

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

January 25, 2023

UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. § 1324A Proceeding
	)	OCAHO Case No. 2022A00033
	)	
COMMANDER PRODUCE, LLC,	)	
Respondent.	)	
_____	)	

ORDER ON PENALTIES

I. INTRODUCTION

This case arises under the employer sanctions provisions of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324a. On March 9, 2022, Complainant, the U.S. Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE), filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO). Complainant alleges that Respondent, Commander Produce LLC, knowingly continued to employ two workers unauthorized for employment in the United States, in violation of § 1324a(a)(2).<sup>1</sup> Complainant further alleges that Respondent failed to ensure proper completion of Forms I-9 for nine workers, and failed to prepare and/or present Forms I-9 for twenty workers, in violation of § 1324a(a)(1)(B). Complainant seeks a total proposed penalty of \$64,072.60, an order that that Respondent “cease and desist” from the Notice of Intent to Fine (NIF) violations, and an order that Respondent comply with the requirements of § 1324a(b) during a period of three years. Compl. ¶ 5, Ex. A.

On July 20, 2022, the Court issued an Order to Show Cause – Answer. *United States v. Commander Produce, LLC*, 16 OCAHO no. 1428a, 1 (2022).<sup>2</sup> The Court found that Complainant

<sup>1</sup> The Court will refer to these as the Knowingly Continued to Employ (KCE) violations.

<sup>2</sup> 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,

perfected service of the complaint and accompanying materials on Respondent, and Respondent had failed to timely file its answer afterwards pursuant to 28 C.F.R. § 68.9(a).<sup>3</sup> *Id.* at 2. On August 24, 2022, the Court issued an Order Granting Motion to Correct the Record and Resetting Order to Show Cause Deadlines. *United States v. Commander Produce, LLC*, 16 OCAHO no. 1428b, 1 (2022). The Court provided Respondent additional time to show cause for its failure to timely file an answer, and to file an answer pursuant to 28 C.F.R. § 68.9(c). *Id.* at 3. To date, Respondent has not filed an answer or shown cause for its failure to timely file an answer.

On October 5, 2022, the Court issued an Order Entering Default Judgment on Liability. *United States v. Commander Produce, LLC*, 16 OCAHO no. 1428c, 1 (2022). The Court made factual findings based on the complaint alone. *Id.* at 2–4. The Court then entered findings of liability for the alleged § 1324a violations as a matter of default. *Id.* at 4–7. With liability established, the administrative law judge (ALJ) exercised her discretion to bifurcate the issues of liability and penalty. *Id.* at 7. The Court afforded the parties “an opportunity to develop the record on penalties by way of supplemental filings.” *Id.* (citing *United States v. Sanjay Jeram Corp.*, 15 OCAHO no. 1412, 3 (2022)). The ALJ cautioned that “[f]ailure to timely provide a submission constitutes a waiver of a party’s right to be heard on penalties.” *Id.*

On November 7, 2022, the Court received Complainant’s supplemental briefing on penalties. Respondent did not file a submission. The case is now ripe for penalty assessment.

## II. COMPLAINANT’S POSITION<sup>4</sup>

In response to the Court’s October 5, 2022 Order, Complainant filed a brief and evidence in support of its proposed penalty assessment. *See generally* C’s Supp. Filing. Complainant maintains that the \$64,072.60 assessed in the NIF is an appropriate penalty amount. *See id.* at 2–4 (explaining how ICE applied its guidance to calculate penalty ranges for the violations).

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seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database “FIM-OCAHO,” or in the LexisNexis database “OCAHO,” or on the website at <http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders>.

<sup>3</sup> OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2022).

<sup>4</sup> While Respondent requested a hearing before OCAHO, it has repeatedly declined to appear in these proceedings. Respondent has waived its right to be heard on penalties, and the Court will not infer its position. Accordingly, the Court only discusses Complainant’s position on penalties.

For the KCE violations, Complainant points to OCAHO caselaw that “penalties for knowing hire violations should be higher than paperwork violations.” *See id.* at 7 (citations omitted) (arguing that its baseline fine reflects this principle). Complainant also presents arguments on the § 1324a(e)(5) penalty factors for the paperwork violations. *See id.* at 4–6. Complainant states that it considers Respondent a “small business and mitigated the base fine five percent.” *Id.* at 4–5. Complainant treats the good faith and history of violations factors as neutral. *Id.* at 5–6. Complainant argues that the paperwork violations penalties should be aggravated given the seriousness and involvement of unauthorized noncitizens. *Id.* Lastly, Complainant contends that Respondent has not met its burden of proof for mitigation of nonstatutory factors, such as an inability to pay the proposed the proposed penalty. *See id.* at 7–8.

Complainant’s evidence in support includes: the Notice of Inspection (NOI) dated February 10, 2020 (G-1); Memorandum to Case File, Determination of Civil Monetary Penalty (G-2); Arizona Department of Economic Security Unemployment Insurance Tax Records (G-3); Forms I-9 (G-4); the Notice of Suspect Documents (NOSD) dated October 6, 2020 (G-5); the NIF (G-6); Respondent’s Request for a Hearing (G-7); Articles of Incorporation (G-8); and the Report of Investigation (ROI) dated February 17, 2021 (G-9).

