fraud charge before OCAHO. *See* 6 OCAHO no. 890, at 739 (limiting consideration to identifying the circumstances leading to the fraud charge and determination of a penalty, if liability found). None of those circumstances arise here as it appears the criminal investigation occurred primarily after the investigation into the company's employment authorization practices.

Lastly, the Court also finds merit in Respondent's argument that, even if it is relevant, consideration of Attachment B is unfairly prejudicial. *See* 28 C.F.R. § 68.40(b). The Court takes into account the upsetting nature of the described criminal allegations, and the strong potential for this evidence to cause confusion of the issues. The Court notes, for instance, that there are four individuals in this case named E.B, and E.B. Jr. is described as the owner in Attachment A, but E.B. III is described as the owner in Attachment B. These concerns substantially outweigh the low probative value of information leading to E.B. III's arrest. Accordingly, the Court will exclude Attachment B from consideration in summary decision in its entirety.

2. Attachments C and D

In Attachments C and D, H.C.C., J.J.R.C., and J.P. attest that, at the time of their statements, they were employees of Taco Ole Mission. Mot. Summ. Dec. Attach. C–D. Each statement provides details regarding their experiences with Respondent's hiring procedures. *Id.* The employees stated that they were not asked to complete a Form I-9 or present employment authorization documents. *Id.* H.C.C., J.J.R.C., and J.P. maintain that Respondent knew of their lack of work authorization during the hiring process. *Id.* Complainant's Motion for Summary Decision ties details from these statements to the applicable statutory factors. *See id.* at 6–9. Complainant has thus demonstrated how the statements of H.C.C., J.J.R.C., and J.P., found at Attachments C and D, are relevant to the penalty assessment, subject to the below caveat.

The three workers also allege poor working conditions and a portion of H.C.C.'s statement (under "Additional Notes") discusses an alleged assault with a weapon. *Id.* at Attach C. The assault, in particular, raises the same relevance and prejudice concerns set forth in the discussion on Attachment B, as well as additional concerns regarding E.B. The affiants list "E.B." as the name of the individual who hired them, which could refer to E.B. Jr., E.B. III, or E.B. IV, making it

---

prospective employee is not an unauthorized alien. *Lee v. Airtouch Commc'ns*, 7 OCAHO no. 926, 47, 57 (1997). In enacting IRCA, Congress was aware that unauthorized workers may be subject to exploitation and abuse in the workplace. *See generally* H.R. Rep. No. 99-682 Part 1, 49 (1986) (recognizing victimization by employers on account of undocumented status, and the aim to "prevent the exploitation of this vulnerable population in the work place."). These public policy objectives help inform why the Court treats failure of a company to prepare I-9 forms as serious offenses. *See infra* Part V.A.3.

unclear as to what E.B. III's role was in the hiring process, and who allegedly perpetrated the knife incident. *See* Mot. Summ. Dec., Attach. A, C–D. Accordingly, the Court will not consider statements about the assault.

C. Respondent's Evidence

As stated above, Respondent did not submit its own Motion for Summary Decision, or an Opposition to Complainant's Motion for Summary Decision. However, Respondent did attach proposed exhibits to its Prehearing Statement, and submitted a supplemental filing in response to the Court's liability order.[7] The Court will thus consider these exhibits from Respondent in this decision: Respondent's 2016–19 tax returns, Ex. R-1–4; Respondent's 2016–19 quarterly reports, Ex. R-5–8; Respondent's tax return for period ending September 30, 2020, Ex. R-9;[8] Respondent's balance sheet as of September 30, 2021, with a letter from Respondent's accountant, Ex. R-10;[9] Respondent's income statement for the period ending November 30, 2021, Ex. R-11; and Respondent's 2020–21 quarterly reports, Ex. R-12.

Complainant raises one objection to Respondent's evidence in its Motion for Summary Decision. Complainant asks the Court "*not* to accept the accounting here provided as legitimate." *See* Mot. Summ. Dec. 7 (emphasis in original). Specifically, Complainant contends that Respondent's tax returns do not accurately reflect its business size or ability to pay the proposed fine. *Id.* Complainant points the Court to the existence of a cash payroll, a prior payroll investigation, and payment conditions described by H.C.C. *Id.* In its proposed stipulations, Complainant states, "[d]espite the Department's factual misgivings regarding Respondent's 2018 tax return information . . . the Department stipulates to its admission as there is no procedural basis to exclude the evidence." C's Prehr'g Stmt.; *infra* Part V.A–B. Reading these assertions together, the Court finds that Complainant has not raised a specific objection upon which to exclude Respondent's accounting. The Court will give due consideration to Complainant's arguments in assigning weight to Respondent's financial evidence.

V. PAPERWORK VIOLATIONS

[7] In an order on summary decision, the Court may consider exhibits attached to a prehearing statement as evidence, and will do so here. *See United States v. Hair U Wear, LLC*, 11 OCAHO no. 1268, 9–10 (2016) (citing *United States v. Kumar*, 6 OCAHO no. 833, 111, 117–18 (1996)).

[8] Respondent's supplemental filing utilizes the same exhibit numbers as in its prehearing statement. For clarity, the Court has assigned new exhibit numbers to the supplemental filing. Exhibits R-1–4 from the supplemental filing are now renumbered as R-9–12.

[9] The Court observes that the accountant letter's does not claim to evaluate the veracity of the submitted financial documents, or claim that the financials are audited. Supp. Filing, Ex. R-10.

The undersigned has given due consideration to the five statutory factors of 8 U.S.C. § 1324a(e)(5) and nonstatutory factors raised by Respondent.

