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 ENTERPRISES OF EDINBURG INC., d/b/a TACO OLE EDINBURG, a.k.a. Bazan's Enterprises Inc., d/b/a Taco Ole Edinburg,[1] Respondent.	)	8 U.S.C. § 1324a Proceeding OCAHO Case No. 2020A00087

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 24, 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 Enterprises of Edinburg, Inc. d/b/a Taco Ole Edinburg (Taco Ole Edinburg), failed to prepare or present Forms I-9 within three days of the Notice of Inspection (NOI) for forty-seven individuals. Complainant also alleged that Respondent hired forty individuals knowing the individuals were unauthorized for employment in the United States.

[1] This Court's previous Amended Order on Summary Decision entered on December 20, 2021, referred to the company as Bazan's Enterprises Inc., d/b/a Taco Ole Edinburg. This is how the company refers to itself in its filings. The Complaint, however, uses the name Bazan Enterprises of Edinburg Inc., d/b/a/ Taco Ole Edinburg.

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. 1409 (2021)[2] (*Taco Ole Edinburg*).[3] The Administrative Law Judge (ALJ) found Respondent liable for forty-seven violations of 8 U.S.C. § 1324a(a)(1)(B), and forty 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 the 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, Taco Ole Edinburg.

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).[4] 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.*

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[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] *United States v. Bazan's Enters., Inc. d/b/a Taco Ole Mission* (OCAHO Case No. 2020A00084) and *United States v. Bazan's Enters., Inc. d/b/a Taco Ole Edinburg* (OCAHO Case No. 2020A00087) are separate matters before OCAHO. Given the similarity in the names, the Court will refer to OCAHO Case No. 2020A00084 as *Taco Ole Mission*, and OCAHO Case No. 2020A00087 as *Taco Ole Edinburg*. In this Order, the Court's May 26, 2022 Final Order on Penalties in *Taco Ole Mission* will be cited as *United States v. Taco Ole Mission*, OCAHO Case No. 2020A00084 (May 26, 2022) (Final Order on Penalties). Subsequent citations will follow the format *Taco Ole Mission*, OCAHO Case No. 2020A00084, at [page number] (May 26, 2022).

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

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)).

1. Paperwork Violations

Civil penalties for paperwork violations are assessed per the parameters set forth in 8 C.F.R. § 274a.10(b)(2) and 28 C.F.R. § 85.5. 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 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 Place*, 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 $284,012 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 structure, including the existence of a "cash basis" payroll not reflected in traditional accounting. *See id.* at 3, 7–8. Complainant maintains that the attached exhibits tend to show that Taco Ole Edinburg did not have an I-9 program, did not use standard accounting deductions for employees, and treated unauthorized workers poorly. *See id.* at 3–4, 7–9 (citing Attach. A–D). Complainant also discusses state criminal charges against E.B. III, who Complainant claims is a senior level employee of Respondent. *Id.* at 3–4 (citing Attach. B).

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

In response to Respondent's supplemental filing, Complainant restates its penalty positions and presents new arguments concerning Respondent's recent financial information.[5] *See* Supp. Resp.

[5] Complainant's supplemental filing asserts that Respondent is not presently complying with I-9 requirements. However, the Court specifically limited the scope of the Government's response to Respondent's financial information. *Taco Ole Edinburg*, 15 OCAHO no. 1409, at 5. The Court therefore will not consider this argument.

1–4. Complainant asserts that Respondent's financial documents "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 file 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.[6]

Respondent argues that the proposed penalties are "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 warranting mitigation. *See* 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 OCAHO proceedings. *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)); *see also 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. 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 provides that all "relevant material and reliable evidence is admissible." 28 C.F.R. § 68.40(b); *see United States v. R&SL, Inc.*, 13 OCAHO no. 1333b, 24, 26 (2022) (citations omitted). "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence, and (b) the fact is of consequence in determining the action." *United States v. Rose Acre Farms, Inc.*, 12 OCAHO no. 1285, 8 (2016) (quoting Fed. R. Evid. 401); *see also A.S. v. Amazon Web Servs., Inc.*, 14 OCAHO no. 1381j, 6 (2021) (noting that this forum has generally construed relevance broadly). The proponent of a document must provide foundation to establish its relevance. *Carpio-Lingan*, 6 OCAHO no. 914, at 5. Specific to a motion for summary decision, the OCAHO rules provide that

[6] The Court previously found Respondent did not raise cognizable Constitutional arguments in its defense. *Taco Ole Edinburg*, 15 OCAHO no. 1409, at 5.