### III. LEGAL STANDARDS

#### A. Considerations in Penalty Assessment

After finding liability, the ALJ has discretion to adopt the penalty proposed by Complainant or to assess penalties de novo. *See United States v. Zuniga Torentino*, 15 OCAHO no. 1397, 4 (2021) (citing *United States v. Yi*, 8 OCAHO no. 1011, 218, 223 (1998)); *United States v. Alpine Staffing, LLC*, 12 OCAHO no. 1303, 10 (2017) (quoting *United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6 (2011)). Complainant has the burden with respect to penalties and “must prove the existence of any aggravating factors by a preponderance of the evidence.” *United States v. 3679 Commerce Pl., Inc.*, 12 OCAHO no. 1296, 4 (2017) (citations omitted).

The ALJ must consider statutory factors when assessing paperwork violations penalties, *see* 8 U.S.C. § 1324a(e)(5), and may consider nonstatutory factors as appropriate for all § 1324a violations. *See also United States v. Day*, 3 OCAHO no. 575, 1751, 1753 (1993) (noting that penalties for KCE violations are within the discretion of the ALJ). Generally, a party seeking consideration of a non-statutory factor has the burden to show that it should be considered as a matter of equity, and that there is a factual basis for the ALJ to grant a favorable exercise of discretion. *United States v. Pegasus Family Rest.*, 12 OCAHO no. 1293, 10 (2016) (citation omitted).

The primary focus in assessing penalties is “the reasonableness of the result achieved[.]” *United States v. Fowler Equip. Co., Inc.*, 10 OCAHO no. 1169, 4 (2013). “The civil penalties of violations of § 1324a are intended to ‘set a meaningful fine to promote future compliance without being unduly punitive.’” *United States v. 1523 Ave. J. Foods, Inc.*, 14 OCAHO no. 1361, 3 (2020) (quoting *3679 Com. Pl., Inc.*, 12 OCAHO no. 1296, at 7).

## B. Applicable Penalty Ranges

The applicable penalty range for a paperwork violation depends on the date of the violation and the date of assessment. *See* 8 U.S.C. § 1324a; 28 C.F.R. § 85.5. Generally, paperwork violations are “continuing” violations until they are corrected or until the employer is no longer required to retain I-9 forms pursuant to IRCA’s retention requirements. *See* 8 C.F.R. § 274a.2(b)(2)(i)(A); *United States v. Curran Eng’g, Co.*, 7 OCAHO no. 975, 874, 895 (1997) (citations omitted); *see also United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1061, 11 (2000). For a continuing violation, “the date of assessment is the date that ICE serves the NIF on a respondent.” *United States v. Farias Enters., LLC*, 13 OCAHO no. 1338, 7 (2020). If the penalty was assessed between June 19, 2020 and December 13, 2021, the minimum penalty is \$234, and the maximum penalty is \$2,332. 28 C.F.R. § 85.5; *see* 8 C.F.R. § 274a.10(b)(2).

Like a continuing paperwork violation, the applicable penalty range for a KCE violation depends on the date of the violation and the date of assessment. *See* 8 U.S.C. § 1324a; 28 C.F.R. § 85.5. If the penalty was assessed between June 19, 2020 and December 13, 2021, the minimum penalty is \$583, and the maximum penalty is \$4,667. 28 C.F.R. § 85.5.<sup>5</sup>

## IV. DISCUSSION

### A. Knowingly Continued to Employ (KCE) Violations (Count I)

“Congress declined to provide any guidelines for assessing penalties” for KCE violations. *United States v. C&D Plastics, Inc.*, 1 OCAHO no. 240, 1557, 1561 (1990); *see also Day*, 3 OCAHO no. 575, at 1753. Here, the Court considered Complainant’s arguments, and all evidence entered into the record by Complainant. *See* C’s Supp. Filing 7, Ex. G-3, Ex. G-5, Ex. G-9.

Complainant submitted evidence in support of its penalty assessment for the KCE violations, including a NOSD and ROI. *Id.* at Ex. G-5, Ex. G-9. The NOSD, issued by DHS and served upon Respondent on October 19, 2020, identifies the company as potentially employing unauthorized

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<sup>5</sup> In addition to civil money penalties, the ALJ may order a respondent to cease and desist from KCE violations, or to comply with the requirements of § 1324a(b) during a period of three years. *See* 8 U.S.C. §§ 1324a(a)(2), (a)(e)(4).

workers. *Id.* at G-5. The NOSD lists two of those unauthorized workers as the persons named at Count II, E.R. and A.S.<sup>6</sup> The ROI names Respondent as the subject of an ICE inspection. *Id.* at G-9. The ROI states: “After multiple queries by [DHS], on February 12, 2021, Manager Kim Kennedy disclosed that [E.R. and A.S.] were still employed by Commander Produce [...] both employees worked for the company before and after the [NOI] was served[.]” *Id.*; *see also id.* at Ex. G-3 (corroborating that E.R. and A.S. were employed for the periods stated in the ROI).