A. Statutory Factors

1. Size of the Business

OCAHO case law instructs that the penalty is generally mitigated when Respondent is a small, family-owned business. *See, e.g.*, *Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355a, at 5 (citing *United States v. Carter*, 7 OCAHO no. 931, 121, 162 (1997)). Complainant concedes that if the Court only considers the Taco Ole Mission restaurant, it is a small business with fewer than 100 employees. Mot. Summ. Dec. 6. Complainant argues, however, that Respondent should be considered along with two other restaurants because they are part of the same practice/payroll scheme and hold themselves out as "Taco Ole." *Id.* at 6–7. Therefore, Taco Ole is not a small business, and aggravation is warranted. *See id.* at 6–7, Attach. A (questioning Respondent's reported employee count). Respondent presents no arguments regarding its size, but its recent employee quarterly reports show an average of sixteen and twenty-one employees. Supp. Filing, Ex. R-12.

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. *United States v. Fowler Equip. Co., Inc.,* 10 OCAHO no. 1169, 6–7 (2013). OCAHO case law generally considers businesses with fewer than 100 employees to be a small business. *See Carter*, 7 OCAHO no. 931, at 162. In relation to the restaurant industry, OCAHO precedent has noted the high employee turnover rate is ubiquitous in the industry, and looks to how many employees the company had at any one time. *See, e.g.*, *United States v. Symmetric Sols., Inc.*, 10 OCAHO no. 1209, 10–11 (2014); *United States v. MEMF, LLC*, 10 OCAHO no. 1170, 4–5 (2013).

In addition, OCAHO ALJs have relied on definitions by the U.S. Small Business Administration (SBA) 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)); U.S. SMALL BUS. ADMIN., TABLE OF SMALL BUSINESS SIZE STANDARDS MATCHED TO NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM CODES (2022) [hereinafter SBA SMALL BUSINESS TABLE].

Citing to its HSI auditor affidavit, Complainant asserts that Taco Ole Mission is "part of the same practice" as two other restaurants, Taco Ole Edinburg and Taco Ole Sharyland, which together held themselves out as 'Taco Ole.' Mot. Summ. Dec. 3, 6–7, Attach. A. The HSI auditor interviewed an accountant and general manager, who both indicated they could answer questions

about two of the restaurant's business operations. *Id.* at Attach. A. The general manager is described as, "General Manager Edinburg from Bazan's Enterprises, Inc. dba TACO OLE Mission." *Id.* The ROI states that "the business has been operating since 1973 and currently has 3 restaurant locations." *Id.* According to the ROI, the interviewees stated that the legal name of the Mission location is "Bazan's Enterprises, Inc. dba TACO OLE Mission," it is a company, and has its own employer identification number. *Id.* The ROI includes statements relating to ownership, and the general manager "approximates about 50 current employees." *Id.* It is unclear whether these facts relate to just Taco Ole Mission, or all three restaurants. The remainder of the ROI included details about the hiring practices of Taco Ole Mission and Edinburg restaurants and the I-9 compliance program, describing similarities and differences in practices as between the two restaurants. *Id.*

Respondent provided tax documents, revealing that Taco Ole Mission filed separately from the other restaurants, and that it has two shareholders with each holding fifty percent of the shares. R's Prehr'g Stmt., Ex. R-1–4; *see also* Supp. Filing, Ex. R-9. It also provided Texas Workforce Commission (TWC) quarterly reports filed for the Taco Ole Mission restaurant. R's Prehr'g Stmt., Ex. R-5–8; Supp. Filing, Ex. R-12.

These documents demonstrate that each restaurant has a separate corporate structure. While the ROI states that Taco Ole Mission is part of the same practice as the other restaurants, this statement is not attributed to anyone so is not sufficiently reliable to be taken as a fact. It is indisputable that the entities file taxes separately and report to the TWC as separate entities. Complainant has not introduced evidence regarding Taco Ole Edinburg's corporate structure into this record. While it appears that the restaurants employ similar hiring and accounting practices, the similarities are not uniform. Complainant has not argued that the Court should pierce the corporate veil. *See United States v. Durable, Inc.*, 11 OCAHO no. 1221, 5–6 (2014) (citing *United States v. Kurzon*, 3 OCAHO no. 583, 1829, 1865–66 (1993)).

Moreover, Complainant chose to file separate actions against each restaurant. The Government has not cited to any precedent allowing it to both pursue separate actions against two entities but also treat them as one in each filing. The Court also treated the businesses as distinct in finding liability. *Bazan's Enters., Inc.*, 15 OCAHO no. 1408, at 1, n.1.

Lastly, and perhaps most importantly, Complainant has presented no evidence that together the two entities employ more than 100 employees at any given time. *See Symmetric Sols., Inc.*, 10 OCAHO no. 1209, at 10–11. As noted above, Respondent's most recent quarterly workforce reports show between an average of sixteen and twenty-one employees. Supp. Filing, Ex. R-12. Complainant did not provide information regarding the most recent reporting for Taco Ole Edinburg. While the Court is cognizant of Complainant's evidence that employees were paid in cash and these filings should not be accorded full weight, any indication that the number of employees at any given time even approached 100 is conjecture. While the Court found a total of seventy-one violations, these employees were not necessarily employed at the same time.

Conclusory or speculative allegations do not create a genuine issue of material fact. *See Curata v. N. Harris Montgomery Cmty. Coll. Dist.*, 9 OCAHO no. 1099, 7, 16 (2003) (citations omitted).

The Court also finds Respondent's documents on its income probative in evaluating the size of the business. On its income statement, Taco Ole Mission reports $2.3 million in annual dining sales and a gross profit of over $1 million. Supp. Filing, Ex. R-11; *see also* Supp. Resp. 3 (noting similar figures in Respondent's most recent tax return). In accordance with OCAHO precedent, the undersigned will also consult the SBA definitions of whether a business is considered small. *See Pegasus Family Rest.*, 10 OCAHO no. 1143, at 6 (citations omitted). The Court concludes that Respondent is either a "full-service restaurant" or "limited-service restaurant" under SBA definitions. *See* SBA SMALL BUSINESS TABLE. Respondent's annual receipts do not exceed the requirements for a "small business" classification by the SBA, which are $10 and $12 million in annual revenue respectively. *Id.*; Supp. Filing, Ex. R-9–11. The business also appears to be family-owned. Mot. Summ. Dec. 3, Attach. A; *see also* R's Prehr'g Stmt., Ex. R-1–4. In addition to a $1 million revenue, Respondent's income statement shows expenditures on regular pay wages, overtime wages, unclassified labor, and "salaries administrative." Supp. Filing, Ex. R-11.