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).

"[T]he Court may exclude relevant evidence if unfair prejudice [or] confusion of the issues . . . substantially outweigh its probative value." 28 C.F.R. § 68.40(b); *Taco Ole Mission*, OCAHO Case No. 2020A00084 (May 26, 2022) (Final Order on Penalties) (citing § 68.40(b), and then citing Fed. R. Evid. 403).

B. Complainant's Evidence

In support of its Motion for Summary Decision, Complainant presented four exhibits, stylized as "attachments": a 2018 Report of Investigation (ROI) for the business "Bazan's Enterprises, Inc. dba Taco Ole Mission," with 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 enclosed probable cause documents (Attachment B); the 2018 sworn statement of individual H.C.C. (Attachment C); and the 2018 sworn statements of persons 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. The Court will review the evidence presented.

1. Attachment A

Attachment A details a HSI investigation of Taco Ole Mission. *See* Mot. Summ. Dec., Attach. A. While the ROI nominally concerns Taco Ole Mission, it also presents information about other restaurants. *See id.* ("The business has been operating since 1973 and currently has 3 restaurant locations (Mission, Edinburg and Sharyland).").

The issue is what statements from HSI's Taco Ole Mission investigation have a tendency to make facts of consequence more or less probable in assessing penalties against Taco Ole Edinburg. *See Rose Acre Farms, Inc.*, 12 OCAHO no. 1285, at 6.

The HSI auditor interviewed a general manager, who is described as "General Manager Edinburg from Bazan's Enterprises, Inc. dba TACO OLE Mission," along with an accountant. Mot. Summ. Dec., Attach A. The general manager and accountant represented that they could answer questions about "both businesses." *Id.* The ROI provides a legal name for the Mission location, "Bazan's Enterprises, Inc. dba TACO OLE Mission," and provides details about the Mission location, but then refers to "TACO OLE" when providing details about ownership and that the general manager "approximates about 50 current employees." *Id.* It is unclear whether these facts relate just to Taco Ole Mission or all three restaurants. *See id.*

Subsequently, the general manager specifically references Taco Ole Edinburg. *Id*. The general manager maintained that "he performs the Human Resource functions for the Edinburg location to include the authority to complete the I-9 Form and the new proposed hiring practices," and that he and the owner "have the authority to hire and terminate employees." *Id.* This establishes a foundation for the general manager to opine on Taco Ole Edinburg's hiring practices. The general manager stated that the "business does not have a hiring process in practice to include the completion of I-9 Forms" and that he "does not provide any paperwork for employees to complete at the time of hire." *Id.* These statements are relevant to the good faith and seriousness factors for the admitted § 1324a paperwork violations. The general manager also stated that "he was not aware of any employees who might not have legal status," which could potentially bear on the admitted § 1324a knowing hire violations. *See id.*

The ROI includes a reference to the business using a regular payroll and cash basis payroll. *Id.* Given that it is in the midst of a paragraph attributed to the general manager describing the hiring practices at Edinburg, it is reasonable to conclude that the reference is to Edinburg. *See id.* Subsequent references, however, to two weekly payrolls, one "cash basis" and one standard accounting as well as a list of "cash basis" for sixty-one employees that was provided to HSI,[7] who were placed on the list because they did not have valid Social Security numbers (SSN) or otherwise want to report wages, appear to refer to Taco Ole Mission. *Id.* The accountant then went on to make statements specifically referencing the Mission restaurant, which the Court will not consider. *See id*. The existence of a cash basis payroll for the Edinburg restaurant is relevant to "good faith" and "seriousness" under § 1324a(e)(5), and penalty assessment under § 1324a(a)(1)(A).

