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

January 12, 2023

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
John Edward Leeper, Esq., for Respondent

ORDER DECLINING TO MODIFY, VACATE, OR REMAND THE CHIEF ADMINISTRATIVE LAW JUDGE'S ORDER ON PENALTIES

I. INTRODUCTION AND PROCEDURAL HISTORY

This case arises under the employer sanctions provisions of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324a. On November 5, 2019, the United States Department of Homeland Security, Immigration and Customs Enforcement (DHS or Complainant), filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against El Paso Paper Box, Inc. (Respondent). The case was assigned to Chief Administrative Law Judge (Chief ALJ) Jean King.[1] The complaint charged Respondent with four counts of violating 8 U.S.C. § 1324a. Specifically, the complaint alleged three counts of violating 8 U.S.C. § 1324a(a)(1)(B) by failing to prepare and/or present Employment Eligibility Verification Forms (Forms I-9) for two employees (Count I) and failing to ensure proper completion of the Form I-9 for sixty-seven employees (Counts II and III) and one count of violating 8 U.S.C. § 1324a(a)(2)[2] by knowingly continuing to employ an individual who was unauthorized for

[1] The case was reassigned to another ALJ on July 29, 2020, and then reassigned back to the Chief ALJ on October 4, 2021.

[2] Count IV of the complaint cites to 8 U.S.C. § 1324a(a)(1)(B) for the knowingly continue to employ violation. However, the Notice of Intent to Fine accompanying the complaint cites to 8 U.S.C. § 1324a(a)(2) for this alleged violation. The correct citation appears to be 8 U.S.C. § 1324a(a)(2) based on the record, and the Chief ALJ determined the citation to 8 U.S.C. § 1324a(a)(1)(B) to be "a harmless, scrivener's error." *See United States v. El Paso Paper Box, Inc.*, 17 OCAHO no. 1451, 2 n.1 (2022). Respondent has not challenged that determination, and there is no basis to disturb it. Alternatively, Respondent had notice of the error and did not challenge the error in its filings before the Chief ALJ. *Id*. Accordingly, even if the incorrect citation were not a scrivener's error, Respondent may have impliedly consented to being charged under 8 U.S.C. § 1324a(a)(2) based on the record, which may have allowed the issue of liability under 8 U.S.C. § 1324a(a)(2) to be treated as if it had been raised in the complaint. *See* 28 C.F.R. § 68.9(e). However, I need not and do not decide that issue. *See infra* note 5.

employment in the United States (Count IV). Complainant sought a total civil money penalty of $70,305.10 for these violations.

Respondent filed an answer to the complaint, denying the alleged violations and asserting two affirmative defenses – a statute of limitations defense and a good faith compliance defense. Both parties subsequently filed prehearing statements, and both parties filed motions for summary decision.

Respondent's motion for summary decision asserted that forty-two of the alleged violations were barred by the statute of limitations. Respondent argued that for those forty-two violations, Respondent was actually being charged with failure to timely complete section 2 of the Form I-9 for those employees. In Respondent's view, since failure to timely complete section 2 is "frozen in time" and the employees at issue were hired more than five years prior to the filing of the complaint in this matter, the statute of limitations barred liability for those violations.

Complainant's motion for summary decision asserted that there were no genuine issues of material fact and that Respondent was liable for all of the violations alleged in the complaint. Addressing Respondent's good faith compliance defense, the Complainant argued that all of the paperwork violations at issue were substantive violations, and thus that the good faith affirmative defense was inapplicable to those violations. Complainant's motion for summary decision also addressed each of the five factors in 8 U.S.C. § 1324a(e)(5) that must be given due consideration in setting the amount of the civil penalty for paperwork violations.

Each party filed a response to the other party's motion for summary decision. Complainant's response to Respondent's motion for summary decision disputed Respondent's argument with respect to the statute of limitations. Complainant argued that the violations at issue were not for failure to timely prepare the Forms I-9, but rather were for failure to properly complete the Forms, and therefore were continuing violations not barred by the statute of limitations. Respondent's response to Complainant's motion for summary decision argued again that the violations were barred by the statute of limitations; asserted that the alleged violations were "technical or procedural" violations which were excused by Respondent's good faith; asserted that the civil penalties were incorrectly calculated and excessive; and, argued that the penalties should be reviewed by the ALJ *de novo* and set at the statutory minimum.

