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

June 15, 2023

UNITED STATES OF AMERICA, Complainant, v. EDGEMONT GROUP, LLC, Respondent.	))))))))	8 U.S.C. § 1324a Proceeding OCAHO Case No. 2020A00050

Appearances: Daniel Burkhart, Esq., and Ryan Kahler, Esq.,[1] for Complainant
Robert Gibbs, Esq., and Adam Boyd, Esq., for Respondent

ORDER BY THE CHIEF ADMINISTRATIVE HEARING OFFICER VACATING THE CHIEF ADMINISTRATIVE LAW JUDGE'S FINAL ORDER ON PENALTIES AND REMANDING FOR FURTHER PROCEEDINGS

I. INTRODUCTION AND PROCEDURAL HISTORY

This case arises under the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324a. The United States Department of Homeland Security, Immigration and Customs Enforcement ("DHS" or "Complainant") filed a complaint against Edgemont Group, LLC ("Respondent") on February 14, 2020, charging Respondent with violating 8 U.S.C. § 1324a by failing to timely prepare and/or present employment eligibility verification forms (Forms I-9) for forty-six individuals. Complainant sought a total civil money penalty of $90,387.20 for the forty-six alleged violations. Respondent filed an answer denying the alleged violations and asserting that Complainant's proposed penalty was "excessive and inappropriate."

Both parties subsequently filed prehearing statements. Through its prehearing statement, Respondent admitted liability for the alleged violations, but continued to contest the reasonableness of the proposed civil penalty. Both parties also filed motions for summary decision, mainly addressing the appropriate amount of the civil penalty for the admitted violations.

[1] On June 12, 2023, the Office of the Chief Administrative Hearing Officer received an Entry of Appearance from Mr. Kahler in which he notes that Mr. Burkhart, Complainant's prior counsel in this case, has left his employment with Complainant. Mr. Kahler therefore requested that he be substituted as counsel on Complainant's behalf in this matter. Upon remand, the Chief Administrative Law Judge may determine whether to formally grant or deny the substitution, in accordance with 28 C.F.R. § 68.33(g). For purposes of this administrative review, the undersigned has accepted and considered Mr. Kahler's filings on the Complainant's behalf and will serve a copy of this order on Mr. Kahler.

On December 22, 2022, Chief Administrative Law Judge ("Chief ALJ") Jean King issued an order on summary decision, finding Respondent liable for forty-six violations of 8 U.S.C. § 1324a(a)(1)(B) based on Respondent's admissions in its prehearing statement. *United States v. Edgemont Grp., LLC*, 17 OCAHO no. 1470, 6-7 (2022). The Chief ALJ also bifurcated the issues of liability and the penalty assessment, inviting the parties to submit further information relevant to penalties. *Id.* Neither party submitted additional information.

On May 18, 2023, the Chief ALJ issued a Final Order on Penalties ("Final Order"). After considering the five statutory factors and several non-statutory factors, the Chief ALJ ultimately assessed[2] a total civil penalty of $55,024.

In determining the appropriate penalty range for each of the alleged violations, the Chief ALJ noted that "[t]he applicable penalty range depends on the date of the violations and the date of the assessment [of the penalty]." Final Order at 2. Ultimately, the Chief ALJ determined that three different penalty ranges were applicable to the violations at issue and imposed a penalty near the mid-range of each of the purportedly-applicable penalty ranges for each violation.

On May 22, 2023, the undersigned issued a Notification of Administrative Review ("Notification").[3] Observing a potential conflict between the Chief ALJ's analysis and recent Office of the Chief Administrative Hearing Officer ("OCAHO") decisions, the Notification provided that the undersigned would review "whether the Chief ALJ applied the correct penalty ranges for the violations at issue, considering both the date of the violations and the date the penalties were deemed to be 'assessed' under OCAHO precedent." Notification at 2.[4]

The Notification provided that the parties could file briefs related to administrative review by June 8, 2023.[5] Complainant filed a Statement on Administrative Review ("Complainant's Br."), albeit late.[6] Respondent did not file a brief or other document related to administrative review.