Thus, the Court will consider only the statements from Attachment A specific to Taco Ole Edinburg's hiring practices and the existence of a cash basis payroll for the Edinburg restaurant.

2. 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. Mot. Summ. Dec. 3, Attach B. Complainant describes E.B. III as either the owner, manager, or son of the shareholder of the restaurant in the ROI. *Id.* However, Respondent's prehearing statement includes a tax document showing that E.B. III is the sole owner of Taco Ole Edinburg. R's Prehr'g Stmt., Ex. R-4. The ROI alleges that one of the victims lacked employment authorization, and E.B. III was aware of that fact. Mot. Summ Dec. 3, Attach B.

[7] While the list does not identify a particular restaurant, the Court observes that Complainant alleged sixty-one knowing hire violations in *Taco Ole Mission*.

Complainant argues generally that the allegations bear on the "seriousness" factor. *See id.* at 8–9. The Court considered this argument in the *Taco Ole Mission* case. In that case, the undersigned found that "[t]he 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[.]" *Taco Ole Mission*, 2020A00084, at 6 (May 26, 2022). The ALJ also found merit in Respondent's argument that even if relevant, consideration of Attachment B could be unfairly prejudicial, given the upsetting nature of the described criminal allegations. *See id.* at 6–7 (citing 28 C.F.R. § 68.40(b)). Accordingly, the Court will exclude Attachment B from consideration in summary decision in its entirety.

3. Attachments C and D

Attachments C and D are statements by H.C.C., J.J.R.C., and J.P. 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. The statements provide details about Taco Ole Mission's hiring procedures and allege poor working conditions. *Id.* Attachment C also discusses an alleged assault with a weapon. *Id.* at Attach. C.

Complainant has not met its burden to show why statements from Taco Ole Mission employees bear on the paperwork and knowing hire penalties for Edinburg. As discussed above, Complainant has not demonstrated how information about the Mission restaurant relates to Taco Ole Edinburg. Therefore, the Court will exclude Attachments C and D in their entirety.

C. Respondent's Evidence

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.[8] 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 2020 tax return, Ex. R-9;[9] Respondent's balance sheet as of November 30, 2021,

[8] 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)).

[9] 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-9–13.

with a letter from Respondent's accountant, Ex. R-10;[10] Respondent's income statement for period ending November 30, 2021, Ex. R-11; and Respondent's 2020–21 quarterly reports, Ex. R-12–13.

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 argues that Respondent's tax returns do not accurately reflect its business size or ability to pay the proposed fine. *Id.* Complainant directs 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

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 precedent instructs that 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 looks at the Taco Ole Edinburg restaurant, it is a small business with less than 100 employees. Mot. Summ. Dec. 7, Attach. A. However, Complainant asserts that Respondent is not a small business because the "Taco Ole" practice/payroll scheme—comprising the Edinburg, Mission, and Sharyland restaurants—employs more than 100 workers. *See id.*; *see also Taco Ole Mission*, OCAHO Case No. 2020A00084, at 8–10 (May 26, 2022). Therefore, Complainant seeks aggravation based on Respondent's business size. Mot. Summ. Dec. 7. While Respondent does not present arguments about its size, its recent employee quarterly reports show an average of between eleven and seventeen employees. Supp. Filing, Ex. R-12–13.

[10] 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.

OCAHO case law takes into account many factors when determining the size of a business. Factors considered include the number of employees, nature of ownership, income or revenue, or length of time in business. *United States v. Fowler Equip. Co., Inc.,* 10 OCAHO no. 1169, 6–7 (2013). OCAHO precedent 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 ALJs have noted that high employee turnover rate is ubiquitous in the industry, and have looked 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). OCAHO ALJs have also 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, 7, Attach. A. As noted above, the HSI auditor interviewed an accountant and general manager, who 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." Mot. Summ. Dec., Attach A. This statement is not attributed to either witness. *See id.* According to the ROI, the interviewees identified the legal name of the Mission location, "Bazan's Enterprises, Inc. dba TACO OLE Mission," and noted it has its own employer identification number. *Id.* The ROI also noted that Taco Ole Mission has two owners each with 50 percent shares. *Id.* The ROI does not discuss Taco Ole Edinburg's corporate structure or ownership. *Id.* The General Manager "approximates about 50 current employees." *Id.* But, it is unclear whether these facts relate to just Taco Ole Mission, or all three restaurants. 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.* The Complainant did not introduce any other evidence about Taco Ole Mission in this record.