On August 18, 2022, the Chief ALJ issued an Order on Motions for Summary Decision. *United States v. El Paso Paper Box, Inc.*, 17 OCAHO no. 1451, 5-16 (2022). In the Order on Motions for Summary Decision, the Chief ALJ denied the Respondent's motion for summary decision, finding that the statute of limitations did not bar the violations at issue. *Id*. at 5-6. The Chief ALJ also granted in part and denied in part the Complainant's motion for summary decision. *Id.* at 15. Specifically: (1) for the two alleged violations in Count I of the complaint, the Chief ALJ granted summary decision for the Complainant on one violation, and denied summary decision with respect to the other violation; (2) for the sixty-six alleged violations in Count II of the complaint, the Chief ALJ granted summary decision for the Complainant on sixty-four violations, and denied summary decision with respect to two violations; (3) for the one alleged violation in Count III of the complaint, the Chief ALJ granted summary decision for the Complainant; and (4) for the one alleged violation in Count IV of the complaint, the Chief ALJ granted summary decision for the Complainant. *Id.* In total, the Chief ALJ found the Respondent liable for sixty-seven of the alleged violations, leaving three alleged violations unresolved.

The Chief ALJ also ordered the parties to meet and confer regarding the unresolved violation in Count I of the complaint and stated her intent to grant summary decision for the Respondent on the two unresolved alleged violations in Count II of the complaint, subject to notice and an opportunity for the parties to respond. *Id.* at 15-16. Finally, the Chief ALJ deferred consideration of the matter of civil penalties for the violations found, inviting the parties to submit current financial information relevant to the penalty calculation and setting a schedule for supplemental briefing on the issue of penalties and the unresolved violations. *Id.* at 16.

The Complainant filed a supplemental brief, arguing that liability was proper for the one remaining violation in Count I of the complaint based on a failure to prepare charge. Respondent filed a reply to Complainant's supplemental brief, disputing Complainant's arguments with respect to the Count I violation. The parties also submitted a joint response to the Chief ALJ's Order, representing that they conferred regarding the unresolved Count I allegation, and agreed that the Form I-9 at issue was not presented to DHS at the time of the Form I-9 inspection.

On December 14, 2022, the Chief ALJ issued an Order on Penalties (Final Order). With regard to the remaining liability issues, the Chief ALJ granted summary decision to the Complainant on the remaining violation in Count I, finding that Complainant established Respondent's liability for failing to present the Form I-9 at issue (based on the joint response to the Order on Motions for Summary Decision). Final Order, at 3. The Chief ALJ also granted summary decision to the Respondent on the remaining two violations in Count II, as neither party addressed those claims in their supplemental briefing. *Id.* at 4.

Moving to the assessment of civil penalties, the Chief ALJ considered each of the required statutory factors with respect to each of the paperwork violations found in the case. The Chief ALJ evaluated each of the five statutory penalty factors as follows:

- Size of the business: Based largely on the number of employees employed by Respondent (between 140 and 150), the Chief ALJ concluded that Respondent should not necessarily be treated as a small business, but also was not "so large as to support aggravation based on size." *Id.* at 6. After also considering the nature of ownership and the length of time Respondent has been in business, the Chief ALJ treated this factor as neutral. *Id.* at 7.
- Good faith: The Chief ALJ found that six of the Forms I-9 at issue were backdated. *Id.* at 8. For those six violations, the Chief ALJ therefore treated good faith as an aggravating factor. *Id.* at 9. For the remainder of the violations involving non-backdated Forms I-9, the Chief ALJ treated good faith as a mitigating factor. *Id.*
- Seriousness of the violations: The Chief ALJ evaluated the seriousness of each violation on a continuum, acknowledging that some violations (such as the failure to complete section 2 of the Form I-9) were more serious than others. *See id.* at 9-11. Ultimately, the Chief ALJ treated seriousness of the violations as an aggravating factor for most of the violations, though to varying degrees based on the specific circumstances of each violation. *See id.*
- Employment of unauthorized workers: With respect to the Form I-9 violation in Count III involving a worker who became unauthorized for employment, the Chief ALJ treated this factor as aggravating only with respect to that one violation. *Id.* at 11.
- History of violations: The Chief ALJ acknowledged that Respondent did not appear to have a previous history of violations and, therefore, treated this factor as neutral, observing that

"[t]he 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." *Id.* at 11-12.