Complainant argues that the Court should impose a \$3,000 baseline fine for the KCE violations. C’s Supp. Filing 7. In support, Complainant cites to OCAHO caselaw on KCE violations being “exponentially more serious” than paperwork violations, and thus warranting a higher fine. *Id.* (citing *United States v. Foothill Packing, Inc.*, 11 OCAHO no. 1240, 11 (2015), and then citing *United States v. DLS Precision Fab LLC*, OCAHO Case No. 13A00019 (April 22, 2014) (Final Decision and Order)).<sup>7</sup>

Upon review of Complainant’s evidence and argument, the Court comes to the similar conclusion that Respondent’s conduct supports a penalty on the upper end of the range. After receiving the NOSD on October 19, 2020, Respondent failed to provide employment authorization documents for E.R. and A.S., and continued to employ them through at least February 12, 2021 (one year after the NOI). *Id.* at G-1, G-5, G-9. These actions reflect a disregard for the prohibition against the knowing employment of unauthorized workers. *See generally* 8 U.S.C. § 1324a.

The record reflects that the knowing hire violations were assessed when the NIF was served on September 17, 2021. *See Commander Produce, LLC*, 16 OCAHO no. 1428c, at 3. The penalty range is therefore \$583–\$4,667 per violation. *See* 8 U.S.C. § 1324a; 28 C.F.R. § 85.5. The Court will impose a civil penalty of \$3,000 for each KCE violation (the amount proposed by Complainant), for a total penalty amount of \$6,000 for the violations contained at Count I.<sup>8</sup>

The KCE violations also merit a cease and desist order. 8 U.S.C. §§ 1324a(a)(1)(A), (e)(4).

Respondent is ORERED to comply with the requirements of 8 U.S.C. § 1324a(b) during a period of three years, pursuant to 8 U.S.C. § 1324a(e)(4)(B)(i).

#### B. Paperwork Violations (Counts II–IV)

<sup>6</sup> To ensure privacy, this Order will refer to employees named at Counts I–IV by their initials.

<sup>7</sup> “Unpublished [OCAHO] decisions lack precedential value and are not intended to be relied upon” in this forum. *United States v. Autobuses Ejecutivos, LLC*, 11 OCAHO no. 1220, 5 (2014).

<sup>8</sup> The Court also considered that Respondent did not contest this fine amount.

The ALJ has duly considered the § 1324a(e)(5) factors to determine the paperwork violations penalties.<sup>9</sup> The ALJ has not considered nonstatutory factors in her assessment of these violations.<sup>10</sup>

## 1. Statutory Factors

### a. Size of the Business<sup>11</sup>

Complainant states that it “considers [Respondent] a small business and mitigated the base fine five percent.” C’s Supp. Filing 5 (citing OCAHO caselaw). According to Complainant, Respondent “listed twelve employees as receiving wages” in the quarter ending March 31, 2020, when the NOI was served. *Id.* at 4–5, Ex. G-2. Complainant also provided Respondent’s Arizona Department of Economic Security Unemployment Insurance Tax Records, including for the year 2020.<sup>12</sup> *Id.* at Ex. G-3 (showing between nine and twelve employees receiving wages in 2020).

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<sup>9</sup> “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.” 8 U.S.C. § 1324(a)(e)(5). The statute does not mandate a particular weight given to each statutory factor. *See Alpine Staffing, LLC*, 12 OCAHO no. 1303 at 10 (citing *Ice Castles Daycare Too*, 11 OCAHO no. 1142, at 6–7, and then citing *United States v. Raygoza*, 5 OCAHO no. 729, 48, 51 (1995)).

<sup>10</sup> An ALJ is not precluded from weighing nonstatutory factors in paperwork violations penalties, as “there is no reason that additional considerations cannot be weighed separately.” *United States v. Integrity Concrete, Inc.*, 13 OCAHO no. 1307, 18 (2017) (quoting *United States v. M.T.S. Service Corp.*, 3 OCAHO no. 448, 527, 531 (1992)). Typically, the party seeking consideration of a nonstatutory factor bears the burden of proof and persuasion—a burden not met here by Respondent. *See United States v. Hartmann Studios, Inc.*, 11 OCAHO no. 1255, 11 (2015) (citations omitted); C’s Supp. Filing 7–8 (noting that Respondent declined to address nonstatutory factors).

<sup>11</sup> The ALJ finds that Congress has already required her to consider the “general public policy of leniency toward small entities, as set out in the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq. (2006), amended by § 223(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-131, 110 Stat. 864 (1996)” with the statutory factor “size of business.” *United States v. Psychosomatic Fitness, LLC*, 14 OCAHO no. 1387a, 12 n.4 (2021) (citations omitted); *see also United States v. R&SL, Inc.*, 13 OCAHO no. 1333b, 36 n.50 (2022) (citations omitted). Thus, the ALJ will give weight to the “size of business” only as a statutory factor.

<sup>12</sup> Complainant argues that more recent financial information from Respondent is not readily available, *see* C’s Supp. Filing 4, and Respondent has not opined otherwise.

OCAHO precedent provides that penalty is generally mitigated when the respondent is a small business. *See, e.g., United States v. Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355a, 5 (2020) (citing *United States v. Carter*, 7 OCAHO no. 931, 121, 162 (1997)). As correctly noted by Complainant, “OCAHO has generally considered companies with fewer than 100 employees to be small businesses.” *1523 Ave. J Foods, Inc.*, 14 OCAHO no. 1361, at 6 (citation omitted). The record supports Complainant’s argument that Respondent employs less than 100 employees; thus, the ALJ will treat Respondent as a small business and mitigate the penalties based on this factor.