Given the income size, the evidence that the restaurants, whether considered together or separately, employ around fifty persons at any given time, and the lack of any evidence showing more employees, the Court finds that Respondent is a small business. The Court does not find a material issue of fact in regards to this factor, and will mitigate the penalty.

2. Good Faith

Complainant asserts that Respondent cannot show good faith because it failed to take steps before the NOI and hired a high percentage of unauthorized workers. *See* Mot. Summ. Dec. 6–8 (citations omitted). Complainant argues that "Respondent's flagrant disregard for the law was frequent and consistent . . . [thus] the Court must find that Respondent acted in bad faith toward the law." *Id.* at 8. Respondent challenges the proposed aggravation for good faith. Respondent contends that it "hired an immigration attorney to correct its hiring procedures . . . [and] always responded in a timely and satisfactory matter [sic] to all of ICE's request." Answer 2.

"The primary focus of a good faith analysis is on the respondent's compliance *before* the investigation." *United States v. New China Buffet Rest.*, 10 OCAHO no. 1133, 5 (2010) (emphasis in original) (citing *United States v. Great Bend Packing Co.*, 6 OCAHO no. 835, 129, 136 (1996), and then citing *United States v. Chef Rayko, Inc.*, 5 OCAHO no. 794, 582, 592 (1995) (modification by the CAHO)). Respondent does not state what steps it took to comply before Complainant began its investigation.

While "[h]aving knowingly employed an unauthorized alien and having failed to complete any of the I-9s properly does lend itself to a finding of bad faith, OCAHO caselaw requires more than 'the mere fact of paperwork violations' in order to show 'a lack of good faith.'" *United States v. Taco Plus, Inc.*, 5 OCAHO no. 775, 416, 421 (1995) (citations omitted); *see United States v.*

Occupational Res. Mgmt. Staff., Inc., 10 OCAHO no. 1166, 24, 27 (2013). Rather, the record must show culpable behavior beyond mere failure of compliance to demonstrate 'lack of good faith.' *Taco Plus, Inc.*, 5 OCAHO no. 775 at 421–22 (citations omitted); *see also United States v. Horno MSJ, Ltd.*, 11 OCAHO no. 1247, 11 (2015) (requiring a "showing of culpable conduct beyond merely a high rate of violations") (citation omitted). Therefore, the Court will not find bad faith based solely on Respondent having a high percentage of unauthorized workers.

The issue is whether Complainant has proved, by a preponderance of the evidence, that Respondent engaged in a scheme or pattern to feign or evade I-9 compliance, which would lead to a finding of bad faith. *See United States v. Holtsville 811 Inc.*, 11 OCAHO no. 1258, 8–9 (2015). In the interview described in the HSI auditor's ROI, Respondent's accountant admitted to "not hav[ing] a hiring process in practice to include the completion of I-9 Forms" and placing workers without a valid Social Security number or Individual Taxpayer Identification number on a separate cash payroll. Mot. Summ. Dec., Attach. A. This was done "because they did not have valid social security numbers or were receiving government assistance benefits and did not want to report wages." *Id.* This account is supported by the statements of H.C.C., J.J.R.C., and J.P. *Id.* at Attach. C–D. H.C.C. and J.J.R.C. both attest to a general lack of hiring process. *Id.* at Attach. C–D. All three attest that Respondent never asked them to present employment eligibility documents, or prepared a Form I-9 on their behalf. *Id.* H.C.C., J.J.R.C., and J.P. all answer "yes" to the question whether the person who hired them knew that they did not have work authorization. *Id.* Taco Ole Mission's pre-investigation hiring practices are preponderant evidence that the business engaged in an "intentional effort to subvert the purposes of the employment eligibility verification requirements." *See United States v. Jula888, LLC*, 12 OCAHO no. 1286, 13 (2016).

The Court concludes that Respondent engaged in a scheme to evade I-9 compliance by knowingly placing workers without a SSN on a separate cash payroll and failing to prepare I-9 forms on their behalf. *See generally* 8 U.S.C. § 1324a (emphasizing that a key purpose of the statute is to curtail the employment of individuals not authorized for employment in the United States). Good faith was not shown, and a finding of bad faith is warranted. The Court will aggravate the penalty for this factor.

3. Seriousness

As to seriousness, Complainant seeks aggravation on multiple bases.[10] Complainant argues that "failure to prepare a Form I-9 . . . is among the most serious of paperwork violations[.]" Mot. Summ. Dec. 8 (citing *United States v. Sols. Grp. Int'l, LLC*, 12 OCAHO no. 1288, 10 (2016), and

[10] Complainant also asks the Court to consider the alleged workplace abuse and assaults as a ground for aggravation under this statutory factor. Mot. Summ. Dec. 8–9 (citing exhibits and articles to support that "unauthorized aliens are a vulnerable population subject to abuse and trafficking"). The Court determined that this evidence was not relevant. *See supra* Part IV.B.

then citing *Siam Thai Rest.*, 10 OCAHO no. 1174, at 4). Complainant asserts that Respondent's knowing hire of unauthorized workers is a "patently serious violation."[11] *Id.* (citing *Taco Plus, Inc.*, 5 OCAHO no. 775).