In making the ultimate penalty assessments, the Chief ALJ began with a mid-range penalty of $1,290 per violation for each of the paperwork violations and adjusted the penalties either upward or downward for each violation based on the factors outlined above. As a result, the Chief ALJ imposed a civil penalty of between $1,096.50 and $1,548 per paperwork violation. *See id.* at 13. For the one violation involving knowingly continuing to employ an unauthorized worker, the Chief ALJ adopted the Complainant's proposed penalty of $658.95, which was near the low end of the applicable penalty range. *See id.* at 12-13. The total civil penalty for all violations was set at $80,187.45. The Chief ALJ also issued an order requiring Respondent to cease and desist from further violations of 8 U.S.C. § 1324a(a)(1)(A). *Id.* at 13-14.

On December 27, 2022, Respondent filed a request for administrative review pursuant to 28 C.F.R. § 68.54(a)(1).[3] On December 28, 2022, the Chief Administrative Hearing Officer (CAHO) issued a Notice Regarding Administrative Review, acknowledging the Respondent's request for administrative review and setting a deadline of January 4, 2023, for filing briefs related to the administrative review. *See* 28 C.F.R. § 68.54(b)(1) (permitting parties to file briefs related to administrative review within twenty-one days of the date of entry of the ALJ's order). Neither party filed a brief by the deadline—or by the date of this decision—nor did either party seek an extension of the briefing deadline.

For the reasons stated below, I decline to modify, vacate, or remand the Chief ALJ's Final Order.

II. JURISDICTION AND STANDARD OF REVIEW

The CAHO has discretionary authority to review a final order of an ALJ in a case brought under 8 U.S.C. § 1324a. *See* 8 U.S.C. § 1324a(e)(7); 28 C.F.R. § 68.54(a). Under OCAHO's rules, a party may file a written request for administrative review within ten days of the date of entry of the ALJ's final order. 28 C.F.R. § 68.54(a)(1). The CAHO may also review an ALJ's final order on his or her own initiative by issuing a notification of administrative review within ten days of the date of entry of the ALJ's final order. 28 C.F.R. § 68.54(a)(2). If administrative review is requested or noticed, the CAHO may enter an order that modifies or vacates the ALJ's order or remands the case for further proceedings within thirty days of the date of entry of the ALJ's order. 8 U.S.C. § 1324a(e)(7); 28 C.F.R. § 68.54(d)(1).

Under the Administrative Procedure Act, which governs OCAHO cases, the reviewing authority in administrative adjudications "has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule." 5 U.S.C. § 557(b). This authorizes the CAHO to apply a *de novo* standard of review to final orders issued by an ALJ. *See Maka v. INS*, 904 F.2d 1351, 1356 (9th Cir. 1990); *Mester Mfg. Co. v. INS*, 900 F.2d 201, 203-04 (9th Cir. 1990). The CAHO reviews both questions of law and fact *de novo*, though the CAHO

[3] Parties must file a request for administrative review within ten days of the date of entry of the ALJ's final order. *See* 28 C.F.R. § 68.54(a)(1). In this case, ten days after the date of entry of the ALJ's final order was December 24, 2022. However, since December 24 was a Saturday, the ten-day time period includes the next business day, which was December 27, 2022. *See* 28 C.F.R. § 68.8(a). Accordingly, Respondent's request for administrative review was timely filed.

should not dismiss an ALJ's findings of fact "cavalierly" and "should accord some degree of consideration of them depending on the particular circumstances of the case under review." *United States v. Fasakin*, 14 OCAHO no. 1375b, 4 (2021). In conducting this review, "the CAHO must ensure that the ALJ's overall decision is well-reasoned, based on the whole record, […] free from errors of law, and supported by or in accordance with reliable, probative, and substantial evidence contained in the record." *Id*. at 5.

III. BRIEFING

Before turning to the merits of the request for administrative review, the failure of both parties to file a brief regarding that review warrants some comment. Briefs serve multiple important purposes during an administrative review. For example, they allow the CAHO to determine whether a party raised relevant issues before the ALJ in order to properly consider those issues on review. *See United States v. M&D Masonry, Inc.*, 10 OCAHO no. 1215, 8 (2014) (finding that issues not properly raised before an ALJ may not be raised before the CAHO on administrative review). In contrast, a conclusory brief—or no brief at all—creates difficulty in assessing whether issues have been properly presented for review. *See Otis v. Bd. of Supervisors of La. State Univ. & Agric. & Mech. Coll.*, 250 F.3d 741 (5th Cir. 2001) (unpublished decision) ("Thus, the court is of the opinion that [appellant's] general and conclusory brief is not sufficiently specific to present issues for review.").