Taco Ole Edinburg's financial documents show that the company has its own employer identification number, and that it files taxes and TWC quarterly reports separately from the other restaurants. R's Prehr'g Stmt., Ex. R-1–4; Supp. Filing, Ex. R-9–13. Respondent's tax documents also show that Edinburg has one shareholder holding 100 percent of the shares. Supp. Filing, Ex. R-9. Given the separate corporate structures, tax status, different ownership, and lack of specific evidence that the two are the same entity, the Court does not find that the restaurants should be considered together when determining the size of the restaurant.

Even if the Court considered the entities together, Complainant has not demonstrated that the restaurants 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 an average of between eleven and seventeen employees. Supp. Filing, Ex. R-12. The Court is cognizant of Complainant's evidence that Respondent utilized a cash payroll, and that these filings should not be accorded full weight. Still, any indication that the number of employees at any given time even approached 100 is conjecture. While the Court found a total of forty-seven violations, these workers 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 about its income probative in evaluating the size of the business. On its 2020 tax return, Respondent identifies itself as a "full-service restaurant" that reports gross receipts of $978,732. Supp. Filing, Ex. R-9. On its 2021 income statement, Taco Ole Edinburg reports a slightly higher figure, $1.2 million, for total sales. Supp. Filing, Ex. R-11; *see also* Supp. Resp. 3. In accordance with OCAHO precedent, the undersigned will 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 finds that Respondent is a "full-service restaurant" under SBA definitions. *See* SBA SMALL BUSINESS TABLE. Respondent's annual receipts do not exceed the requirements for the SBA "small business" classification of a "full-service restaurant," which is $10 million in annual revenue. *Id.*; Supp. Filing, Ex. R-9–11. The business also appears to be family-owned. Mot. Summ. Dec. 3; *see also* Supp. Filing, Ex. R-9. In addition to the $1.2 million total sales, Respondent's income statement shows expenditures for regular pay wages, unclassified labor, contract labor, and "salary administration." Supp. Filing, Ex. R-11.

Considering Respondent's income size and the lack of evidence showing more than 100 employees, the Court finds that Respondent is a small business. The Court does not find a material issue of fact for this factor and will thus mitigate the penalty.

2. Good Faith

Complainant maintains that Respondent cannot show good faith due to its failure to take steps before the NOI and hiring a high percentage of unauthorized workers. *See* Mot. Summ. Dec. 7–8 (citations omitted). According to Complainant, "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 disputes Complainant's characterization of its actions. According to Respondent, there should be no aggravation for good faith because 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 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 an alleged high percentage of unauthorized workers.

