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

December 14, 2022

UNITED STATES OF AMERICA,	)	
	)	
Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 2020A00012
	)	
EL PASO PAPER BOX, INC.,	)	
	)	
Respondent.	)	
	)	

Appearances: Graciela Jiron, Esq., for Complainant[1]
John Edward Leeper, Esq., for Respondent

ORDER ON PENALTIES

1. BACKGROUND

On November 5, 2019, the United States Department of Homeland Security, Immigration and Customs Enforcement (Complainant or the government) filed a complaint against Respondent, El Paso Paper Box, Inc. (Respondent or the company). The complaint charged Respondent—a Texas corporation that manufactures folding cartons for the packaging industry—with three counts of violating section 274A(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1324a(a)(1)(B) and one count of violating section 274A(a)(1)(A), 8 U.S.C. § 1324a(A)(1)(A). Compl. Ex. A, at 3–8. Complainant asserted that Respondent did not prepare and/or present the Employment Verification Form (Form I-9) for two employees (Count I); failed to ensure that sixty-seven employees properly completed section 1 and/or failed to properly complete section 2 or 3 of the Form I-9 (Counts II and III); and "knowingly continued to employ one employee" (Count IV). Compl. 1–4. Complainant sought $70,305.10 in penalties for these violations. Compl. Ex. A, at 1.

[1] Although Attorney Jiron is the attorney for Complainant listed on the complaint, and Complainant has not filed a motion for substitution, Attorney Martin Celis signed the United States Department of Homeland Security's Supplemental Brief and the Joint Response to Order on Motions for Summary Decision.

The parties filed cross motions for summary decision and on August 18, 2022, the Court issued an Order on Motions for Summary Decision. *United States v. El Paso Paper Box Inc.*, 17 OCAHO no. 1451 (2022).[2] In this Order, the Court denied Respondent's Motion for Summary Decision in its entirety, finding that Complainant's claims against relevant employees were not barred by the statute of limitations for paperwork violations. *Id.* at 5–6.

The Court granted in part and denied in part Complainant's Motion for Summary Decision. *Id.* at 6–15. For Count I, the Court denied the motion as to failure to prepare and/or failure to present for Employee Number 1 of Count I and granted the motion as to Employee Number 2 of Count I, finding that Complainant established that Respondent failed to present the I-9 at the time of the inspection for that employee. *Id.* at 6–8. For Count II, the Court denied Complainant's motion for two I-9s and granted the motion for sixty-four I-9s, finding that Complainant established that Respondent failed to ensure employees properly completed Section 1 and/or failed to properly complete Section 2 or 3 for those employees. *Id.* at 8–13. For Count III, the Court granted Complainant's motion, finding that Complainant established that Respondent did not complete Section 3 for reverification when one employee's work authorization expired. *Id.* at 13. For Count IV, the Court granted Complainant's motion, finding that Complainant established that Respondent knowingly continued to employ the individual at issue in Count III after he became unauthorized for employment. *Id.* at 13–14.

The Court found a genuine issue of material fact as to whether the I-9 for Employee Number 1 of Count I was provided to Complainant on the day of the inspection, and ordered the parties to meet and confer regarding this allegation, and file a joint submission informing the Court of their positions. *Id.* at 15. The Court further provided the parties notice and an opportunity to respond before entering summary decision in favor of Respondent as to Count I for failure to prepare for Employee Number 1, and Count II for failure to complete Section 2 of the I-9 for Employee Number 20 and failure to complete Section 3 for Employee Numbers 3 and 27. *Id.* The Court also permitted the parties to submit current financial information relevant to the calculation of penalties. *Id.*

On September 21, 2022, Complainant filed a Supplemental Brief (C's Supp. Br.) addressing whether the Complainant had established liability for Count I for failure to prepare Form I-9s for two employees, when Respondent prepared the Forms I-9 for the first time after the date of service of the Notice of Inspection (NOI). Also on September 21, 2022, the parties filed a Joint Response to Order on Motions for Summary Decision (Jt. Resp.). The parties agreed that the Form I-9 for Count I, Violation I was not presented to ICE on the day of inspection. Jt. Resp. 2.

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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 "FIMOCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

On September 29, 2022, Respondent filed its Reply to Complainant's Supplemental Brief (R's Supp. Br.). Respondent argued that under Count I, for the reasons set forth in the Court's Order, it cannot be charged with failing to prepare Forms I-9, and that the complaint did not charge Respondent with failure to *timely* prepare the Forms I-9. R's Supp. Br. 2.

Having fully considered the supplemental briefing submitted by both parties, the Court will address the remaining issues regarding liability, and then turn to its calculation of penalties.

II. COUNT I: FAILURE TO PRESENT FOR EMPLOYEE NUMBER 1

In its prior Order, the Court found a material issue of fact as to whether the I-9 for Employee Number 1 of Count I was provided to the Complainant on the day of the inspection. *El Paso,* 17 OCAHO no. 1451, at 6–7. The Court ordered the parties to meet and confer regarding this allegation and file a joint submission informing the Court of their positions. *Id.* at 15. In their Joint Response, the parties agreed that Complainant served Respondent with the NOI on July 17, 2018, notifying Respondent of its inspection of Forms I-9 on July 20, 2018, and that Respondent did not present Employee Number 1's I-9 to Complainant on July 20, 2018. Jt. Resp. 2.