Requests for administrative review by the CAHO are not complicated filings, and legal arguments are not necessarily expected in the request for review itself because the parties have additional time to file a brief. *United States v. Bhattacharya*, 14 OCAHO no. 1380b, 5 (2021). However, when a party submits a conclusory request for administrative review and then does not submit a subsequent brief, as Respondent did, it is difficult for the CAHO to evaluate the legal sufficiency or persuasiveness of the party's request. That difficulty is further amplified when the opposing party also fails to file a brief, as Complainant did, leaving the reviewer somewhat adrift in discerning the parties' positions on review and the relevant arguments.

To be clear, there is no regulatory requirement for parties to submit briefs during an administrative review by the CAHO. *See* 28 C.F.R. § 68.54(b)(1) (providing that parties "may" file briefs during an administrative review). Thus, the failure to file a brief will not necessarily warrant an adverse legal action such as deeming the request for review unopposed (if the opposing party fails to file a brief) or deeming it abandoned and dismissing it (if the party requesting review fails to file a brief). *Cf*., *e.g*., 8 U.S.C. § 1252(b)(3)(C) (providing that a petition for review of a removal order "shall" be dismissed if a timely brief is not filed "unless a manifest injustice would result"); Fed. R. App. P. 31(c) (providing that an appellee may move to dismiss an appeal if the appellant does not timely file a brief); *Swinburn v. First Fed. Saving & Loan of Lubbock, Tex*., 487 F.2d 338 (5th Cir. 1973) (dismissing an appeal for failure to file a brief on time). Nevertheless—in practice, if not also in law—the failure to submit a brief following a conclusory and unexplicated request for administrative review, such as the one filed by Respondent, will frequently be insufficient or persuasive to warrant a vacatur or modification of an ALJ's decision. Accordingly—and because "mind reading is not an accepted tool of judicial inquiry," *United States v. Stanford Sign & Awning, Inc.,* 10 OCAHO no. 1145, 8 (2012) (citation omitted)—the CAHO ordinarily expects both parties to fully develop their positions and arguments during an administrative review.

IV. ANCILLARY MATTERS

This case also superficially raises two issues related to charging decisions by DHS in cases under 8 U.S.C. § 1324a that have generated a great deal of confusion between both DHS and employers over the years and that could likely benefit from further clarification by OCAHO. However, neither issue has been squarely presented by either party, and both issues have only been touched upon in an ancillary fashion. Moreover, neither is ultimately dispositive of Respondent's request for administrative review. Accordingly, each issue warrants only a brief discussion.

A. Statute of Limitations

It is well-established in OCAHO case law that a Form I-9 may contain more than one violation of 8 U.S.C. § 1324a(a)(1)(B), though a respondent will generally only be liable for one violation per Form I-9. *See* Final Order, at 4 (collecting cases); *accord* 8 U.S.C. § 1324a(e)(5) (limiting liability to "each individual" with respect to whom a violation of 8 U.S.C. § 1324a(a)(1)(B) occurred, rather than imposing liability for each violation). It is also well-established that different paperwork violations may accrue at different times and, thus, trigger the running of the statute of limitations in 28 U.S.C. § 2462 at different times. *See El Paso Paper Box, Inc.*, 17 OCAHO no. 1451, at 4. Finally, it is also well-established that DHS, in an exercise of its prosecutorial discretion authority, may charge some but not all violations of 8 U.S.C. § 1324a(a)(1)(B), may charge multiple violations for one Form I-9, or may charge violations in the alternative, though a respondent's liability will generally still be limited to one violation per Form I-9. *See, e.g., United States v. Alpine Staffing, Inc.,* 12 OCAHO no. 1303, 21 n.11 (2017) (noting both the implications of DHS's charging authority and its ability to charge in the alternative).

Combined, these principles provide a number of possible charging permutations, which may cause confusion or present traps for the unwary on both sides. For example, depending on the specific information omitted and assuming other criteria are met, an employer who fails to complete section 2 of a Form I-9 may be charged with either a failure to timely prepare the Form I-9 or a failure to properly complete section 2 of the Form I-9. The former violation is complete upon the lapse of three days from the date of hire, at which point the statute of limitations begins running. *E.g., United States v. Visiontron Corp.*, 13 OCAHO no. 1348, 5-6 (2020). The latter, however, is a continuing violation, and the statute of limitations does not begin to run until the violation is corrected. *See El Paso Paper Box*, 17 OCAHO no. 1451, at 6.