The Court finds Respondent's admission to liability dispositive for this factor. Respondent admitted to failing to prepare or present seventy-one I-9 forms, as alleged in the Complaint, through its Answer. *Bazan's Enters., Inc.*, 15 OCAHO no. 1408, at 4, 7. "[I]t is well-established in OCAHO case law that the failure to prepare or present an I-9 is one of the most serious violations because it frustrates the national policy intended to ensure that unauthorized aliens are excluded from the workplace." *Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355a, at 6 (citing *United States v. Golden Emp. Grp., Inc.*, 12 OCAHO no. 1277, 2 (2016)). The Court will treat Respondent's paperwork violations as very serious, and will aggravate the penalty on this factor.

4. Unauthorized Aliens

Complainant argues that the Court should aggravate the penalty based on the fact that "85% of the workforce lacked documents to legally work in the United States." Mot. Summ. Dec. 9. Complainant cites to its determination that sixty-one of the seventy-one audited workers are unauthorized for employment in the United States. *Id.* Respondent does not provide any argument as to this factor.

While Complainant did not provide any evidence regarding how it determined that the individuals were unauthorized, Respondent admitted to Count II, knowingly hiring aliens unauthorized for employment. Answer 2. "The express language of FRCP 56(c), coupled with a wealth of OCAHO decisional law, makes clear that a motion for summary decision may be based, in whole or in part, upon the nonmoving party's admissions." *United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1062, 4 (2000) (citing *United States v. Walden Station, Inc.*, 8 OCAHO no. 1053, 810, 813 (2000), and then citing *Mikhaline v. Web Sci Techs., Inc.*, 8 OCAHO no. 1033, 513, 518 (1999)). Respondent admitted to hiring the sixty-one employees listed in the NIF, knowing the individuals were unauthorized for employment. Answer 2. These are among the same employees listed in Count I. Compl. Ex. A.

OCAHO precedent holds that it is inappropriate to enhance a paperwork violations penalty across-the-board because certain workers were found to be unauthorized. *See United States v. Forsch*

[11] Complainant argues that "a mere showing that an unauthorized alien has been knowingly hired" warrants aggravation on seriousness. Mot. Summ. Dec. 8 (citing *Taco Plus, Inc.*, 5 OCAHO no. 775). Complainant overstates the ALJ's conclusion on seriousness in *Taco Plus, Inc*. The ALJ found one Form I-9 for an unauthorized worker distinguishable from the other allegations, as its deficiency was "almost tantamount to a total failure to prepare." *Taco Plus, Inc.*, 5 OCAHO no. 775, at 422. However, the order does not specifically attribute the deficiency to the respondent's knowing hire of the unauthorized worker.

Polymer Corp., 11 OCAHO no. 1156, 4 (2012) (citing *United States v. Hernandez*, 8 OCAHO no. 1043, 660, 669 (2000)). Accordingly, the penalty will be aggravated as to the sixty-one individuals also listed in Count II.

5. History of Violations

Complainant asks the Court to treat the history of violations both as a neutral and negative factor. Mot. Summ. Dec. 7. Complainant argues that Respondent's prior payroll investigation with the Department of Labor (DOL) and cash payroll are "indicia of history of deception and illegal activity related to hiring practices." *Id.* (emphasis added). Nevertheless, Complainant cites to *United States v. New China Buffet Restaurant* to show that it is appropriate to treat the history of violations as a neutral factor, since a lack of history of violations does not support leniency. *Id.* (citing 10 OCAHO no. 1333, at 6). The Government also did not seek to increase the proposed penalty based on this statutory factor. Compl. Ex. A.

OCAHO caselaw is clear on the relevant "history" in this statutory factor. "[T]o show a history of previous violations the government must establish, inter alia, that a NIF was issued, that a complaint was filed, and that the company was afforded the opportunity for a due process hearing." *United States v. SKZ Harvesting, Inc.*, 11 OCAHO no. 1266, 15 (2016) (citing *Hernandez*, 8 OCAHO no. 1043, at 666). Complainant has not met this criteria for this statutory factor.

The Court will treat the history of violations as neutral.

B. Non-Statutory Factors

Respondent argues for a mitigation of the proposed penalty based on its ability to pay, engagement in subsequent remedial measures, and proportionality. The Court finds that Respondent has not met its burden of proof to warrant mitigation on non-statutory factors.

1. Ability to Pay

Respondent repeatedly asserts that the proposed fine will lead to its bankruptcy. *See generally* Answer; Supp. Filing. While Respondent provides the Court with multiple years of financial data, Respondent's only specific argument is that the penalty assessment would be excessive when its "total revenues are 1,069,000 with a taxable income of 11,000." *See* Answer 1–2.[12] Respondent does not otherwise articulate how its evidence demonstrates an inability to pay the proposed penalty. Complainant contends that its penalty determination is reasonable, and especially so in light of Respondent's "significant sales increase" and COVID-relief package loans. *See* Supp. Resp. 2 (referencing financial documents in Respondent's supplemental filing).

[12] Respondent's 2020 tax return shows a negative taxable income. Supp. Filing, Ex. R-9.

OCAHO case law has long affirmed that "penalties are not intended to put employers out of business[.]" *United States v. Psychosomatic Fitness, LLC*, 14 OCAHO no. 1387a, 14 (2021) (quoting *United States v. Two for Seven, LLC*, 10 OCAHO no. 1208, 8–9 (2014)). Nonetheless, "it is well established in our case law that a corporation's ability to demonstrate tax losses does not necessarily establish a company's poor financial condition or its inability to pay." *R&SL, Inc.*, 13 OCAHO no. 1333b, at 41 (quoting *United States v. Mott Thoroughbred Stables, Inc.*, 11 OCAHO no. 1233, 5 (2014) (internal citation omitted)).