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[2] As discussed in more detail in Part IV, *infra*, the issue of precisely when the penalty assessment against Respondent occurred remains the central, unresolved issue in the instant case. Thus, the use of the term "assessed" to describe the Chief ALJ's imposition of a civil money penalty in the Final Order is presented only as a conditional, semantic descriptor and ultimately may or may not be a legally accurate description.

[3] The Notification was subsequently published as *United States v. Edgemont Group, LLC*, 17 OCAHO no. 1470a (2023).

[4] No other issue in the Final Order was included within the scope of administrative review, and neither party sought such review on its own request.

[5] The copy of the Notification sent to Respondent's owner, Leo Matz, was returned to OCAHO as "undeliverable," with a notation indicating that Mr. Matz does not reside at the given address. If Mr. Matz (or Edgemont Group) has relocated, Respondent has not properly informed OCAHO of an updated mailing address for Mr. Matz. The envelope containing the Notification was therefore addressed to the last known address for Mr. Matz, in accordance with 28 C.F.R. § 68.3(a)(3). Additionally, Respondent is represented by counsel in this matter. OCAHO's rules of practice and procedure at 28 C.F.R. Part 68 provide that service may be made by mailing notices and orders to the last known address of a party's "attorney or representative of record." 28 C.F.R. § 68.3(a)(3). Therefore, notwithstanding the question of the current address of Respondent's owner, service was properly effected on Respondent via service on Respondent's attorneys of record.

[6] Although Complainant's Statement on Administrative Review was dated and mailed June 7, 2023, it was not received by OCAHO until June 12, 2023. Because documents are not considered filed until they are received by OCAHO, *see* 28 C.F.R. § 68.8(b), the filing was untimely. However, as discussed further in Part III, *infra*, the undersigned has

For the reasons stated below, the Chief ALJ's Final Order on Penalties will be VACATED, and the case will be REMANDED for further proceedings consistent with this order.

II. JURISDICTION AND STANDARD OF REVIEW

The Chief Administrative Hearing Officer ("CAHO") has discretionary authority to review an ALJ's final order in cases 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, the CAHO may 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). A party may also 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). If administrative review is timely noticed or requested, 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 ("APA"), 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). In conducting an administrative review, the CAHO exercises independent judgment and discretion free from ideological or institutional pressure. *United States v. Corrales-Hernandez*, 17 OCAHO no. 1454e, 3 (2023). The CAHO reviews both questions of law and questions of fact *de novo*, though the CAHO should not lightly dismiss an ALJ's findings of fact 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 administrative 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

On June 12, 2023, Complainant filed an untimely, two-paragraph statement with a copy of a fact sheet from DHS's public website attached, which the undersigned construes collectively as Complainant's brief on administrative review. Due to the statement's limited legal analysis and its reliance on existing, public DHS guidance, there is no apparent prejudice that would inure to Respondent in considering it; consequently, in the exercise of discretion, the undersigned has accepted and considered Complainant's filing notwithstanding its untimeliness. *See Sharma v. NVIDIA Corp.*, 17 OCAHO no. 1450d, 3 n.7 (2023) (noting the discretion of OCAHO adjudicators to accept untimely filings); *see also United States v. Bhattacharya*, 14 OCAHO no. 1380b, 3 n.3 (2021) ("OCAHO adjudicators do have some discretion to accept non-conforming pleadings in appropriate circumstances"). Complainant's brief states that based on prior OCAHO case law, its

nevertheless considered Complainant's filing as a matter of discretion.

position is that the date of assessment for purposes of 28 C.F.R. § 85.5 is the date of service of the Notice of Intent to Fine ("NIF"). Complainant's Br. at 1-2.