In the instant case, this distinction confused Respondent regarding violations charged in Count II of the complaint, and its arguments regarding the statute of limitations were unavailing because DHS charged a failure to properly complete the Forms I-9, rather than a failure to timely complete the Forms. *Id*. Respondent's confusion is understandable because the same nucleus of facts gave rise to multiple charges with differing starting points for the running of the statute of limitations.[4] Nevertheless, the Chief ALJ's decision denying Respondent's motion for summary decision comports with longstanding OCAHO case law, and Respondent has not meaningfully challenged that decision in its request for administrative review.

[4] Confusion regarding charging decisions in a complaint under 8 U.S.C. § 1324a and the statute of limitations is not limited to respondents. *See, e.g., Visiontron Corp*., 13 OCAHO no. 1348, at 5-6 (finding an employer not liable for certain violations due to the statute of limitations where DHS charged failure to timely complete violations rather than failure to properly complete violations), *petition for review denied,* 2022 WL 9583754 (2d Cir. 2022).

B. Forms I-9 Prepared After Receipt of a Notice of Inspection (NOI)

An employer who does not prepare a Form I-9 for an employee until after it has been served with an NOI by DHS has likely committed a substantive violation of 8 U.S.C. § 1324a(a)(1)(B), assuming it was otherwise required to prepare the Form I-9. However, DHS has not always been consistent in its theory of charging a violation of 8 U.S.C. § 1324a(a)(1)(B) based on the creation of Forms I-9 after the service of an NOI, and OCAHO case law has not always been consistent in how it has treated such charges. *Compare United States v. Intelli Transport Servs., Inc*., 13 OCAHO no. 1319, 3-4 (2019) (finding liability based on a failure-to-prepare charge, though analyzing it through the lens of a failure-to-timely-prepare allegation, where the Forms I-9 were prepared after the NOI was served) *with El Paso Paper Box*, 17 OCAHO no. 1451, at 7 (denying liability based on a failure to prepare charge where the Forms I-9 were prepared after the NOI because "it is indisputable that the Forms were indeed prepared"). Moreover, as a charge of failure to prepare a Form I-9 necessarily and inherently encompasses an allegation of a failure to timely prepare a Form I-9, the parties' treatment of a scenario in which Forms I-9 created after the service of an NOI are charged only as a failure-to-prepare violation may nevertheless authorize an ALJ, under certain circumstances, to conform the failure-to-prepare charge to the evidence and find liability as a failure to timely prepare the Form I-9. *See* 28 C.F.R. § 68.9(e) (noting that "[w]hen issues not raised by the pleadings are reasonably within the scope of the original complaint and are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings, and such amendments may be made as necessary to make the pleading conform to the evidence").[5]

In the instant case, the parties disputed whether Complainant could sustain a failure-to-prepare charge in Count I regarding two employees of Respondent whose Forms I-9 were indisputably prepared after service of the NOI. *See* Final Order, at 3-4. The Chief ALJ declined to reach that issue because both of the Forms I-9 at issue were subject to liability based on other charges. *Id*. As discussed in more detail below, Respondent has not demonstrated any error in the Chief ALJ's liability determinations, and the record reveals none. Accordingly—and notwithstanding the somewhat conflicting OCAHO case law—it is not necessary to resolve the issue of the appropriate charge for Forms I-9 prepared after the service of an NOI in order to address Respondent's request for administrative review, and I decline to do so.

[5] The part of 28 C.F.R. § 68.9(e) regarding treating issues tried by consent as part of the original complaint and conforming pleadings to the evidence is modeled after Federal Rule of Civil Procedure 15(b)(2), and both provisions notably speak in terms of issues being tried, *i.e*., determined through a trial. There is a split among the federal circuit courts of appeals, however, as to whether Rule 15(b)(2) also applies to pre-trial motions, such as motions for summary judgment. *See Liberty Lincoln-Mercury, Inc. v. Ford Motor Co*., 676 F.3d 318, 327 n.7 (3d Cir. 2012) (collecting cases). Although the Federal Rules of Civil Procedure may be used as a "general guideline" in OCAHO proceedings, 28 C.F.R. § 68.1, and federal court interpretations of those Rules may have strong persuasive value for OCAHO adjudicators assessing analogous OCAHO regulations, no OCAHO case so far has determined the scope of applicability of 28 C.F.R. § 68.9(e). Because the record reflects that Respondent clearly did not consent to consideration of a failure-to-prepare charge as a failure-to-timely-prepare charge and because the issue is ultimately not dispositive of Respondent's request for administrative review, the instant case does not provide an appropriate vehicle for determining whether 28 C.F.R. § 68.9(e) applies to a motion for summary decision or only to issues arising through trial.