Therefore, the Court finds that Complainant has established liability for failure to present as to Employee Number 1 for Count I, as the I-9 for that employee was not presented until after the inspection. *See* 8 C.F.R. § 274a.2(b)(2)(ii) (following the three business days-notice of an impending inspection, "any refusal or delay in presenting the Forms I-9 for inspection is a violation of the retention requirements as set forth in Section 274A(b)(3) of the Act"). Complainant's Motion for Summary Decision is GRANTED as to failure to prepare and/or present for Employee Number 1 of Count I.

III. COUNT I: FAILURE TO PREPARE

In its prior Order, the Court found that Complainant "cannot meet its burden to demonstrate failure to prepare Forms I-9 as it is indisputable that the Forms were indeed prepared," and that the "fact that they were not prepared as of the date the NOI was served is not itself a violation other than as a marker that starts the three-day period required to present the Forms I-9." *El Paso*, 17 OCAHO no. 1451, at 7. The Court noted that Complainant had not alleged failure to *timely* prepare, and for the same reason, denied Respondent's motion for summary judgment based on a statute of limitations defense, as a failure to prepare claim (as opposed to failure to timely prepare) is a continuing violation. *Id.* The Court provided the parties leave for additional briefing on the failure to prepare issue in Count I. *Id.* at 15.

In its Supplemental Brief, Complainant argues that it has established Respondent's liability for failure to prepare the I-9s of two employees, even though Respondent prepared these I-9s after the service of the NOI. C's Supp. Br. 2.

In light of the Court's holding that Complainant has now established its claim for failure to present as to the I-9 for Employee Number 1 in Count I, and its holding in its prior Order that Complainant

had established liability for failure to present as to the I-9 for Employee Number 2 in Count I, the Court need not reach Complainant's supplemental argument about liability for failure to prepare as to these employees. As the Court noted in its prior decision, "[a]n employer is liable for only one violation per I-9, despite the presence of other violations." *El Paso*, 17 OCAHO no. 1451, at 11 (quoting *United States v. R&SL Inc.*, 13 OCAHO no. 1333b, 35 (2022)) (internal quotations omitted); *see also United States v. Agri-Systems*, 12 OCAHO no. 1301, 13 n.8 (2017) ("Although many of the Forms I-9 contain more than one substantive violation, the company will only be held liable for one substantive violation per Form I-9"); *United States v. Cawoods Produce, Inc.*, 12 OCAHO no. 1280, 14 n.14 (2016) (same). Failure to present, failure to prepare, and failure to timely prepare are all substantive violations. *See United States v. Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355, 3–4 (2020) (citing the Memorandum from Paul W. Virtue, INS Acting Exec. Comm'r of Programs, *Interim Guidelines: Section 274A(b)(6) of the Immigration & Nationality Act Added by Section 411 of the Illegal Immigration Reform & Immigrant Responsibility Act of 1996* (Mar. 6, 1997), which characterizes "failure to prepare or present a Form I-9" as substantive); *United States v. Frio Cnty. Partners, Inc.*, 12 OCAHO no. 1276, 9 (2016) ("Failure to timely prepare a Form I-9 is a substantive violation") (citation omitted).

As such, because the Court has already found Respondent liable for one substantive violation for these employees' Forms I-9—failure to present—Respondent is not liable for additional substantive violations as to this Form I-9, such as failure to prepare or failure to timely prepare.

IV. COUNT II, FAILURE TO COMPLETE SECTION 2 OF THE I-9 FOR EMPLOYEE NUMBER 20 AND FAILURE TO COMPLETE SECTION 3 FOR EMPLOYEE NUMBERS 3 AND 27

In its prior decision, the Court provided the parties the opportunity to address whether Complainant is able to prove Count II, failure to complete Section 2 of the I-9 for Employee Number 20 and failure to complete Section 3 for Employee Numbers 3 and 27. *El Paso*, 17 OCAHO no. 1451, at 15–16. In their subsequent briefing, neither party addressed these claims. Accordingly, for the reasons explained in its prior Order, summary decision is GRANTED for Respondent as to these claims.[3]

V. CIVIL MONEY PENALTIES

A. Legal Standard

The Court assesses civil penalties for violations of these regulations in accordance with the parameters set forth in 8 C.F.R. § 274a.10(b)(2) and 28 C.F.R. § 85.5. Complainant has the burden of proof with respect to penalties and "must prove the existence of an aggravating factor by a preponderance of the evidence." *United States v. 3679 Commerce Place*, 12 OCAHO no. 1296, 4

[3] In its prior Order, the Court found Respondent liable for failing to complete Section 2 of the I-9 for Employee Number 27. The Court's grant of summary judgement for Respondent as to failure to complete Section 3 for this employee does not impact this prior finding of liability.

(2017) (citing *United States v. March Constr., Inc.*, 10 OCAHO no. 1158, 4 (2012); *United States v. Carter*, 7 OCAHO no. 931, 121, 159 (1997)).