The issue is whether Complainant has met its burden of proof that Respondent engaged in culpable conduct or an intent to deceive in its complete lack of I-9 compliance, which may warrant a finding of bad faith. *See United States v. Holtsville 811 Inc.*, 11 OCAHO no. 1258, 8–9 (2015). The Court finds statements from the ROI probative of the issue. *See* Mot. Summ. Dec., Attach A. The general manager stated that the business "does not provide any paperwork for employees to complete at the time of hire." *Id.* The accountant admitted that he prepares two weekly payrolls for the business, one "cash basis" and one "standard accounting." *Id.* While cash payments are not illegal, when coupled with an admission that Respondent knowingly hired workers who were not authorized for employment, and had no systems in place to hire employees, it is reasonable to infer that Respondent intended to evade I-9 compliance. *See United States v. Hudson Delivery Serv., Inc.*, 7 OCAHO no. 945, 368, 393 n.25 (1997); *Symmetric Sols.*, 10 OCAHO no. 1209, at 8; *see also United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1337, 10 (2010) (citation omitted); *United States v. Mester Mfg. Co.*, 1 OCAHO no. 18, 53, 80 (1988), *aff'd sub nom.*, *Mester Mfg. Co. v. INS*, 879 F.2d 561 (9th Cir. 1989). Respondent has admitted that it knowingly hired aliens unauthorized for employment in Count II, which includes individuals named in Count I. *See* Answer 1–3. Therefore, Taco Ole Edinburg'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 intended to evade I-9 compliance by failing to prepare I-9 forms on behalf of its workers, and maintaining separate payrolls when it knowingly hired individuals unauthorized for employment. *See generally* 8 U.S.C. § 1324a (emphasizing that a key purpose of the statute is to curtail the knowing hire of unauthorized aliens). The Court will aggravate the penalty for this factor.

3. Seriousness

Complainant seeks aggravation as to seriousness on multiple bases.[11] Complainant asserts 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 then citing *Siam Thai Rest.*, 10 OCAHO no. 1174, at 4). Complainant argues that Respondent's knowing hire of unauthorized workers is a "patently serious violation."[12] *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 forty-seven I-9 forms, as alleged in the Complaint, through its Answer. *Taco Ole Edinburg*, 15 OCAHO no. 1409, 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 for this factor.

4. Unauthorized Aliens

Complainant posits 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 forty of the forty-seven workers were unauthorized for employment in the United States. *Id.* Respondent does not provide any argument as to this factor.

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[11] 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.

[12] Complainant argues that "a mere showing that an unauthorized alien has been knowingly hired" warrants aggravation as to seriousness. Mot. Summ. Dec. 8 (citing *Taco Plus, Inc.*, 5 OCAHO no. 775). Complainant overstates the ALJ's conclusion regarding 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.

While Complainant did not provide any evidence on how it determined the individuals to be unauthorized, the Court gives weight to Respondent's admission that it knowingly hired the individuals named in Count II, in violation of § 1324a(a)(1)(A). Answer 2; *see United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1062, 4 (2000) (citations omitted) ("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 . . . upon the non-moving party's admissions"). These are among the same employees listed in Count I. Compl. Ex. A.

In accordance with OCAHO caselaw, the undersigned finds it inappropriate to enhance a paperwork violations penalty across-the-board when only certain workers were found to be unauthorized. *See United States v. Forsch Polymer Corp.*, 10 OCAHO no. 1156, 4 (2012) (citing *United States v. Hernandez*, 8 OCAHO no. 1043, 660, 669 (2000)). Thus, the penalty will be aggravated only as to the forty 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 claims 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 precedent 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 statutory factor's criteria.

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 for non-statutory factors.

1. Ability to Pay

Respondent repeatedly claims 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 105,097,00 [sic] . . . with a taxable income of 14,000." *See* Answer 1–2.[13] Respondent does not otherwise articulate how its evidence demonstrates an inability to pay the proposed penalty. Complainant argues that its penalty determination is reasonable, and especially so in light of Respondent's increased sales and COVID-relief package loans. *See* Supp. Resp. 2–3 (referencing financial documents in Respondent's supplemental filing).

OCAHO precedent has long held 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)). Even so, "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) (citation omitted)).

The newly submitted financial documents show that while Respondent reported a lower income on its 2020 tax return ($978,732) as well as a net income loss ($75,675), it reported higher gross sales ($1.2 million) on its income statement for the period ending November 30, 2021. *See* R's Prehr'g Stmt.; Supp. Filing, Ex. R-9, 11; Supp. Resp. 2–3 (citing Supp. Filing, Ex. R-11). The income statement also lists Respondent's gross profit as $387,879, with a net income loss of $39,146. Supp. Resp., Ex. R-11. Moreover, Respondent's balance sheet reports total assets of $309,448, with $47,564 in current assets, and total stockholders' equity of $215,406. Supp. Resp., Ex. R-10. Although there is a question about the nature of the funds received, Respondent's balance sheet corroborates Complainant's claim that the business received a loan from the SBA. *See* Supp. Filing, Ex. R-10; Supp. Resp. 2–3, Ex. A. The overall picture is of a business that operates close to the margin of profitability, but that has considerable income, along with solid assets and equity. Respondent has not provided any analysis as to why the penalty amount would put it out of business or that it cannot pay the proposed penalty.