V. DISCUSSION

A. Respondent's Request for Administrative Review

Respondent's complete request for administrative review is stated below:

1. On December 14, 2022, the Administrative Law Judge issued an Order on Penalties.
2. Respondent disagrees with the penalties ordered therein as being clearly contrary to the weight of the evidence and law and, therefore requests administrative review.
3. Among the errors, the ALJ erred in the analysis and application of the penalty mitigation factors. The ALJ erred in aggravating penalties and failing to mitigate penalties.
4. Among the errors, the ALJ erred in reaching Finding of Fact Nos 11-16, which are against the great weight of the evidence. Respondent does not waive its objections to other Findings of Fact.
5. Among the errors, the ALJ erred in reaching Conclusions of Law Nos. 1-2 (finding liability), 8-12 (aggravating penalties), 13 (treating the lack of history of violations neutral), 15 (treating the charges as continuing violations) and 17-20 (specific dollar amount of the penalties). Respondent does not waive its objections to other Conclusions of Law.
6. Wherefore, for the foregoing reasons, Respondent respectfully requests administrative review.

R's Request for Admin. Review, 1-2.

Respondent did not elaborate further on the legal or factual grounds for these alleged errors in its request for administrative review and did not file a brief in support of its request for administrative review, despite being provided an opportunity to do so.

Having reviewed the Final Order, the previous Order on Motions for Summary Decision, the Respondent's request for administrative review, and the rest of the administrative record, I do not find any errors in the Chief ALJ's Order on Penalties that would warrant modification, vacatur, or remand. The Chief ALJ's findings of fact and conclusions of law are supported by substantial, reliable, and probative evidence in the record and applicable law, and Respondent's barebones and conclusory assertions of errors are insufficient to warrant modifying or vacating those findings and conclusions. Respondent's cursory assertions of error are addressed in turn below.[6]

[6] Paragraphs 2 and 3 in Respondent's request for administrative review are conclusory, summary challenges to the ALJ's Final Order which are insufficient on their face to warrant modification, vacatur, or remand of the Chief ALJ's Final Order. To the extent that those challenges are subsumed within the slightly more specific challenges articulated in paragraphs 4 and 5 of the request for administrative review, they are addressed in parts V.B and C, *infra*.

B. Respondent's Challenges to the Chief ALJ's Findings of Fact

In its request for administrative review, Respondent asserts that "the ALJ erred in reaching Finding of Fact Nos[.] 11-16, which are against the great weight of the evidence." *Id.* at 1. The Findings of Fact in question are as follows:

> 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.

Final Order, at 14-15.

Contrary to Respondent's assertions, each of the above Findings of Fact is supported by the record. Respondent points to no specific facts, exhibits, or arguments in the record that contradict these Findings of Fact, and none is apparent from the record before me.

Finding of Fact No. 11, regarding Respondent's violation percentage, was supported by Complainant's exhibits and memorandum supporting its motion for summary decision. *See id.* at 5 (citing C's Mem. MSD 10-13; C's Ex. G-9, at 1). Finding of Fact No. 12, regarding liability for the violations alleged in Count I of the complaint, is supported by Complainant's exhibits, Respondent's opposition to Complainant's motion for summary decision, and the parties' Joint Response to Order on Motions for Summary Decision. *See El Paso Paper Box, Inc.*, 17 OCAHO no. 1451, at 6 (citing C's MSD Ex. G-3, at 38, 110-12; R's Opp'n 6, 11); Final Order, at 3 (citing Jt. Resp. 2).

Finding of Fact No. 13, regarding liability for the violations alleged in Count II of the complaint, is also supported by the record, including by the Complainant's motion for summary decision and exhibits and the Respondent's opposition to Complainant's motion for summary decision. *See El Paso Paper Box, Inc.*, 17 OCAHO no. 1451, at 8-13. Finding of Fact No. 14, regarding backdating of six Forms I-9, is also supported by similar record documents. *See id.* at 8 (citing C's MSD Ex. G-3, at 14, 107, 119, 123, 180; R's Opp'n Ex. G-3, at 83).