#### b. Good Faith

Complainant maintains that good faith should be treated as a neutral factor. C’s Supp. Filing 5. Complainant explains that “although Commander appears to be enrolled in the USCIS E-Verify Program, all the I-9s Commander was required to retain either contained substantive violations or were not presented at all.” *Id.* (citing Ex. G-3, G-4). Complainant also argues that Respondent’s 100% violation rate, and failure to prepare I-9s for 70% of their employees, is not indicative of good faith (that would warrant mitigation). *See id.* (citing *Farias Enters., LLC*, 13 OCAHO no. 1338, at 4 (internal citation omitted)).

The analysis here focuses “on whether or not the employer reasonably attempted to comply with its obligations under § 1324a prior to the issuance of the [NOI].” *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 10 (2010) (citations omitted). The ALJ assesses “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. Exec. Cleaning Serv. of Long Island Ltd.*, 13 OCAHO no. 1314, 3 (2018) (emphasis added) (citations omitted).

The Court agrees with Complainant’s treatment of good faith as neutral. The record lacks relevant information on Respondent’s conduct before the investigation, such that the ALJ may evaluate good or bad faith.<sup>13</sup> As § 1324a does not require registration with E-Verify, Respondent’s apparent registration is immaterial to the penalty assessment. *See Psychosomatic Fitness, LLC*, 14 OCAHO no. 1387a, at 13 (citations omitted). Moreover, the cited low compliance rates alone do not demonstrate bad faith. *Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355a, at 5 (citations omitted); *see also United States v. Taco Plus, Inc.*, 5 OCAHO no. 775, 416, 521 (1995) (citations omitted) (noting that OCAHO caselaw requires more than “the mere fact of paperwork violations” in order

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<sup>13</sup> While not germane to the analysis of the good faith statutory factor, the Court does note that Respondent has engaged in some concerning behavior (attempts to evade service of documents when service on Respondent was ordered by the Court). *See* C’s July 8, 2022 Status Update. Respondent should consider itself cautioned against engaging in behavior that obstructs the process of collecting the ordered penalty in this case.

“to show a ‘lack of good faith,’” even when the business has knowingly employed unauthorized workers). Accordingly, the ALJ will treat the good faith factor as neutral.

c. Seriousness

Complainant asserts that “all 20 of the paperwork violations are serious,” and that OCAHO caselaw supports a 5% aggravation of the penalty. *See* C’s Supp. Filing 5–6 (citations omitted). Specifically, Complainant argues that of the twenty-nine Forms I-9 Respondent was required to retain, nine were prepared after service of the NOI, and twenty were not prepared at all. *Id.* at 5.

OCAHO caselaw provides that “the seriousness of violations may be evaluated on a continuum, because not all violations are equally serious.” *United States v. Senox Corp.*, 11 OCAHO no. 1219, 9 (2014) (citations omitted). “Failure to prepare or present an I-9 is one of the most serious violations because it completely subverts the purpose of the employment verification requirements.” *United States v. Speedy Gonzalez Constr., LLC*, 11 OCAHO no. 1243, 5–6 (2015); *see also United States v. Skydive Academy of Hawaii Corp.*, 6 OCAHO no. 848, 235, 246 (1996). “[The] failure to ensure proper completion of the [I-9] form [is] also serious, but somewhat less so . . . and the difference may be reflected in the final penalty.” *United States v. Roman Racing Stables*, 11 OCAHO no. 1230, 5 (2014) (citation omitted).

The Court concurs with Complainant—these violations are serious and should be treated as such. The ALJ will employ the continuum approach in the penalty assessment, bearing in mind that while the violations are all serious, a failure to prepare a Form I-9 at all is a more serious violation than a failure to ensure proper completion of that form. The ALJ will aggravate the penalties based on this factor.

d. Employment of Unauthorized Workers

Complainant argues that the penalty should be aggravated by 5% for this statutory factor, but only for the six paperwork violations involving unauthorized workers. *See* C’s Supp. Filing 6 (citing *United States v. Morgan’s Mexican & Lebanese Foods, Inc.*, 8 OCAHO no. 1013, 9 (1998)). Complainant contends that it established, by a preponderance of the evidence, that these six individuals were unauthorized to work in the United States. *See id.* at 6 (citing Ex. G-2, G-5, G-9) (referencing research by its auditor, including the discovery of government and commercial database discrepancies). Complainant further states that the Court “has already found that two of the individuals in Count IV, E.R. and A.S., are noncitizens when making factual findings at to Count I.” *Id.*; *see Commander Produce, LLC*, 16 OCAHO no. 1428c, at 3.

The Court finds that Complainant met its burden of proof on aggravation for the paperwork violations involving E.R. and A.S. The Court made factual findings that E.R. and A.S. are noncitizens, whom Complainant continued to employ “knowing that they were, or had become unauthorized aliens with respect to such employment.” *Commander Produce, LLC*, 16 OCAHO



no. 1428c, at 3. Because these findings are now established evidence in the record, Complainant may rely on them to support aggravating the E.R. and A.S. paperwork violations. *See id.* at 2, n.3; *see also United States v. Bazan’s Enters., Inc.*, 15 OCAHO no. 1408a, 13–14 (2022) (citations omitted) (finding that the respondent’s admissions on the knowing hire of unauthorized workers supported aggravating paperwork violations pursuant to the unauthorized aliens statutory factor).