The newly submitted financial documents show Respondent's income significantly increased from tax year 2019 to tax year 2020, with a more current gross profit of over $1 million. Supp. Resp. 2 (citing Supp. Filing, Ex. R-11). The documents also indicate that Respondent's net income was $58,918. *Id.* Respondent's 2020 tax return and balance sheet corroborate Complainant's claim that the business received PPP/EDIL loans. Supp. Resp. 3, Ex. A; Supp. Filing, Ex. R-9–10. Respondent's balance sheet also shows a bank account, among other current assets, valued at over 75% of Complainant's total proposed penalty, and substantial stockholder equity. Supp. Filing, Ex. R–10. The overall picture is of a business that operates profitably, and has considerable income, along with solid assets and equity. As the Respondent has not provided any analysis as to why the penalty amount would put it out of business, and why it cannot pay the penalty, Respondent has not met its burden of proof.

Having not met its burden of proof, the Court will not mitigate Respondent's penalty on this factor.

2. Subsequent Remedial Measures

While Respondent argues for its post-investigation cooperation and compliance efforts under "good faith," OCAHO has considered subsequent remedial measures as a non-statutory factor. *See 3679 Commerce Pl., Inc.*, 12 OCAHO no. 1296, at 7 n.6 (citations omitted).

The Court finds that Respondent's post-inspection activities, including the hiring of an immigration attorney and cooperation with ICE in its investigation, do not warrant additional mitigation. "[C]ompliance with the law is the expectation, not the exception." *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 9 (2010). Respondent does not warrant mitigation because it made efforts to conform its conduct to the law only after the ICE investigation began. 3*679 Commerce Pl., Inc.*, 12 OCAHO no. 1296, at 10.

3. Proportionality

Respondent also asks the Court to mitigate its penalty because the fine is "excessive under the circumstances." *See generally* Answer; R's Prehr'g Stmt.; Supp. Filing. Complainant disputes that the penalty is excessive, citing to its arguments under the 8 U.S.C. § 1324a(e)(5) factors. *See generally* Mot. Summ. Dec.

Respondent correctly recognizes "OCAHO case law has often observed that proportionality is the key to assessing penalties." *See United States v. Safe-Air of Ill.*, 12 OCAHO no. 1270, 5 (2016) (collecting OCAHO cases); *United States v. Century Hotels Corp.*, 11 OCAHO no. 1218, 8 (2014) ("There needs to be some rational relationship between the magnitude of an offense and the penalty to be assessed.") (citation omitted). A penalty should be sufficiently meaningful to accomplish the purpose of deterring future violations, *United States v. Jonel, Inc.*, 8 OCAHO no. 1008, 175, 201 (1998), without being "unduly punitive" in light of the respondent's resources, *United States v. Minaco Fashions, Inc.*, 3 OCHAO no. 587, 1900, 1909 (1993). Penalties close to the statutory maximum should be reserved for the most egregious violations, and not "everyday garden-variety violations." *Century Hotels Corp.*, 11 OCAHO no. 1218, at 8 (citation omitted).

Respondent has not met its burden of proof to demonstrate why Complainant's proposed penalty is "excessive" for its admitted paperwork violations. "[T]he function of a maximum penalty here is not punitive, but prophylactic and corrective." *Symmetric Sols., Inc.*, 10 OCAHO no. 1209 at 11. The Court has found aggravation for many of the statutory factors, and therefore the penalty appropriately reflects the seriousness of the violations in this case.

C. Penalty

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

The record reflects that the charges are continuing violations that were assessed when the NIF was served, on September 26, 2018. Compl. Ex. A at 2. The range is therefore $224–$2,236.

Complainant proposed a base penalty of $1,901 for each violation based upon the percentage of violations compared to the number of employees, for an aggregated base penalty of $134,971. Complainant did not treat any statutory factor as neutral, apart from a history of previous violations. It increased the fine for business size by approximately 2.5 percent, and five percent

for good faith, seriousness, and the involvement of unauthorized workers. These increases added $23,785 to the aggregated base penalty. The total penalty sought is $158,756.

The Court begins with a mid-range penalty of $1,290 per violation, and adjusts up or down based upon the factors. In this case, the Court adjusts upward based upon bad faith, the seriousness of the offense, and for the specific workers who were found to not have employment authorization. The Court will mitigate due to the size of the business.

The Court will impose a penalty of $1,870 each for sixty-one of the seventy-one paperwork violations. The Court will impose a penalty of $1,677 each for ten of the seventy-one paperwork violations. The total penalty for Respondent's violations of 8 U.S.C. § 1324a(a)(1)(B) is $130,840.

VI. KNOWING HIRE VIOLATIONS

The undersigned exercises her discretion in assessing the penalties for the admitted knowing hire violations. *See United States v. Day*, 3 OCAHO no. 575, 1751, 1753 (1993). The Court cautions against extrapolating the 8 U.S.C. § 1324a(e)(5) factors to a knowing hire penalty assessment. *See United States v. Sunshine Building Maint.*, 7 OCAHO no. 997, 1122, 1187 (1998).

As explained in *United States v. Jalisco's Bar & Grill*:

> "To begin with, the knowing hire or continued employment of an unauthorized alien is virtually never done in good faith, is always extremely serious, and by definition always involves an unauthorized alien. Neither the size of the employer nor the absence of previous violations provides a reason to reduce or enhance the penalty for such conduct. To the extent that a rare knowing hire case might provide some ground for mitigation, the range of permissible penalties is already sufficiently broad to provide plenty of room for the exercise of discretion." 11 OCAHO no. 1224, 11 (2015).

Complainant's and Respondent's arguments as to the knowing hire violations mirror those presented for the paperwork violations. *Supra* Parts III–V. In addition, Respondent argues that it acted in "good faith." *See* Answer 1–3. Complainant also seeks a "cease and desist" order from the NIF violations. Mot. Summ. Dec. 2.