The civil penalties for violations of § 1324a are intended "to set a meaningful fine to promote future compliance without being unduly punitive." *Id.* at 7. To determine the appropriate penalty amount, "the following statutory factors must be considered: 1) the size of the employer's business, 2) the employer's good faith, 3) the seriousness of the violations, 4) whether or not the individual was an unauthorized alien, and 5) the employer's history of previous violations." *Id.* at 4 (citing 8 U.S.C. § 1324a(e)(5)). The Court considers the facts and circumstances of the individual case to determine the weight it gives to each factor. *United States v. Metro. Enters*., 12 OCAHO no. 1297, 8 (2017). While the statutory factors must be considered in every case, section 1324a(e)(5) "does not mandate any particular outcome of such consideration, and nothing in the statute or the regulations requires . . . that the same weight be given to each of the factors in every case . . . or that the weight given to any one factor is limited to any particular percentage of the total." *United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6–7 (2011) (internal citations omitted). Further, the Court may also consider other, non-statutory factors—such as the Respondent's ability to pay the fine—as appropriate in the specific case. *3679 Commerce Place*, 12 OCAHO no. 1296, at 4 (citation omitted). Finally, Complainant's "penalty calculations are not binding in OCAHO proceedings, and the [Administrative Law Judge] may examine the penalties *de novo* if appropriate." *United States v. Alpine Staffing, Inc.*, 12 OCAHO no. 1303, 10 (2017).

B. Position of the Parties

Complainant is seeking a total civil monetary penalty of $70,305.10 for the sixty-nine violations alleged in the Notice of Intent to Fine (NIF) and incorporated into the Complaint. *See* NIF 1; C's Mem. MSD 10–13. Specifically, Complainant assessed a penalty of $1,008.70 for each failure to prepare and/or present the I-9 Form relating to two individuals listed in Count 1, for a total of $2,017.40. NIF 3. Complainant assessed a penalty of $1,008.70 for each failure to ensure that the employee properly completed Section 1 and/or failure to properly complete Section 2 or 3 of the Form I-9 for the 66 individuals listed in Count 2, for a total of $66,574.20. *Id.* at 4–6. Complainant assessed a penalty of $1,054.55 for failure to ensure that the individual listed in Count III properly completed Section 2 or 3 of the Form I-9. *Id.* at 7. Finally, Complainant assessed a penalty of $658.95 for continuing to employ the employee listed in Count IV (the same employee as listed in Count III) after he became unauthorized for employment in the United States. *Id.* at 8.

Complainant arrived at this figure by using its fine structure which begins with a base amount that is determined by the percentage of substantive violations present in the forms required to be submitted, which in this case was 27 percent. *See* C's Mem. MSD 10–13; C's Ex. G-9, at 1. Complainant aggravated the penalty due to the size of Respondent's business, contending that Respondent is a large business. C's Mem. MSD 10–11. Complainant also aggravated the penalty based on seriousness, arguing that Respondent's substantive verification violations are "indicative of the seriousness of [its] violations of the law." *Id.* at 11–13. Next, Complainant aggravated the penalty for Counts III and IV because the employee at issue was unauthorized for work in the United States. *Id.* at 12–13. Complainant treated the factors of Respondent's good faith and history of violations as neutral. *See id.* at 11, 13.

Respondent argues that its violations warrant the statutory minimum penalty. R's Opp'n 24. First, Respondent argues that its lack of previous violations and its good faith should be treated as mitigating factors warranting a reduction in the amount of the penalty, rather than as neutral. *Id.* Second, Respondent argues that because sixty-eight of the sixty-nine workers listed in the complaint were always authorized to work in the United States, and only one had a lapse in authorization for only nineteen days, the Court should likewise treat the presence of unauthorized workers as a mitigating, as opposed to aggravating, factor. *Id.* at 24–25. Next, as to seriousness, Respondent asserts that the evidence demonstrates the lack of seriousness of its violations, and that this factor should be treated as a mitigating as opposed to aggravating factor. *Id.* at 25. Finally, Respondent asserts that despite the size of its payroll, it is founded and owned by a single person, and nothing about its size warrants an enhancement. *Id.* at 25–26.

C. Paperwork Violations: Counts I, II and III

1. Statutory Factors

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

a. Size of the Business

OCAHO case law instructs that the penalty is generally mitigated when Respondent is a small, family-owned business. *See, e.g.*, *United States v. Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355a, 5 (2020) (citing *Carter*, 7 OCAHO no. 931, at 162). Complainant aggravated the fine for this factor, finding that Respondent is a large business both in terms of annual sales and the size of its workforce, noting that, inter alia, it had quarterly sales in 2018 of a little over $1 million and employed 142 workers at the time of inspection. *See* C's Mem. MSD 10–11. Respondent argues that it is owned by one person, and nothing about its size warrants enhancement. R's Opp'n 26.

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. *See 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.

Here, as to number of employees, there is no material issue of fact that Respondent employs between 140–50 persons. *See* C's Mem. MSD Ex. G-10, at 9 (Record of Investigation recounting interview with Respondent's Payroll Coordinator Maria Tonche, who indicated that at the time of the Notice of Inspection, July 17, 2018, there were 142 current employees); R's Opp'n Ex. R-1 (affidavit from Respondent's founder, owner and president Paul Malooly, attesting that Respondent employs approximately 150 employees at any given time). While this number of employees does not suggest that Respondent should be treated as a small employer, warranting mitigation, *see, e.g.*, *Carter*, 7 OCAHO no. 931 at 162 (noting that OCAHO case law generally considers businesses with fewer than 100 employees to be small businesses), the Court does not find that it is so large as to support aggravation based on size, *see id.* at 161 ("[I]in past cases the penalty has not been aggravated based on the business size factor, even as to businesses that

employed more than a hundred employees." (first citing *United States v. Riverboat Delta King, Inc.,* 5 OCAHO no. 738, 126, 128–29 (1995), and then citing *United States v. Ulysses, Inc.*, 3 OCAHO no. 449, 544, 550–51 (1992)).