The remaining issue is whether Complainant met its burden of proof as to the other four individuals named at Count IV (J.C., V.L., A.L., and R.V.). Deciding this issue requires further analysis of the evidence submitted by Complainant. To conduct this analysis, “[t]he Court must ensure that evidence is sufficiently reliable,<sup>14</sup> and then it must consider what weight, if any, to assign the evidence based on its probative value.” *R&SL, Inc.*, 13 OCAHO no. 1333b, at 24.

“It is well-established in OCAHO case law that significant database discrepancies with adequate evidentiary support, particularly when unrebutted,” can support aggravation for the unauthorized aliens statutory factor. *United States v. Maverick, Inc.*, 15 OCAHO no. 1405a, 8 (2022) (citations omitted). But, in this case, Complainant submits only an ROI (Ex. G-9) to support its aggravation. The ROI therefore must be both reliable and probative evidence to be considered.<sup>15</sup>

Analysis of this particular ROI demonstrates it is sufficiently reliable for consideration by the Court. The submitted ROI is a five-page document which contains a detailed synopsis of the

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<sup>14</sup> As the Court previously explained in *R&SL, Inc.*, 13 OCAHO no. 1333b, at 24:

The proponent of documentary evidence must “authenticate a document by evidence sufficient to demonstrate that the document is what it purports to be[.]” *United States v. Carpio-Lingan*, 6 OCAHO no. 914, 1, 5 (1997) (citations omitted). Generally, documentary evidence that is complete, signed, sworn under penalty of perjury, dated, authenticated, laid down with foundation contain sufficient indicia of reliability. *See United States v. Psychosomatic Fitness LLC*, 14 OCAHO no. 1387a, 5–7 (2021); *United States v. Bhattacharya*, 14 OCAHO no. 1380a, at 4–5 (2021) (finding that documents that previously “contained no markings indicating what they were attached to, or indication of when or whether they were filed” were authenticated and reliable only when a declaration was provided identifying the documents, describing the chain of custody, and explaining the context in which the documents were presented).

<sup>15</sup> “Probative value is determined by how likely the evidence is to prove some fact[.]” *United States v. Bensimon*, 172 F.3d 1121, 1126 (9th Cir. 1999) (quoting *Am. Home Assurance Co. v. Am. President Lines*, 44 F.3d 774, 779 (9th Cir. 1994)). “Evidence is relevant if: (a) it has a tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action.” *United States v. Rose Acre Farms, Inc.*, 12 OCAHO no. 1285, 8 (2016) (quoting Fed. R. Evid. 401).

investigative steps taken by the auditor assigned to the case. It appears complete and identifies the auditor and approving special agent. Further, the synopsis is “reported by” the same auditor identified in the synopsis; hence, the person preparing the synopsis has personal knowledge of the contents contained therein. The document indicates that it was prepared for the purpose of supporting the information contained in the NIF, which forms the basis of the factual findings in this case. Further, this document is reliable because it appears to have been created close in time to the events it describes. The case was opened on January 27, 2020 and the synopsis describes events running through February 12, 2021. The document was approved by a second-level reviewer on February 17, 2021. Finally, the Court notes that Respondent does not contest the reliability of the ROI despite having a meaningful opportunity to do so. While this document is not sworn or signed, on balance it is sufficiently reliable, and the Court will consider its contents.<sup>16</sup>

The contents of the ROI are highly probative. According to the ROI, the auditor utilized the following resources to evaluate Respondent’s Forms I-9: the State of Arizona Corporation Commission website; the Consolidated Load Evaluation and Reporting (CLEAR) database; Central Index System (CIS), ICM, CBP-TECS, and CCDI databases; unemployment insurance tax submissions filed with the Arizona Department of Economic Security; and “various open source internet reference and search sites.” In his review of the I-9s, the auditor queried alien registration numbers in the CIS database, Social Security numbers (SSNs) in government and commercial databases, passport numbers in government databases, and driver’s license or other state identification documents in the ICM and CBE-TECS databases. From these checks, the auditor concluded nine employees had used SSNs “that were invalid or were not assigned to them,” and “there [was] a reasonable inference that these individuals [were] unauthorized for employment.” On October 6, 2020, Complainant issued Respondent a NOSD that identifies nine individuals (including the six named at Count IV) as potentially unauthorized for employment.<sup>17</sup> C’s Supp. Filing, Ex. G-5. Complainant later represents that these individuals were using SSNs not assigned to them. *Id.* at Ex. G-2.

By presenting this particular ROI (which is reliable and probative), Complainant has met its burden to support aggravating the penalty as J.C., V.L., A.L., and R.V. Accordingly, the Court will aggravate the penalty based on this statutory factor for the six individuals named at Count IV.

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<sup>16</sup> To be clear, a sworn affidavit is generally reliable and is a better evidentiary option vice an unsworn description contained in a report. “Affidavits are reliable if ‘they are sworn and signed by the affiants . . . contain facts that would be admissible in evidence . . . rely on personal knowledge . . . [and] show that the affiants are competent to testify to the matters stated therein.’” *R&SL, Inc.*, 13 OCAHO no. 1333b, at 23 (citation omitted).

<sup>17</sup> While the auditor identified nine individuals, Complainant only alleged (and thus put Respondent on notice of) six individuals as unauthorized for employment. Accordingly, the Court will only consider aggravation as to the six individuals.