The Court finds that Respondent has not raised a meritorious good faith defense for its knowing hire violations. "The only good faith defense to a knowing hire violation . . . is that contained at § 1324a(a)(3), which provides that an employer [show] good faith compliance with the requirements of subsection (b)[.]" *United States v. Yin Tien Chen Individually and Winning Orchards LLC, Ltd.*, 9 OCAHO no. 1092, 9 (2003). In other words, Respondent's affirmative defense would be compliance with the employment eligibility requirements of 8 U.S.C.

§ 1324a(b)(1)–(3). The record does not suggest that Respondent demonstrated compliance with the verification requirements before the ICE investigation.

Respondent's disregard for the prohibition against hiring unauthorized workers supports a penalty on the upper end of the range. Respondent's repeated practice with cash payroll, and woeful hiring procedures make these violations particularly egregious. Further, Complainant found eighty-five percent of the employees whose records it reviewed within the audit period to be unauthorized. *See* Mot. Summ. Dec. 9. Respondent has not demonstrated to the Court that the penalty is excessive or that it has an inability to pay the proposed fine, *supra* Part V.B.

Complainant proposed a base penalty of $3,802 for each violation, based upon the percentage of violations compared to the number of employees, making the aggregated base penalty $231,922. Complainant applies the statutory factors to aggravate each violation five percent for the size of the business, five percent on good faith, and five percent on seriousness, five percent on unauthorized workers, with no aggravation based on a history of prior violations. The total penalty sought is $272,853.

Civil penalties for knowing hire violations are assessed according to the parameters in 8 C.F.R. § 274a.10(b)(1)(ii)(A) and 8 C.F.R. § 85.5. For civil penalties assessed between January 29, 2018 and June 19, 2020, the minimum penalty for each violation that occurred is $559, and the maximum penalty is $4,473. *Id.* The record reflects that the violations were assessed when the NIF was served, on September 26, 2018. Compl. Ex. A. The range is thus $559–$4,473 per violation.

The Court will begin with a mid-range penalty at $2,516, and adjusts up or down based on discretion. Here, the Court adjusts upward based on the particularly egregious nature of these violations, as demonstrated through the cash payroll, and hiring procedures. The Court also takes note, as Complainant did, of the large percentage of employees who were unauthorized.

The Court will set the penalty at $3,495 for each of the sixty-one violations in Count II. The total civil penalty for the sixty-one knowing hire violations is assessed at $213,195.

Moreover, the knowing hire violations necessitate a cease and desist order. 8 U.S.C. §§ 1324a(a)(1)(A),(e)(4); *see Foothill Packing*, 11 OCAHO no. 1240, at 13 (finding that the statute's provision on injunctive relief reflects a "Congressional judgment about the gravity of knowing hire violations[.]").

VII. 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. The Court ORDERS Respondent to pay

$130,840 in penalties for failing to prepare and/or present Forms I-9 for seventy-one employees, and $213,195 in penalties for the knowing hire of sixty-one individuals unauthorized for employment in the United States. The parties are free to establish a payment schedule as appropriate.

Respondent, Bazan's Enterprises, Inc. d/b/a Taco Ole Mission, is directed to henceforth CEASE AND DESIST from further violating the provisions of 8 U.S.C. § 1324a(a)(1)(A).

VIII. FINDINGS OF FACT

1. This Order incorporates the findings of fact in the December 20, 2021, Amended Order on Summary Decision.

2. Bazan's Enterprises, Inc. d/b/a Taco Ole Mission, is a company located in Texas. Its legal name is "Bazan's Enterprises, Inc. d/b/a TACO OLE Mission."

3. Bazan's Enterprises, Inc. d/b/a Taco Ole Mission, has a separate corporate structure from the entities Taco Ole Edinburg and Taco Ole Sharyland.

4. The restaurants Taco Ole Mission, Taco Ole Edinburg, and Taco Ole Sharyland employ similar hiring and accounting practices, but the similarities are not uniform.

5. Bazan's Enterprises, Inc. d/b/a Taco Ole Mission has its own employer identification number to file taxes, and reports to the Texas Workforce Commission as a separate entity.

6. Bazan's Enterprises, Inc. d/b/a Taco Ole Mission, has two shareholders with each holding fifty percent of the shares.

7. Bazan's Enterprises, Inc. d/b/a Taco Ole Mission, is family-owned.

8. Bazan's Enterprises, Inc. d/b/a Taco Ole Mission, is either a "full-service restaurant" or "limited service" restaurant under Small Business Administration definitions; its annual receipts do not exceed the requirements for a "small business" classification by the Small Business Administration under either classification.

9. Bazan's Enterprises, Inc. d/b/a Taco Ole Mission, has a current gross profit of over $1 million, with a net income of $58,918.

10. Bazan's Enterprises, Inc. d/b/a Taco Ole Mission's balance sheet shows a bank account, among other current assets, valued at over seventy-five percent of the Department of Homeland Security's proposed penalty.

11. Bazan's Enterprises, Inc. d/b/a Taco Ole Mission, reported a significant increase in income from tax year 2019 to tax year 2020.

12. Bazan's Enterprises, Inc. d/b/a Taco Ole Mission, received Paycheck Protection Program (PPP) loans and related Economic Injury Disaster Loans (EIDL).

13. The most recent quarterly workforce reports for Bazan's Enterprises, Inc. d/b/a Taco Ole Mission, show an average of between sixteen and twenty-one employees.

14. Bazan's Enterprises, Inc. d/b/a Taco Ole Mission did not have a hiring process in practice to include the completion of I-9 forms and placed workers without a valid Social Security number or Individual Taxpayer Identification number on a separate cash payroll.

15. Bazan's Enterprises, Inc. d/b/a Taco Ole Mission, did not demonstrate compliance with the employment eligibility verification requirements before the Department of Homeland Security investigation.

16. Bazan's Enterprises, Inc. d/b/a Taco Ole Mission, engaged in post-inspection activities, including the hiring of an immigration attorney and cooperation with the Department of Homeland Security in its investigation.