As to nature of ownership and length of time in business, the record reflects that the company was founded in 1995 and that Mr. Malooly is its founder, sole owner, and President. *See* R's Opp'n Ex. R-1 (affidavit of Mr. Malooly attesting that he is the sole owner and president of El Paso Paper Box, Inc., which he founded in 1995, and considers to "have a family type atmosphere"). These factors likewise do not support either aggravation or mitigation; while Respondent is wholly-owned, it has been in business since 1995 and is therefore an established business whose structure is that of a corporation. And while Mr. Malooly attests that Respondent has a "family type atmosphere," *see id.*, the evidence in the record does not suggest that Respondent is in form or substance a family business.

Finally, as to revenue or income, the Court does not find that Complainant has submitted adequate financial information to meet its burden of proving that this warrants aggravation. Complainant submitted its Memorandum to Case File, Determination of Civil Monetary Penalty, which includes figures regarding the company's gross wages, *see* C's Mem. MSD Ex. G-9, at 1–2, but the record does not include the Internal Revenue and Texas Workforce Commission documents upon which these statements are based.

Thus, considering the evidence in the record regarding Respondent's number of employees, revenue or income, payroll, nature of ownership, or length of time in business, the Court does not find that Complainant has met its burden of proving by a preponderance of the evidence that Respondent's size is an aggravating factor. However, as the evidence in the record reflects that Respondent employs more than 100 employees, has been in business for over twenty years, and is not a family business, the Court will treat this factor as neutral, rather than mitigating. *See United States v. Modern Disposal, Inc.*, 10 OCAHO no. 1175, 3–4 (2013) (finding insufficient evidence to support the government's assessment of the penalty factors where there was no evidence, other than number of employees, upon which to predicate a finding as to the company's size, and the respondent appeared to be a "small-to-medium" employer).

b. Good Faith

In its calculation, Complainant treated the good faith factor as neutral. C's Mem. MSD 11. Complainant noted that while Respondent does not participate in E-Verify or the Social Security Number Verification System, it cooperated fully with the inspection. *Id.*; *see* C's Mem. MSD Ex. G-9, at 2. Respondent argues that good faith should be a mitigating factor because it employed qualified people to process its I-9 Forms, all of its workers were authorized to work in the United States when they were hired, virtually all of the forms were accompanied by copies of the identification documents, and the company fully cooperated in the inspection process and implemented changes to its processing. R's Opp'n 24.

The good faith analysis primarily focuses on the steps the employer took before the investigation to reasonably ascertain what the law requires and the steps it took to follow the law. *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 10 (2010); *United States v. New China Buffet*

Rest., 10 OCAHO no. 1133, 5 (2010) (citations omitted). In order to find that the employer lacked good faith, there must be "evidence of culpable conduct that goes beyond the mere failure to comply with the verification requirements." *See United States v. Siam Thai Sushi Rest.*, 10 OCAHO no. 1174, 3–4 (2013) (citing *United States v. Taste of China*, 10 OCAHO no. 1164, 4–5 (2013)). Because the focus is on the company's conduct before the investigation, "subsequent attempts at compliance have minimal bearing on an analysis of its good faith because conduct occurring after the investigation is over is ordinarily outside the permissible scope of consideration." *Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, at 10; *see also United States v. Felipe, Inc.*, 1 OCAHO no. 93, 626, 634 (1989) (ignorance and mistake do not suffice to show good faith where reasonable care and diligence are required).

Here, the record reflects that Respondent was aware of its I-9 compliance obligations and had tasked a professional to complete the forms. *See* R's Opp'n Exs. R-2 (affidavit of Ms. Tonche attesting that in her job as Payroll and Benefits Coordinator, one of her responsibilities is "processing the paperwork associated with new hires, including the completion of Form I-9"), R-1 (affidavit of Mr. Malooly attesting that he makes "every effort to comply with all government regulations," and that prior to working for Respondent, Ms. Tonche had experience processing new employees including Forms I-9). Respondent kept copies of relevant documents, *see* C's Mem. MSD Ex. G-3, and at the time of inspection, had Forms I-9 for all but two employees, *see* R's Opp'n Ex. R-2, at 2 (Ms. Tonche attesting that she could not locate one employee's I-9, and she thought that a second employee was an independent contractor, so she did not process a Form I-9 for him). Respondent indicated that it conducted periodic reviews of its I-9s which, while failing to catch all errors, appeared to help keep the company's error percentage to 27 percent. *See* C's Mem. MSD Ex. G-9 (Memorandum to Case File indicating violation percentage of 27 percent); R's Opp'n Ex. R-2 (affidavit of Ms. Tonche attesting that she periodically reviewed the Forms I-9).

The record also reflects that six of the Forms I-9 were backdated. *See* C's Mem. MSD Ex. G-9, at 3. In Ms. Tonche's affidavit, she explains that in the process of conducting audits prior to service of the NOI, she discovered that she had not completed page two for five employees. R's Opp'n Ex. R-2. She printed out the forms that were available on that date, and completed the forms, dating them on or close to the employee's start date. *See id.*; C's Mem. MSD Ex. G-2, at 13, 106, 118, 122; *id.* Ex. G-4, at 7. Regardless of why the forms were created, the dates entered could not have been the actual date the forms were signed, as this date pre-dated the creation of the forms.