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).

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

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." *Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, at 9. Respondent's penalty 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 requests that the Court mitigate its penalty as 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 rightly notes that "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 $89,347. Complainant only treated the history of previous violations statutory factor as neutral. It increased the fine for business size by approximately 2.5 percent, and by five percent for good faith, seriousness, and the involvement of unauthorized workers. These increases added $15,745 to the aggregated base penalty. The total penalty sought is $105,092.

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 those workers who were found to be unauthorized for employment. The Court will mitigate due to the size of the business.

The Court will impose a penalty of $1,806 each for forty of the forty-seven paperwork violations. The Court will impose a penalty of $1,612 each for seven of the forty-seven paperwork violations. The total penalty for Respondent's violations of 8 U.S.C. § 1324a(a)(1)(B) is $83,524.

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); *Taco Ole Mission*, OCAHO Case No. 2020A00084, at 16 (May 26, 2022) (cautioning against extrapolating the paperwork violations statutory factors to knowing hire violations) (citations omitted).

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

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)." *Taco Ole Mission*, OCAHO Case No. 2020A00084, at 16 (May 26, 2022). 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 cash payroll practice 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.

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 $152,080. Complainant applies the statutory factors to aggravate each violation by approximately 2.5 percent for the size of the business, by five percent for good faith, seriousness, and unauthorized workers, with no aggravation based on a history of prior violations. The total penalty sought is $178,920.

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. 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 its discretion. The Court will set the penalty at $3,495 for each of the forty violations in Count II. The total civil penalty for the forty knowing hire violations is assessed at $139,800.

The knowing hire violations also necessitate a cease and desist order. §§ 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 $83,524 in penalties for failing to prepare and/or present Forms I-9 forty-seven employees, and $139,800 in penalties for the knowing hire of forty individuals unauthorized for employment in the United States. The parties are free to establish a payment schedule as appropriate.

Respondent, Bazan Enterprises of Edinburg, Inc. d/b/a Taco Ole Edinburg, 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 and conclusions of law in the December 20, 2021, Amended Order on Summary Decision. References to "Bazan's Enterprises, Inc. d/b/a Taco Ole Edinburg" are references to Respondent. The Findings of Fact in this Order shall refer to Respondent as "Taco Ole Edinburg."

2. Taco Ole Edinburg has a separate corporate structure from the entities Taco Ole Mission and Taco Ole Sharyland.

3. Taco Ole Edinburg has its own employer identification number to file taxes, and reports to the Texas Workforce Commission as a separate entity.

4. Taco Ole Edinburg has one shareholder holding 100 percent of the shares.

5. Taco Ole Edinburg is family-owned.

6. Taco Ole Edinburg is a "full-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.

7. Taco Ole Edinburg's 2020 tax return shows gross income as $978,732, with net income loss as ($75,675).

8. Taco Ole Edinburg's 2021 income statement, for the period ending November 30, 2021, reported slightly higher gross sales than its 2020 tax return, at $1.2 million. The income statement lists gross profit at $387,879, a net income loss of ($39,146.78).

9. Taco Ole Edinburg's 2021 balance sheet reports total assets of $309,448, with $47,564 in current assets, and total stockholders' equity of $215,406.

10. Taco Ole Edinburg received a loan from the Small Business Administration.

11. The most recent quarterly workforce reports for Taco Ole Edinburg, show an average of between eleven and seventeen employees.

12. Taco Ole Edinburg utilized a "cash basis" and "traditional accounting" payroll practice, and had no systems in place to hire employees.

13. Taco Ole Edinburg did not demonstrate compliance with the employment eligibility verification requirements before the Department of Homeland Security investigation.