17. The underlying aim of the Immigration Reform and Control Act of 1986 is to deter illegal immigration by imposing a duty on employers to verify the employment eligibility of employees to ensure that a prospective employee is not an unauthorized alien.

18. In enacting the Immigration Reform and Control Act of 1986, Congress was cognizant that unauthorized workers may be subject to exploitation and abuse in the workplace.

19. Bazan's Enterprises, Inc. d/b/a Taco Ole Mission admitted to hiring the individuals named in Count II, knowing that the individuals were unauthorized aliens.

20. Eighty-five percent of the employees whose record the Department of Homeland Security reviewed within the audit period were unauthorized.

IX. CONCLUSIONS OF LAW

1. Federal Rule of Civil Procedure 56(c), a permissible guidance in OCAHO proceedings, *see* 28 C.F.R. § 68.1, allows an ALJ to consider "admissions on file" for the basis of summary decision. *United States v. St. Croix Pers. Servs., Inc.*, 12 OCAHO no. 1289, 9 (2016) (citations omitted). The undersigned will consider admissions by Bazan's Enterprises, Inc. d/b/a Taco

Ole Mission in assessing the 8 U.S.C. § 1324a(e)(5) penalty factors and the penalty assessment for the 8 U.S.C. § 1324a(a)(1)(A) violations.

2. The undersigned will not consider the Department of Homeland Security's argument on present compliance with I-9 requirements, raised in its supplemental filing because the Court specifically limited the scope of the Government's response to Respondent's financial information. *United States v. Bazan's Enters., Inc.*, 15 OCAHO no. 1408, 5 (2021).

3. The Court finds that the Department of Homeland Security's Attachment A is facially relevant, since it discusses the Department of Homeland Security investigation leading up to the OCAHO proceedings, contains sufficient indicia of reliability, and is not unfairly prejudicial.

4. The Court finds that the contents of Department of Homeland Security's Attachment B are not relevant material evidence to the remaining issues in this case, and are unfairly prejudicial, and excludes the Attachment. *See* 28 C.F.R. § 68.40(b).

5. The statements of H.C.C., J.J.R.C., and J.P., found at Attachments C and D, are relevant to the penalty assessment.

6. The Court will not consider the portion of H.C.C.'s statement (under "Additional Notes") that discusses an alleged assault with a weapon for the same relevance and prejudice concerns set forth in the discussion on Attachment B.

7. In an order on summary decision, the Court may consider exhibits attached to a prehearing statement as evidence, and will do so here. *See United States v. Hair U Wear, LLC*, 11 OCAHO no. 1268, 9–10 (2016) (citing *United States v Kumar*, 6 OCAHO no. 833, 111, 117–18 (1996)).

8. Reading the Department of Homeland Security's assertions in its motion for summary decision and prehearing statement together, the Court finds that the Department of Homeland Security has not raised a specific objection upon which to exclude Bazan's Enterprises, Inc. d/b/a Taco Ole Mission's accounting.

9. The Department of Homeland Security's argument that Bazan's Enterprises, Inc. d/b/a Taco Ole Mission and Taco Ole Edinburg together employ more than 100 employees at any given time is conclusory or speculative, which does not create a genuine issue of material fact. *See United States v. Symmetric Sols, Inc.*, 10 OCAHO no. 1209, 10–11 (2013); *Curata v. N. Harris Montgomery Cmty. Coll. Dist.*, 9 OCAHO no. 1099, 7, 16 (2003) (citations omitted).

10. Given the income size, the evidence that the restaurants, whether considered together or separately, employ around fifty persons at any given time, and the lack of any evidence showing more employees, the Court finds that Bazan's Enterprises, Inc. d/b/a Taco Ole

Mission is a small business. *See United States v. Pegasus Family Rest., Inc.*, 10 OCAHO no. 1143, 6 (2012); *United States v. Symmetric Sols, Inc.*, 10 OCAHO no. 1209, 10–11 (2013); U.S. SMALL BUS. ADMIN., TABLE OF SMALL BUSINESS SIZE STANDARDS MATCHED TO NORTH AMERICAN INDUSTRY CLASSIFICATION SYSTEM CODES (2019).

11. The Court will mitigate the paperwork violations penalty because Bazan's Enterprises, Inc. d/b/a Taco Ole Mission is a small business.

12. The Court will not find bad faith based solely due to Bazan's Enterprises, Inc. d/b/a Taco Ole Mission having an alleged high percentage of unauthorized workers. *See United States v. Taco Plus, Inc.*, 5 OCAHO no. 775, 416, 421 (1995) (citations omitted); *United States v. Horno MSJ, Ltd.*, 11 OCAHO no. 1247, 11 (2015) (citations omitted).

13. The Court concludes that Bazan's Enterprises, Inc. d/b/a Taco Ole Mission engaged in a scheme to evade I-9 compliance by knowingly placing workers without a Social Security number on a separate cash payroll and failing to prepare I-9 forms on their behalf. *See generally* 8 U.S.C. § 1324a. Good faith was not shown, and a finding of bad faith is warranted. The Court will aggravate the paperwork violations penalty for this factor. *See United States v. Holtsville 811 Inc.*, 11 OCAHO no. 1258, 8–9 (2015); *United States v. Jula888, LLC*, 12 OCAHO no. 1286, 13 (2016).

14. The Court will treat Bazan's Enterprises Inc. d/b/a Taco Ole Mission's paperwork violations as very serious, since "it is well-established in OCAHO case law that the failure to prepare or present an I-9 is one of the most serious violations because it frustrates the national policy intended to ensure that unauthorized aliens are excluded from the workplace." *United States v. Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355a, 6 (2020) (citing *United States v. Golden Emp't Grp., Inc.*, 12 OCAHO no. 1277, 2 (2016)). The Court will aggravate the paperwork violations penalty on this factor.