Finding of Fact No. 15, regarding liability for the alleged violation in Count III of the complaint, is supported by Complainant's exhibits. *See id.* at 13 (citing C's MSD Ex. G-4, at 1; C's MSD Ex. G-2, at 5; C's MSD Ex. G-2, at 4-7; and C's MSD Ex. G-10, at 53).[7] Finding of Fact

[7] The Chief ALJ's Order on Motions for Summary Decision cites twice to "C's MSD Ex. G-2" in discussing liability for the Count III violation. *El Paso Paper Box, Inc.*, 17 OCAHO no. 1451, at 13. Based on my review of the record, it appears as though these citations were typographical errors, and the correct citations are to "C's MSD Ex. G-3." Exhibit G-2 supporting Complainant's Motion for Summary Decision appears to be a copy of the Immigration Enforcement Subpoena directed at Respondent as part of the initial Form I-9 inspection, and is only four pages in length, whereas the Chief ALJ purported to cite to page 5 and pages 4-7 of the exhibit. Conversely, Exhibit G-3 supporting the Complainant's Motion for Summary Decision contains copies of the Forms I-9 collected from the

No. 16, regarding liability for knowingly continuing to employ a worker who had become unauthorized for employment, is similarly supported by the record and by well-established legal principles regarding constructive knowledge. *See id.* at 13-14 (citing C's Mem. MSD 9-10; C's MSD Ex. G-10, at 53; 8 C.F.R. § 274a.1(*l*)(1)).

Respondent fails to identify any evidence in the record that refutes these findings, and I cannot identify any errors in these findings based on a *de novo* review. Accordingly, there is no basis to modify, vacate, or remand the Chief ALJ's Final Order based on Respondent's challenges to the Chief ALJ's Findings of Fact.

C. Respondent's Challenges to the Chief ALJ's Conclusions of Law

In its request for administrative review, Respondent asserts that the Chief ALJ erred in reaching the following Conclusions of Law: 1-2, 8-12, 13, 15, and 17-20. The challenged Conclusions of Law are as follows:

> 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.
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> […]
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> 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

Respondent. The copy of the Form I-9 and supporting documents for the employee at issue in Count III appears at pages 4-7 of Exhibit G-3. Therefore, it appears that the Chief ALJ intended to cite to Exhibit G-3 in this section of discussion, and indeed, the Chief ALJ's findings as to liability for the alleged violation in Count III of the complaint are fully supported by the relevant pages of Exhibit G-3.

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 [noncitizen]).
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).

[…]

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.(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).

[…]

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[0] 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.

Final Order, at 15-17.

As with Respondent's challenges to the Chief ALJ's Findings of Fact, each of the Chief ALJ's Conclusions of Law identified above is supported by the record and by applicable law. Respondent fails to identify any evidence in the record or contrary legal authority that would undermine these conclusions.

Conclusion of Law No. 1, regarding liability for one alleged violation in Count I of the complaint, is supported by the parties' Joint Response to Order on Motions for Summary Decision and by the applicable regulation. *See id.* at 3 (citing Jt. Resp. 2); 8 C.F.R. 274a(b)(2)(ii)).

Oddly, Respondent challenges Conclusion of Law No. 2 granting summary decision to Respondent as to two of the alleged violations in Count II of the complaint, even though that Conclusion was decided in Respondent's favor. As with Respondent's other challenges to the Chief ALJ's Final Order, Respondent does not elaborate on the basis for its seemingly-inapposite challenge to Conclusion of Law No. 2. Nevertheless, Conclusion of Law No. 2 is supported by the record. *See El Paso Paper Box, Inc.*, 17 OCAHO no. 1451, at 11-13; Final Order, at 4.

Conclusions of Law Nos. 8-13, regarding application of the penalty factors in 8 U.S.C. § 1324a(e)(5), are also amply supported by the record and are fully consistent with the cited case law. *See* Final Order, at 7-12. Moreover, the Chief ALJ correctly determined the applicable penalty range in Conclusion of Law No. 15. Finally, I find no error in the Chief ALJ's ultimate penalty

assessments in Conclusions of Law Nos. 17-20. As the statute requires, the ALJ gave "due consideration" to each of the required penalty factors in determining the appropriate civil penalty, and the ultimate penalties were reasonable in light of the circumstances of each violation and past OCAHO case law.[8] *See* 8 U.S.C. § 1324a(e)(4), (5); Final Order, at 6-12.