In general, "backdating alone, without more, is insufficient to support a finding by a preponderance of the evidence that good faith was lacking." *See United States v. Speedy Gonzalez Constr., Inc.*, 11 OCAHO no. 1243, 6 (2015) (noting that where backdating occurred after the service of the NOI, "[a]bsent any information about the surrounding facts and circumstances, for example, what instructions were given to the company at the time of the NOI, a variety of competing inferences could arise" from the company's backdating). However, this Court has also found that when Forms I-9 are backdated prior to service of the NOI, they "reveal culpable conduct on their face" and has "decline[d] to ignore [] blatantly back-dated I-9s," aggravating penalties for bad faith as to those backdated forms. *See United States v. Imacuclean Cleaning Servs.,* 13 OCAHO no. 1327, 8–10 (2019); *see also United States v. Occupational Res. Mgmt., Inc.*, 10 OCAHO no. 1166, 27 (2013) (finding that backdated "forms themselves constitute clear evidence of culpable conduct

beyond the mere failure of compliance," and that an employer "does not act in good faith when its agents enter false information in its I-9 forms in order to make the records look correct").

Here, the Court acknowledges that only 6 out of the 260 Forms I-9 collected were backdated, and the record does not reflect that this was a systematic practice, *cf., e.g.*, *Occupational Res.*, 10 OCAHO no. 1166, at 27–28 (aggravating based on bad faith for fifty-nine backdated forms), that the record otherwise supports a finding of good faith, and that Complainant treated this factor as neutral in its calculation. The Court will therefore mitigate for good faith as to the non-backdated Forms, and aggravate for bad faith as to the backdated Forms.

c. Seriousness of the Violations

Complainant treated the seriousness of the violations as an aggravating factor. C's Mem. MSD 11. Complainant argues that it demonstrated the existence of hundreds of substantive violations, all of which are considered serious by OCAHO caselaw. *Id.* at 12. Respondent disputes the characterization, arguing that the requisite proof of identification and work authorization was stapled to the Forms I-9. R's Opp'n 25. Respondent also argues that the backdated I-9s were caught in a periodic review and corrected at that time, and that for the two employees in Count I, Employee Number 1 was originally classified as an independent contractor, and Respondent believed that a form had been created for Employee Number 2 when he was hired approximately twelve years before the NOI, although it could not be located. *Id.*

"[P]aperwork violations are always potentially serious." *United States v. Skydive Acad. Haw. Corp.*, 6 OCAHO no. 848, 235, 245 (1996). The Court evaluates the seriousness of violations "on a continuum since not all violations are necessarily equally serious." *United States v. Solutions Grp. Int'l, LLC*, 12 OCAHO no. 1288, 10 (2016) (quoting *Siam Thai Sushi Rest*., 10 OCAHO no. 1174, at 4).

i. Count I

In Count I, as detailed above, Respondent failed to present two Forms I-9 to inspectors. Failure to present the Form I-9 is "one of the most serious violations," *see United States v. Dr. Robert Schaus, D.D.S.*, 11 OCAHO no. 1239, 12 (2014) (citing *United States v. Symmetric Solutions, Inc.*, 10 OCAHO no. 1209, 11 (2014)). However, as Respondent notes, the record reflects Respondent's belief that a Form I-9 was created for Employee Number 2, although it could not be located at the time of the NOI, and that Ms. Tonche was not informed that Employee Number 1 was not an independent contractor. *See* R's Opp'n Exs. R-1, R-2. Nevertheless, the Court aggravates the penalty for the violations in Count I.

ii. Count II

In Count II, Respondent committed a range of serious paperwork violations. Many of the violations in this Count were very serious. Respondent: (1) backdated six Forms I-9;[4] (2) failed

[4] Employee Numbers 4, 28, 37, 41, 43, and 65 of Count II in the Violations Chart, *El Paso*, 17 OCAHO no. 1451, at 18–22.

to complete or properly complete Section 2 of the Form I-9 for forty-two employees;[5] and (3) failed to sign the attestation in Section 2 for five I-9s.[6] *See, e.g.*, *Occupational Res. Mgmt., Inc.*, 10 OCAHO no. 1166, at 27–28 (noting that backdating is a "very serious violation"); *United States v. New Outlook Homecare, LLC*, 10 OCAHO 1210, 4 (2014) (citing OCAHO case law holding that "failure to properly complete section 2 is always a very serious violation"); *Imacuclean Cleaning Servs., LLC*, 13 OCAHO 1327, at 10 ("[T]he failure to sign the section 2 employer attestation is 'among the most serious of possible violations.'" (citation omitted)).

The remainder of Respondent's paperwork violations in this Count—including (1) failing to ensure that an employee checked the box in Section 1 of the Form I-9 indicating his immigration status;[7] (2) failing to provide the alien number where the lawful permanent resident box was checked for three Forms I-9;[8] (3) failing to review and verify a proper List A, B, or C document for three employees;[9] (4) failing to recertify and complete the portion of Section 2 of one Form I-9 after accepting a receipt for lost or stolen documents;[10] and (5) failing to date Section 3 for three I-9s[11]—are likewise serious violations. *See , e.g.*, *United States v. Super 8 Motel & Villella Italian Rest.*, 10 OCAHO no. 1191, 10, 14 (2013) ("While less serious [than failure to prepare or present], an employer's improper verification of documents in section 2 and an employee's failure to attest to his or her status in section 1 are still serious violations." (citation omitted)); *United States v. Horno MSJ, Ltd.*, 11 OCAHO no. 1247, 11 (2015) (noting that failure to check the box in Section 1, properly verify documents in Section 2, and ensure that a lawful permanent resident employee enters an alien number, are serious violations); *Carter*, 7 OCAHO no. 931, at 173 ("[F]ailure to date the certification is serious because one cannot determine when the employment verification occurred.").