### e. History of Violations

Complainant “does not contend that Commander has previously violated section 274A of the Act, and therefore no aggravation of the penalty is warranted.” C’s Supp. Filing 6. The Court agrees. *See United States v. Hernandez*, 8 OCAHO no. 1043, 660, 666 (2000) (noting that the relevant ‘history’ is the respondent’s previous § 1324a violations); *see also United States v. New China Buffet Rest.*, 10 OCAHO no. 1133, 6 (2010) (“[N]ever having violated the law before does not necessarily warrant additional leniency[.]”). Accordingly, the ALJ will treat the history of violations factor as neutral.

### 2. Penalty Amounts

The record reflects that the paperwork violations were continuing violations, and were assessed when the NIF was served on September 17, 2021. *See Commander Produce, LLC*, 16 OCAHO no. 1428c, at 3; *see also Farias Enters., LLC*, 13 OCAHO no. 1388, at 7. The penalty range is therefore \$234–\$2,332 per violation. *See* 28 C.F.R. § 85.5; 8 C.F.R. § 274a.10(b)(2).

For Count II, the Court will impose a civil penalty of \$1,982 for each violation, for a total penalty amount of \$17,838.

For Count III, the Court will impose a civil penalty of \$1,982 for each violation, for a total penalty amount of \$27,748.

For Count IV, the Court will impose a civil penalty of \$2,081 for each violation, for a total penalty amount of \$12,486.

### 3. Propriety of a Cease and Desist Order

In addition to civil monetary penalties, Complainant seeks an order requiring Complainant to “cease and desist from the violations set forth in the [NIF],” including for the paperwork violations. Compl. ¶ 5, Ex. A. However, OCAHO precedent has long held that DHS is not entitled to a cease and desist order for paperwork violations. *United States v. Elsinore Mfg., Inc.*, 1 OCAHO no. 5, 13, 16 (1988), *modified by the CAHO on other grounds*, 1 OCAHO no. 13, 44–45 (1988); *see* 8 U.S.C. § 1324a(e)(4). Accordingly, the ALJ will not enter a cease and desist order for the paperwork violations at Counts II–IV.

V. CONCLUSION

The ALJ has exercised her discretion in assessing penalties for the KCE violations, and has given each statutory factor due consideration for the paperwork violations.<sup>18</sup>

The Court **ORDERS** Respondent to pay \$6,000 for knowingly continue to employ two individuals unauthorized for employment in the United States (\$3,000 per each violation).

The Court **FURTHER ORDERS** Respondent to cease and desist from violations of 8 U.S.C. § 1324a(b), and to comply with the requirements of 8 U.S.C. § 1324a(b), with respect to individuals hired (or recruited or referred for employment for a fee) during a period of three years.

The Court **FURTHER ORDERS** Respondent to pay \$17,838 (\$1,982 for each violation) for failing to ensure proper completion of Forms I-9 for nine individuals (Count II).

The Court **FURTHER ORDERS** Respondent to pay \$27,748 (\$1,982 for each violation) for failing to prepare and/or present Forms I-9 for the fourteen individuals (Count III).

The Court **FURTHER ORDERS** Respondent to pay \$12,486 (\$2,081 for each violation) for failing to prepare and/or present Forms I-9 for six individuals (Count IV).

The total amount of civil monetary penalties, for the violations at Count I–IV, is \$64,072.

VI. FINDINGS OF FACT

1. This Order incorporates the Findings of Fact from the October 5, 2022 Order Entering Default Judgment on Liability.

Knowingly Continued to Employ (KCE) Violations

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<sup>18</sup> Indeed, where the respondent has declined to participate in the administrative hearing process it requested, and where the complainant has demonstrated that its proposed penalty is reasonable under statutory and nonstatutory factors, the Court may reach the conclusion that the respondent be ordered to pay the penalty amount proposed by the complainant. *See generally Zuniga Torentino*, 15 OCAHO no. 1397, at 6.

2. Arizona Department of Economic Security Unemployment Insurance Tax Records corroborate that E.R. and A.S. were employed for the periods stated on the February 17, 2021 Report of Investigation.

#### Paperwork Violations

3. Respondent employs less than 100 employees.
4. On October 6, 2020, Complainant issued a Notice of Suspect Documents that identifies nine individuals (including the six named at Count IV) as potentially unauthorized for employment.
5. After receiving the Notice of Suspect Documents on October 19, 2020, Respondent failed to provide employment authorization documents for E.R. and A.S., and continued to employ them through at least February 12, 2021 (one year after the Notice of Inspection).
6. Respondent engaged in some concerning behavior; that is, attempts to evade service of documents, when service on Respondent was ordered by the Court.
7. The February 17, 2021 Report of Inspection is a five-page document which contains a detailed synopsis of the investigative steps taken by the auditor assigned to the case. The document is not sworn or signed. The person preparing the synopsis has personal knowledge of the contents contained therein. Respondent did not contest the reliability of the Report of Inspection.
8. Respondent filed neither an answer nor a submission on penalties, despite having an opportunity to do so.