14. Taco Ole Edinburg engaged in post-inspection activities, including the hiring of an immigration attorney and cooperation with the Department of Homeland Security in its investigation.

15. Taco Ole Edinburg admitted to hiring the individuals named in Count II, knowing that the individuals were unauthorized aliens.

16. 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 Taco Ole Edinburg 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 Enters., Inc.*, 15 OCAHO no. 1409, 6 (2021).

3. The Court finds that select statements from the general manager and accountant, contained in the Department of Homeland Security's Attachment A, are relevant to Taco Ole Edinburg.

4. The Court finds that the contents of the Department of Homeland Security's Attachment B are not relevant material evidence to the remaining issues in the case, including the "seriousness" statutory penalty factor, and excludes the Attachment. *See United States v. Taco Ole Mission,* 2020A00084 (Final Order on Penalties) (May 26, 2022).

5. The Court finds that statements of H.C.C., J.J.R.C., and J.P., found at Attachments C and D, are not relevant to the penalty assessment, as they are not Taco Ole Edinburg employees.

6. 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)).

7. 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 Taco Ole Edinburg's accounting.

8. The Department of Homeland Security's argument that Taco Ole Edinburg and Taco Ole Mission 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).

9. Given the income size and the lack of any evidence showing Taco Ole Edinburg employs more than 100 more employees, the Court finds that Taco Ole Edinburg 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). The Court will mitigate the paperwork violations penalty because Taco Ole Edinburg is a small business.

10. The Court will not find bad faith based solely due to Taco Ole Edinburg 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).

11. Taco Ole Edinburg engaged in culpable conduct or intent to evade I-9 compliance given its admissions to knowingly hiring unauthorized workers and lack of hiring practices, coupled with its cash payroll practice. *See United States v. Hudson Delivery Serv., Inc.*, 7 OCAHO no. 945, 368, 393 n.25 (1997); *United States v. Symmetric Sols.*, 10 OCAHO no. 1209, 8 (2013); *see also United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1337, 10 (2010) (citation omitted); *United States v. Mester Mfg. Co.*, 1 OCAHO no. 18, 53, 80 (1988), *aff'd sub nom.*, *Mester Mfg. Co. v. INS*, 879 F.2d 561 (9th Cir. 1989).

12. Taco Ole Edinburg intended to evade I-9 compliance. Good faith was not shown, and a finding of bad faith is warranted. *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).

13. The Court will treat Taco Ole Edinburg'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. Grp., Inc.*, 12 OCAHO no. 1277, 2 (2016)). The Court will aggravate the paperwork violations penalty on this factor.

14. The paperwork violations penalty will be aggravated only as to the forty 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)).

15. "[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.

16. Taco Ole Edinburg is a business that operates close to the margin of profitability, but has considerable income, along with solid assets and equity. As Taco Ole Edinburg has not provided an analysis as to why the penalty amount would put it out of business, the company has not demonstrated that it cannot pay the proposed penalty. *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)).

17. Taco Ole Edinburg'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).

18. While Taco Ole Edinburg correctly recognizes OCAHO case law on proportionality, the company has not met its burden of proof to demonstrate why the Department of Homeland Security'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).

19. 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).

20. 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.

21. 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.

22. The Court will impose a penalty of $1,806 each for forty of the forty-seven paperwork violations. The Court will impose a penalty of $1,612 each for seven of the forty-seven paperwork violations. The total penalty for Respondent's violations of 8 U.S.C. § 1324a(a)(1)(B) is $83,524.

23. 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).

24. Taco Ole Edinburg 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).

25. Taco Ole Edinburg'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.

26. 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.

27. 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.

28. The Court begins 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.

29. 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 at $139,800.

30. 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).

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. BAZAN ENTERPRISES OF EDINBURG INC., d/b/a TACO OLE EDINBURG, a.k.a. Bazan's Enterprises Inc., d/b/a Taco Ole Edinburg, Respondent.	)	8 U.S.C. § 1324a Proceeding OCAHO Case No. 2020A00087

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 page 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