Respondent argues against the seriousness of these violations, asserting that the requisite proof of identification and work authorization was stapled to the Forms I-9. The Court acknowledges that Respondent did attach the requisite identity and work authorization documents to most of the Forms I-9, even if the Forms themselves were not properly completed.[12] Nonetheless, most of the

[5] Employee Numbers 2, 7, 8, 12, 13, 14, 15, 16, 17, 18, 19, 22, 23, 24, 25, 27, 29, 30, 32, 33, 35, 36, 38, 39, 44, 45, 46, 47, 48, 51, 52, 53, 54, 55, 56, 57, 59, 60, 61, 62, 64, and 66 of Count II in the Violations Chart.

[6] Employee Numbers 5, 6, 34, 42, and 50 of Count II in the Violations Chart.

[7] Employee Number 11 of Count II in the Violations Chart.

[8] Employee Numbers 31, 40, and 63 of Count II in the Violations Chart.

[9] Employee Numbers 1, 10, and 21 of Count II in the Violations Chart.

[10] Employee Number 58 of Count II in the Violations Chart.

[11] Employee Numbers 9, 26, and 49 of Count II in the Violations Chart.

[12] The Court notes that no identification and/or work authorization documents were attached to the Form I-9 for Employee Number 11 of Count II. *See* C's MSD Ex. G-3, at 31. Moreover, for

violations in Count II involved Section 2 of the Form I-9, which has been described as "the very heart" of the verification process." *United States v. Emp'r Solutions Staffing Grp. II, LLC*, 11 OCAHO no. 1242, 11 (2015). Considering the nature and number of the paperwork violations at issue in Count II, the Court will aggravate the penalty for these violations accordingly.

iii. Count III

In Count III, the Court found that Respondent failed to complete Section 3 of the I-9 for one employee prior to the expiration of his work authorization. *El Paso*, 17 OCAHO no. 1451, at 13. "An employer's failure to re-verify an individual's employment authorization eligibility after the expiration of their previous employment authorization is serious and undermines the purpose of the employment eligibility verification requirements." *United States v. Visiontron Corp.*, 13 OCAHO no. 1348, 9 (2020). The Court will aggravate the fine as to this violation.

d. Employment of Unauthorized Workers

Complainant aggravated the penalty for the individual at issue in Counts III and IV, and did not aggravate for any others. C's Mem. MSD 12. Respondent argues that sixty-eight of the sixty-nine individuals were authorized to work in the United States, and the one individual's employment authorization had lapsed for a mere nineteen days. R's Opp'n 24. Therefore, Respondent argues that Complainant did not carry its burden of proof and this should be a mitigating factor. *Id.*

As the Court has found the Respondent liable for knowingly continuing to employ an individual who became unauthorized for employment in Count IV, the Court will aggravate the penalty for the failure to re-verify that individual's employment authorization in Count III, *see United States v. East Coast Foods, Inc.*, 12 OCAHO no. 1281, 11 (2016) ("[P]enalties are not to be enhanced across the board even if there is a finding that some individuals were unauthorized; rather, an enhancement is only appropriate for the specific violations that involve an unauthorized employee"), and will not treat this as a mitigating factor, *see United States v. Saeed Rahimzadeh Corp.*, 3 OCAHO no. 551, 1494, 1501 (1993). While the Court does not condone the company apparently not being alert to the lapse in employment authorization, the Court finds that the circumstances of this violation are not as serious, and will adjust the penalty accordingly.

e. History of Violations

Complainant stated that there is no history of previous violations and accordingly the factor should be treated as neutral. C's Mem. MSD 13. Respondent does not dispute this, but states that this should be a mitigating factor. R's Opp'n 24.

The record does not indicate that Respondent has a previous history of violations. The general viewpoint in OCAHO case law is that not violating the law in the past does not, on its own, necessarily provide adequate grounds for mitigation. *See United States v. DJ Drywall, Inc.*, 10

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two other employees, although documents were attached to the Form I-9, those documents raise questions as to whether Respondent properly reviewed them. *See id.* at 2 (attaching Employee Number 1's expired Texas identification card), 29 (attaching Employee Number 21's restricted social security card, while the Form I-9 incorrectly specified that it was unrestricted)).

OCAHO no. 1136, 12 (2010) ("[N]ever having violated the law before is not necessarily grounds for leniency, and the company has offered no evidence or argument that such leniency is warranted in this case."); *New China Buffet*, 10 OCAHO no. 1133, at 6 ("[A]s ICE correctly points out, never having violated the law before does not necessarily warrant additional leniency, and it is still appropriate to treat this factor as a neutral one."); *see also United States v. Red Coach Rest.*, 10 OCAHO no. 1200, 4 (2013) (affirmance by the CAHO); *but see Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, at 11 (finding the absence of prior violations would, under the circumstances of that case, "point to mitigation"). The Court does not find any circumstance that would point to mitigation for this factor, and will treat it as neutral.