#### VII. CONCLUSIONS OF LAW

1. This Order incorporates the Conclusions of Law from the October 5, 2022 Order Entering Default Judgment on Liability.

#### Considerations in Penalty Assessment

2. While Respondent requested a hearing before OCAHO, it has repeatedly declined to appear in these proceedings. Respondent has waived its right to be heard on penalties, and the Court will not infer its position. *United States v. Commander Produce, LLC*, 16 OCAHO no. 1428c, 7 (2022).
3. After finding liability, the administrative law judge has discretion to adopt the penalty proposed by Complainant or to assess penalties de novo. *See United States v. Zuniga*

*Torentino*, 15 OCAHO no. 1397, 4 (2021) (citations omitted); *Alpine Staffing, LLC*, 12 OCAHO no. 1303, 10 (2017) (citation omitted).

4. The administrative law judge exercises discretion to assess penalties for knowingly continued to employ violations, as Congress declined to provide any guidelines. *See United States v. Day*, 3 OCAHO no. 575, 1751, 1753 (1993); *see also United States v. C&D Plastics, Inc.*, 1 OCAHO no. 240, 1557, 1561 (1990).
5. The administrative law judge duly considered the 8 U.S.C. § 1324a(e)(5) statutory factors in the paperwork violations penalty assessment. *See United States v. Alpine Staffing, LLC*, 12 OCAHO no. 1303, 10 (2017) (citations omitted).
6. The administrative law judge did not consider nonstatutory factors in paperwork violations penalty assessment, because, generally, a party seeking consideration of a nonstatutory factor bears the burden of proof and persuasion—a burden not met here. *See United States v. Pegasus Family Rest.*, 12 OCAHO no. 1293, 10 (2016) (citation omitted); *United States v. Integrity Concrete, Inc.*, 13 OCAHO no. 1307, 18 (2017) (citation omitted); *United States v. Hartmann Studios, Inc.*, 11 OCAHO no. 1255, 11 (2015) (citation omitted).
7. Where the respondent has declined to participate in the administrative hearing process it requested, and where the complainant has demonstrated that its proposed penalty is reasonable under statutory and nonstatutory factors, the Court may reach the conclusion that the respondent be ordered to pay the penalty amount proposed by the complainant. *See generally United States v. Zuniga Torentino*, 15 OCAHO no. 1397, 6 (2021).

#### Knowingly Continued to Employ (KCE) Violations

8. Respondent's failure to provide employment authorization documents after receipt of a Notice of Suspect Documents reflects a disregard for the prohibition against the knowing employment of unauthorized workers, and supports a penalty on the upper end of the range for the KCE violations. *See generally* 8 U.S.C. § 1324a.
9. The applicable penalty range for the knowing hire violations is \$583–\$4,667 per violation, as the Notice of Intent to Fine was served upon Respondent on September 17, 2021. *See United States v. Commander Produce, LLC*, 16 OCAHO no. 1428c, 3 (2022); 8 U.S.C. § 1324a; 28 C.F.R. § 85.5. The Court will impose a civil penalty of \$3,000 for each KCE violation (the amount proposed by Complainant), for a total penalty amount of \$6,000 for the violations contained at Count I.
10. The KCE violations also necessitate a cease and desist order; accordingly, Respondent is ordered to comply with the requirements of 8 U.S.C. § 1324a(b) during a period of three years. 8 U.S.C. §§ 1324a(a)(1)(A), (e)(4).

Paperwork Violations

9. The administrative law judge gives weight to the “size of the business” only as a statutory factor, as Congress already required her to consider the “general public policy of leniency toward small entities, as set out in the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq. (2006), amended by § 223(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-131, 110 Stat. 864 (1996)” with the statutory factor “size of business.” *United States v. Psychosomatic Fitness, LLC*, 14 OCAHO no. 1387a, 12 n.4 (2021) (citations omitted); *see also United States v. R&SL, Inc.*, 13 OCAHO no. 1333b, 36 n.50 (2022) (citations omitted).
10. Given that Respondent employs less than 100 employees, the administrative law judge will treat Respondent as a small business and mitigate the penalties based on this factor. *United States v. Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355a, 5 (2020) (citation omitted); *United States v. 1523 Ave. J. Foods, Inc.*, 14 OCAHO no. 1361, 3 (2020) (citation omitted).
11. The administrative law judge will treat the good faith factor as neutral, as the record lacks relevant information on Respondent’s conduct before the investigation. *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 10 (2010) (citations omitted); *United States v. Exec. Cleaning Serv. Of Long Island Ltd.*, 13 OCAHO no. 1314, 3 (2018) (citations omitted).
12. Respondent’s apparent e-Verify registration is immaterial to the good faith statutory factor assessment, *see United States v. Psychosomatic Fitness, LLC*, 14 OCAHO no. 1387a, 13 (2021) (citations omitted), and cited low compliance rates alone do not demonstrate bad faith. *United States v. Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355a, 5 (2020) (citations omitted). *See also United States v. Taco Plus, Inc.*, 5 OCAHO no. 775, 416, 521 (1995).
13. The administrative law judge will employ a continuum approach in weighing the seriousness statutory factor because not all violations are equally serious. *United States v. Senox Corp.*, 11 OCAHO no. 1219, 9 (2014) (citations omitted).
14. Respondent’s violations are serious and warrant aggravation, and the administrative law judge will treat them as such; while both are serious violations, a failure to prepare a Form I-9 at all is a more serious violation than a failure to ensure proper completion of that form. *United States v. Speedy Gonzalez Constr., LLC*, 11 OCAHO no. 1243, 5–6 (2015); *United States v. Skydive Academy of Hawaii Corp.*, 6 OCAHO no. 848, 235, 246 (1996); *United States v. Roman Racing Stables*, 11 OCAHO no. 1230, 5 (2014) (citation omitted).