15. The paperwork violations penalty will be aggravated only as to the sixty-one individuals also listed in Count II as OCAHO precedent holds that it is inappropriate to enhance a paperwork violations penalty across-the-board because certain workers were found to be unauthorized. *See United States v. Forsch Polymer Corp.*, 11 OCAHO no. 1156, 4 (2012) (citing *United States v. Hernandez*, 8 OCAHO no. 1043, 660, 669 (2000)).

16. "[T]o show a history of previous violations the government must establish, inter alia, that a NIF was issued, that a complaint was filed, and that the company was afforded the opportunity for a due process hearing." *United States v. SKZ Harvesting, Inc.*, 11 OCAHO no. 1266, 15 (2016) (citing *United States v. Hernandez*, 8 OCAHO no. 1043, 660, 666 (2000)). The Department of Homeland Security did not establish these factors and the Court will treat the history of violations as neutral.

17. While it appears the fine may have an impact on Bazan's Enterprises, Inc. d/b/a Taco Ole Mission's business, Respondent has not demonstrated that it will put the company out of business. *See United States v. Psychosomatic Fitness, LLC*, 14 OCAHO no. 1387a, 14 (2021) (quoting *United States v. Two for Seven, LLC*, 10 OCAHO no. 1208, 8–9 (2014)); *United States v. R&SL, Inc.*, 13 OCAHO no. 1333b, 41 (2022) (quoting *United States v. Mott Thoroughbred Stables, Inc.*, 11 OCAHO no. 1233, 5 (2014) (citation omitted)). The Court will not mitigate Respondent's penalty on its inability to pay.

18. The Court finds that Bazan's Enterprises, Inc. d/b/a Taco Ole Mission's post-inspection activities do not warrant additional mitigation. *See United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 9 (2010); *United States v. 3679 Commerce Pl., Inc.*, 12 OCAHO no. 1296, 10 (2017).

19. While Bazan's Enterprises, Inc. d/b/a Taco Ole Mission correctly recognizes OCAHO case law on proportionality, the company has not met its burden of proof to demonstrate why Complainant's proposed penalty is "excessive" for its admitted paperwork violations. *See United States v. Safe-Air of Ill.*, 12 OCAHO no. 1270, 5 (2016); *United States v. Century Hotels Corp.*, 11 OCAHO no. 1218, 8 (2014).

20. The Court has found aggravation for many of the statutory factors, and therefore the paperwork violations penalty appropriately reflects the seriousness of the violations in this case. *See United States v. Symmetric Sols., Inc.*, 10 OCAHO no. 1209, 11 (2014).

21. 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.

22. The paperwork violations are continuing violations that were assessed when the Notice of Intent to Fine was served, on September 26, 2018. *See United States v. Curran Eng'g Co.*, 9 OCAHO no. 1061, 11 (2000); *United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1061, 11 (2000). The penalty range is thus $224–$2,236 per violation.

23. The Court will impose a penalty of $1,870 each for sixty-one of the seventy-one paperwork violations. The Court will impose a penalty of $1,677 each for ten of the seventy-one paperwork violations. The total penalty for Respondent's violations of 8 U.S.C. § 1324a(a)(1)(B) is $130,840.

24. The undersigned exercises her discretion in assessing the penalties for the admitted knowing hire violations. *United States v. Day*, 3 OCAHO no. 575, 1751, 1753 (1993).

25. The Court finds that Bazan's Enterprises, Inc. d/b/a Taco Ole Mission has failed to raise a meritorious good faith defense for its knowing hire violations. Respondent has not raised the affirmative defense of complying with the employment eligibility requirements of 8 U.S.C.

§ 1324a(b)(1)–(3). *See United States v. Yin Tien Chen Individually and Winning Orchards LLC, Ltd.*, 9 OCAHO no. 1092, 9 (2003).

26. Bazan's Enterprises, Inc. d/b/a Taco Ole Mission's disregard for the prohibition against hiring unauthorized workers supports a penalty on the upper end of the range for its 8 U.S.C. § 1324a(a)(1)(A) violations.

27. Civil penalties for knowing hire violations are assessed according to the parameters set forth in 8 C.F.R. § 274a.10(b)(1)(ii)(A) and 8 C.F.R. § 85.5.

28. The record reflects that the knowing hire violations were assessed when the NIF was served, on September 26, 2018. The range is therefore $559–$4,473 per violation.

29. The Court will begin with a mid-range penalty at $2,516, and adjusts up upward based on the particularly egregious nature of these violations, as demonstrated through the cash payroll, the lack of hiring procedures, and the large percentage of employees who were unauthorized.

30. The Court will set the penalty at $3,495 for each of the sixty-one violations in Count II. The total civil penalty for the sixty-one knowing hire violations is assessed at $213,195.

31. The knowing hire violations necessitate a cease and desist order, which the Court has incorporated into its order. 8 U.S.C. §§ 1324a(a)(1)(A),(e)(4); *see United States v. Foothill Packing*, 11 OCAHO no. 1240, 13 (2015).

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.

Date: May 26, 2022

_____

Honorable 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.

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

June 22, 2022

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

ERRATA

The Final Order on Penalties issued on May 26, 2022, is hereby amended to correct the following:

1. The string cite following the first sentence under the sub-heading "Evidence in OCAHO Proceedings," contained at pages 4–5, is corrected to read:

   See United States v. Bhattacharya, 14 OCAHO no. 1380a, 4 (2021) (quoting *United States v. Tinoco-Medina*, 6 OCAHO no. 890, 720, 738 (1996)); *United States v. Carpio-Lingan*, 6 OCAHO no. 914, 4–5 (1997) (noting more flexible evidentiary standards in administrative proceedings) (citing the Administrative Procedure Act, 5 U.S.C. § 551 et seq.).

SO ORDERED.

Dated and entered on June 22, 2022.

Jean C. King
Chief Administrative Law Judge