2. Non-Statutory Factors

Respondent did not assert any non-statutory factors.

D. Count IV: Knowing Hire Violation

The Court found Respondent liable for employing an individual who became unauthorized for employment in the United States, knowing that the individual was unauthorized for employment. *El Paso*, 17 OCAHO no. 1451, at 13–14. The undersigned exercises her discretion in assessing the penalties for this admitted knowing hire violations. *United States v. Day*, 3 OCAHO no. 575, 1751, 1753 (1993). An analysis does not require an assessment of the 8 U.S.C. § 1324a(e)(5) factors. 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. 1124, 11 (2015) (citing *United States v. Sunshine Bldg. Maint.*, 7 OCAHO no. 997, 1122, 1187 (1998)).

Neither party presented any arguments as to the penalty for this Count. Complainant sought a penalty at the lower end of the range, or $658.95. The Court agrees that a penalty in the lower range is appropriate given that there was one violation, and it was for a lapse in employment authorization of 19 days.

E. Penalty Range

The applicable penalty range depends on the date of the violations and the date of assessment. *See* 8 C.F.R. § 274a.10(b)(2); 28 C.F.R. § 85.5. For paperwork violations that occur after November 2, 2015, the adjusted penalty range as set forth in § 85.5 applies. *See* 28 C.F.R. § 85.5. When a violation occurs after November 2, 2015, and the penalty is assessed after January 29, 2018, but

before June 19, 2020, the minimum penalty is $224 and the maximum is $2,236. Civil Monetary Penalties Inflation Adjustment, 83 Fed. Reg. 3944 (Jan. 29, 2018).

1. Paperwork Violations

Generally, paperwork violations are "continuous" violations until they are corrected or until the employer is no longer required to retain the Form I-9 pursuant to IRCA's retention requirements. *See* § 274a.2(b)(2)(i)(A); *Curran Eng'g*, 7 OCAHO no. 975, at 895; *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 noncompliance." *WSC Plumbing, Inc*., 9 OCAHO no. 1071, at 9.

The record reflects that the charges are continuing violations that were assessed when the Notice of Intent to Fine was served, on June 19, 2019. Compl. Ex. A. The range is therefore $224–$2,236.

Complainant proposed a penalty per violation of $1,008.70 for Counts I and II, a penalty of $1,054.55 for Count III, and $658.95 for Count IV. *Id.*

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

In Count I, the Court will set a fine of $1161 per violation.

In Count II, the Court will adjust from the mid-range for a fine of $1096.50 for 11 violations, $1161 for 47 violations, and $1548 for six violations.

In Count III, the Court will set a fine of $1290.

2. Knowing Hire Violations

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 $583, and the maximum penalty is $4,667. 8 C.F.R. § 274a.10(b)(1)(ii)(A); 8 C.F.R. § 85.5. The record reflects that the violation was assessed when the NIF was served, on June 19, 2019. Compl. Ex. A. The range is therefore $583 to $4,467 per violation.

The Court will set the penalty at $658.95 for the violation in Count IV.

Moreover, the knowing hire violation necessitates a cease and desist order. 8 U.S.C. § 1324a(a)(1)(A), (e)(4); *see United States v. Foothill Packing, Inc.*, 11 OCAHO no. 1240, 13 (2015) (finding that the statute's provision on injunctive relief reflects a "[c]ongressional judgment about the gravity of knowing hire violations").

VI. CONCLUSION

The Court finds that 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 $79,528.50 in penalties for the paperwork violations in Counts I–III, and $658.95 in penalties for one count of knowingly continuing to hire an employee after he became unauthorized for employment in the United States, for a total fine of $80,187.45. The parties are free to establish a payment schedule as appropriate.

Respondent, El Paso Paper Company, is directed to henceforth CEASE AND DESIST from further violating the provisions of 8 U.S.C. § 1324a(a)(1)(A).

VII. FINDINGS OF FACT

1. El Paso Paper Company is located in El Paso, Texas, and was founded in 1995.

2. El Paso Paper Company employs between 140–50 persons.

3. Paul Malooly is El Paso Paper Company's sole founder, owner, and president.

4. Maria Tonche is El Paso Paper Company's Payroll Coordinator.

5. Ms. Tonche's job duties include processing the paperwork associated with new hires, including the completion of Forms I-9.

6. Ms. Tonche had experience processing Forms I-9 prior to working for Respondent.

7. At the time of inspection, El Paso Paper Company did not participate in the E-Verify or the Social Security Number Verification System.

8. Respondent conducted periodic reviews of its Forms I-9.

9. Complainant served Respondent with a Notice of Inspection on July 17, 2018, notifying Respondent of its inspection of Forms I-9 on July 20, 2018.

10. Respondent cooperated with Complainant's inspection.

11. Respondent's violation percentage was 27 percent.

12. Respondent failed to present the Forms I-9 for the two employees in Count I.

13. Respondent failed to ensure that 64 of the employees listed in Count II properly completed Section 1 and/or failed to properly complete Section 2 or 3 of the Form I-9.

14. Six of the Forms I-9 for the employees in Count II were backdated.

15. Respondent failed to complete Section 3 for reverification for the employee in Count III when that employee's work authorization expired.