15. Complainant met its burden of proof on aggravation on the unauthorized aliens statutory factor for the paperwork violations involving E.R. and A.S. (named at Count IV) based on the Court's factual findings in the October 5, 2022 Order Entering Default Judgment on Liability. *United States v. Commander Produce, LLC*, 16 OCAHO no. 1428c, 2–3 (2022); *see also United States v. Bazan's Enters., Inc.*, 15 OCAHO no. 1408a, 13–14 (2022) (citations omitted). The administrative law judge will aggravate the penalty for these two individuals based on this factor.
16. While “it is well-established in OCAHO case law that significant database discrepancies with adequate evidentiary support, particularly when unrebutted,” can support aggravation for the unauthorized aliens statutory factor, Complainant submits only a Report of Investigation; therefore, the Report of Investigation must be both reliable and probative evidence to be considered. *United States v. Maverick, Inc.*, 15 OCAHO no. 1405a, 8 (2022) (citations omitted); *United States v. Bensimon*, 172 F.3d 1121, 1126 (9th Cir. 1999) (citation omitted); *United States v. Rose Acre Farms, Inc.*, 12 OCAHO no. 1285, 8 (2016) (citation omitted).
17. Complainant met its burden of proof on aggravation on the unauthorized aliens statutory factor for the paperwork violations involving J.C., V.L., A.L., and R.V. (named at Count IV) through presentation of the February 17, 2021 Report of Investigation, because this particular Report of Investigation is sufficiently reliable and highly probative evidence. *See United States v. R&SL, Inc.*, 13 OCAHO no. 1333b, 22, 24 (2022) (citations omitted). The administrative law judge will aggravate the penalty for these four individuals based on this factor.
18. A sworn affidavit is generally reliable and is a better evidentiary option vice an unsworn description contained in a report. “Affidavits are reliable if ‘they are sworn and signed by the affiants . . . contain facts that would be admissible in evidence . . . rely on personal knowledge . . . [and] show that the affiants are competent to testify to the matters stated therein.’” *United States v. R&SL, Inc.*, 13 OCAHO no. 1333b, 23 (2022) (citation omitted).
19. The administrative law judge will treat the history of violations factor as neutral because Complainant does not contend that Respondent previously violated 8 U.S.C. § 1324a. *See United States v. Hernandez*, 8 OCAHO no. 1043, 660, 666 (2000); *see also United States v. New China Buffet Rest.*, 10 OCAHO no. 1133, 6 (2010).
20. The applicable penalty range for the paperwork violations (which are continuing violations) is \$234–\$2,332 per violation, as the Notice of Intent to Fine was served upon Respondent on September 17, 2021. *See United States v. Commander Produce, LLC*, 16 OCAHO no. 1428c, 3 (2022); 28 C.F.R. § 85.5; 8 C.F.R. § 274a.10(b)(2); *see also United States v. Farias Enters., LLC*, 13 OCAHO no. 1388, 7 (2020). For Count II, the Court will impose a civil penalty of \$1,982 for each violation, for a total penalty amount of \$17,838.



For Count III, the Court will impose a civil penalty of \$1,982 for each violation, for a total penalty amount of \$27,748. For Count IV, the Court will impose a civil penalty of \$2,081 for each violation, for a total penalty amount of \$12,486.

21. OCAHO precedent has long held that the Department of Homeland Security is not entitled to a cease and desist order for paperwork violations; accordingly, the administrative law judge will not enter a cease and desist order for the paperwork violations at Counts II–IV. *United States v. Elsinore Mfg., Inc.*, 1 OCAHO no. 5, 13, 16 (1998), *modified by the CAHO on other grounds*, 1 OCAHO no. 13, 44–45 (1988); *see* 8 U.S.C. § 1324a(e)(4).

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

SO ORDERED.

Dated and entered on January 25, 2023.

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Honorable Andrea R. Carroll-Tipton  
Administrative Law Judge

### Appeal Information

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

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

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

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

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

January 31, 2023

UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. § 1324A Proceeding
	)	OCAHO Case No. 2022A00033
	)	
COMMANDER PRODUCE, LLC,	)	
Respondent.	)	
_____	)	

ERRATA

The Order on Penalties, issued on January 25, 2023, is hereby amended to correct the following:

1. Page 10 is corrected to read: “For Count III, the Court will impose a civil penalty of \$1,982 for each violation, for a total penalty amount of \$27,748. For Count IV, the Court will impose a civil penalty of \$2,081 for each violation, for a total penalty of \$12,486.”
2. Page 11 is corrected to read: “The Court **FURTHER ORDERS** Respondent to pay \$12,486 (\$2,081 for each violation) for failing to prepare and/or present Forms I-9 for six individuals (Count IV). The total amount of civil penalties, for the violations at Count I–V, is \$64,072.”
3. Page 15 is corrected to read, in Conclusion of Law No. 20: “For Count III, the Court will impose a civil penalty of \$1,982 for each violation, for a total penalty amount of \$27,748. For Count IV, the Court will impose a civil penalty of \$2,081 for each violation, for a total penalty amount of \$12,486.”

SO ORDERED.

Dated and entered on January 31, 2023.

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Andrea R. Carroll-Tipton  
Administrative Law Judge