In short, Respondent has essentially asked the undersigned to reweigh the evidence and reach a conclusion different than that of the Chief ALJ, particularly regarding the penalty amount. Although the undersigned possesses *de novo* review authority, Respondent has not provided sufficient support or reasoning for me to reweigh the evidence and reach a different conclusion. To the contrary, the Chief ALJ's Final Order is well-reasoned, based on the whole record, free from errors of law, and supported by substantial evidence in the record, and Respondent has not identified a legally persuasive basis to modify, vacate, or remand it.

VI. CONCLUSION

Respondent's request for administrative review fails to provide a sufficient basis for challenging the Chief ALJ's Final Order in this case. Accordingly, I decline to modify, vacate, or remand the Chief ALJ's Final Order.

Under OCAHO's rules, an ALJ's final order becomes the final agency order sixty days after the date of the order, unless the CAHO modifies, vacates, or remands the order. *See* 28 C.F.R. § 68.52(g). Since the undersigned has declined to modify, vacate, or remand the Chief ALJ's Final Order, the Final Order will become the final agency order sixty days after its date of entry. A person or entity adversely affected by a final agency order may file a petition for review of the final agency order in the appropriate United States Circuit Court of Appeals within forty-five days after the date of the final agency order. 8 U.S.C. § 1324a(e)(8); 28 C.F.R. § 68.56.

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[8] The Chief ALJ imposed a penalty of $658.95 for the one violation of 8 U.S.C. § 1324a(a)(2) in Count IV, which was lower than the per-violation penalties imposed for the paperwork violations of 8 U.S.C. § 1324a(a)(1)(B) in Counts I through III. Final Order, at 17. Although Respondent did not brief or otherwise raise the issue, the undersigned notes that there is OCAHO case law suggesting that all violations of 8 U.S.C. § 1324a(a)(1)(A) or (a)(2) are inherently more serious than all paperwork violations of 8 U.S.C. § 1324a(a)(1)(B) and, thus, should warrant correspondingly higher penalties. *See, e.g., United States v. Jalisco's Bar & Grill, Inc.,* 11 OCAHO no. 1224, 9-10 (2014) ("The knowing hire of an unauthorized [noncitizen] is a far more serious violation of law than is a paperwork violation of any character. Both the statute itself and the regulations setting out the permissible penalties for each type of violation reflect this distinction in the levels of gravity of the respective violations."); *United States v. Foothill Packing, Inc.,* 11 OCAHO no. 1240, 13 (2015) ("[DHS] provided no explanation as to why the penalty proposed for a paperwork violation should exceed that proposed for a knowing hire violation, and I am at a loss to understand what rationale could support such a result. The whole point of the employment eligibility verification system is to prevent the hiring of unauthorized [noncitizens]. For an employer to knowingly hire an unauthorized worker is exponentially more serious than any run-of-the-mill paperwork violation and the relative gravity of the violations should be reflected in the penalties imposed."). Although that principle will generally hold in most cases brought under 8 U.S.C. § 1324a, it is not a categorical rule that cannot yield to unique facts, particularly as the mid-range of penalties for paperwork violations of 8 U.S.C. § 1324a(a)(1)(B) generally exceeds the minimum penalty for a first-time violation of 8 U.S.C. § 1324a(a)(1)(A) or (a)(2). *See* 28 C.F.R. § 85.5. In the instant case, Respondent's lone violation of 8 U.S.C. § 1324a(a)(2) was based on a nineteen-day lapse in work authorization whereas it had sixty-seven serious paperwork violations of 8 U.S.C. § 1324a(a)(1)(B), including multiple instances of backdating Forms I-9. On that record, and considering the Chief ALJ's assessment of the relevant factors in 8 U.S.C. § 1324a(e)(5), the Chief ALJ did not err in imposing a lower civil money penalty for Respondent's one violation of 8 U.S.C. § 1324a(a)(2) than for Respondent's paperwork violations of 8 U.S.C. § 1324a(a)(1)(B).

It is SO ORDERED, dated and entered this 12th day of January, 2023.

James McHenry
Chief Administrative Hearing Officer