16. Respondent knowingly continued to employ the employee in Count IV when his work authorization lapsed for nineteen days.

VIII. CONCLUSIONS OF LAW

1. The Court finds that Complainant has established liability for failure to present as to Employee Number 1 for Count I, as the I-9 for that employee was not presented until after the inspection. *See* 8 C.F.R. § 274a.2(b)(2)(ii) (following the three business days-notice of an impending inspection, "any refusal or delay in presenting the Forms I-9 for inspection is a violation of the retention requirements as set forth in Section 274A(b)(3) of the Act").

2. For the reasons in its prior Order, the Court grants summary decision for Respondent as to Count II, failure to complete Section 2 of the I-9 for Employee Number 29, and failure to complete Section 3 for Employee Numbers 3 and 27.

3. The Court finds Respondent's number of employees does not suggest that Respondent should be treated as a small employer, warranting mitigation, nor does it support aggravation based on size. *See United States v. Fowler Equip. Co., Inc.*, 10 OCAHO no. 1169, 6–7 (2013).

4. The Court finds that Respondent's nature of ownership and length of time in business do not support either aggravation or mitigation.

5. The Court finds that Complainant has not submitted adequate financial information to meet its burden of proving that Respondent's revenue or income warranted aggravation.

6. The Court does not find that Complainant had met its burden of proving by a preponderance of the evidence that Respondent's size is an aggravating factor, but considering Respondent's number of employees, length of time in business, and ownership, the Court will treat the factor as neutral, rather than mitigating. *See United States v. Modern Disposal, Inc.*, 10 OCAHO no. 1175, 3–4 (2013).

7. The Court will mitigate for good faith for the non-backdated Forms I-9 in Count II, considering that the record reflects that Respondent was aware of its I-9 compliance obligations and had tasked a professional to complete the forms, and considering that only 6 out of the 260 Forms I-9 collected were backdated. *Cf., e.g.*, *United*

States v. Occupational Res. Mgmt., Inc., 10 OCAHO no. 1166, 27–28 (2013) (aggravating based on bad faith for fifty-nine backdated forms).

8. The Court will aggravate for bad faith as to the backdated Forms I-9 in Count II. *See United States v. Imacuclean Cleaning Servs.,* 13 OCAHO no. 1327, 8–10 (2019); *United States v. Occupational Res. Mgmt., Inc.*, 10 OCAHO no. 1166, 27 (2013).

9. The Court will aggravate the penalty for the two Forms I-9 in Count I, as failure to present the Form I-9 is "one of the most serious violations." *United States v. Dr. Robert Schaus, D.D.S.*, 11 OCAHO no. 1239, 12 (2014) (citing *United States v. Symmetric Solutions, Inc.*, 10 OCAHO no. 1209, 11 (2014)).

10. The Court will aggravate the penalties for the paperwork violations in Count II for seriousness on a continuum. *United States v. Solutions Grp. Int'l, LLC*, 12 OCAHO no. 1288, 10 (2016) (quoting *United States v. Siam Thai Sushi Rest.*, 10 OCAHO no. 1174, 4 (2013)).

11. The Court will aggravate the fine for the violation in Count III for seriousness, as "[a]n employer's failure to re-verify an individual's employment authorization eligibility after the expiration of their previous employment authorization is serious and undermines the purpose of the employment eligibility verification requirements." *United States v. Visiontron Corp.*, 13 OCAHO no. 1348, 9 (2020).

12. The Court will aggravate the penalty for the violation in Count III for employment of unauthorized workers. *See United States v. Morgan's Mexican & Lebanese Foods, Inc.*, 8 OCAHO no. 1013, 239, 249–50 (1989) (aggravating penalty only for unauthorized alien).

13. The Court will treat the history of violations factor as neutral, as the general viewpoint in OCAHO case law is that not violating the law in the past does not, on its own, necessarily provide adequate grounds for mitigation. *See United States v. DJ Drywall, Inc.*, 10 OCAHO no. 1136, 12 (2010).

14. The Court exercises discretion in assessing the penalties for the admitted knowing hire violation in Count IV, *see United States v. Day*, 3 OCAHO no. 575, 1751, 1753 (1993), and awards a penalty at the lower range for the violation in Count IV as there was only one violation for a lapse in authorization of 19 days.

15. The range for the paperwork violations is $224–$2,236, as the record reflects that the charges are continuing violations that were assessed when the Notice of Intent to Fine was served, on June 19, 2019. *See* § 274a.2(b)(2)(i)(A); *Curran Eng'g*, 7 OCAHO no. 975 at 895; *see also United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1061, 11 (2000).

16. This Court begins with a mid-range penalty of $1,290, and adjusts up or down based upon the factors.

17. The Court will set a penalty of $1161 for each of the two violations in Count I.

18. The Court will set a penalty of $1,096.5 for 11 violations, $1161 for 47 violations, and $1548 for six violations in Count II.

19. The Court will set a penalty of $1161 for the violation in Count III.

20. The Court will set a penalty of $658.95 for the violation in Count IV.

SO ORDERED.

Dated and entered on December 14, 2022.

_____

Jean King
Chief Administrative Law Judge

Appeal Information

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

Provisions governing administrative reviews by the CAHO are set forth at 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. pt. 68. Note in particular that a request for administrative review must be filed with the CAHO within ten (10) days of the date of this order, pursuant to 28 C.F.R. § 68.54(a)(1) (2012).

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

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