As noted, Respondent did not file a brief. In fact, it appears that Respondent has not filed any document in this case since January 2022 despite receiving multiple invitations to do so and, thus, has effectively stopped participating in this case. 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). Further, "the failure to file a brief will not necessarily warrant an adverse legal action" toward a party in the relevant proceeding. *United States v. El Paso Paper Box, Inc*., 17 OCAHO no. 1451b, 5 (2023). Nevertheless, the failure to file a brief not only makes it more difficult to conduct the review by leaving the reviewer "adrift" in discerning the parties' positions and arguments, *see id*., but it also indicates a disconcerting lack of interest in the case that is disrespectful to both the tribunal and the opposing party. Further, due to Respondent's lack of participation in this case for over a year, it also raises questions as to whether Respondent has abandoned its request for a hearing before OCAHO. *See, e.g., United States v. Steidle Lawn & Landscape, LLC*, 17 OCAHO no. 1457c (2023) (dismissing a request for hearing as abandoned).[7] As recently noted in another case, "the CAHO ordinarily expects both parties to fully develop their positions and arguments during an administrative review." *El Paso Paper Box,* 17 OCAHO no. 1451b, at 5. Should this expectation continue to be unfulfilled in other cases, particularly in cases where the party failing to file a brief is represented by counsel, OCAHO may need to reevaluate whether some additional type of censure is warranted.

IV. DISCUSSION

In cases arising under 8 U.S.C. § 1324a, the appropriate range of civil penalties depends on both the date of the violations and the date when the penalties are assessed. *See* 28 C.F.R. § 68.52(c); 28 C.F.R. § 85.1; *e.g.*, *United States v. Exec. Cleaning Servs. of Long Island Ltd.*, 13 OCAHO no. 1314, 5-6 (2018). When the violations occurred after November 2, 2015, and the penalties for those violations are assessed after August 1, 2016, the inflation-adjusted penalty ranges set forth in 28 C.F.R. § 85.5 apply. 28 C.F.R. § 68.52(c)(8); 28 C.F.R. § 85.1.

However, the relevant regulations in 28 C.F.R. Part 85 do not define the term "assessed," nor do they provide any other guidance as to how to determine the date of assessment. In the absence of such guidance, OCAHO interpreted the date of assessment in 8 U.S.C. § 1324a cases to be the date when DHS serves the NIF on a respondent. *See United States v. Farias Enters. LLC*, 13 OCAHO no. 1338, 7 (2020) (beginning the use of the NIF service date as the date of assessment for purposes of determining the applicable penalty range); *see also United States v. Cityproof Corp.*, 15 OCAHO no. 1392a, 7 (2022); *United States v. Psychosomatic Fitness LLC*, 14 OCAHO no. 1387a, 9 (2021); *United States v. Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355a, 8 (2020); *United States v. Visiontron Corp.*, 13 OCAHO no. 1348, 9 (2020).

In the instant case, the record reflects that all of the violations occurred after November 2,

[7] Because the question of abandonment was not included in the scope of the administrative review, Notification at 2, the undersigned does not address it. On remand, however, the Chief ALJ may address it if appropriate.

2015. *See* Complainant's Prehearing Statement at 2-4; Respondent's Prehearing Statement at 2. The record also reflects that the NIF was served on the Respondent on October 17, 2019. *See* Compl. at 2, 6-7; Complainant's Mot. Summ. Dec. at 25-26. In the Final Order, the Chief ALJ correctly noted that the inflation-adjusted penalty ranges set forth in 28 C.F.R. § 85.5 applied to the violations at issue. *See* Final Order at 3. Thus, under OCAHO precedent since 2020,[8] where the date DHS served the NIF on the Respondent is treated as the date of assessment of the penalty, all of the penalties at issue in this case should have been assessed in the same range. However, the Chief ALJ determined that three different penalty ranges were applicable to the violations:

> If the penalty was assessed between August 1, 2016, and February 3, 2017, the minimum penalty is $216, and the maximum penalty is $2,156. § 85.5. If the penalty was assessed between February 3, 2017 and January 29, 2018, the minimum penalty is $220, and the maximum is $2,191. *Id.* If the penalty was assessed between January 29, 2018 and June 19, 2020, the minimum penalty is $224 and the maximum is $2,236. *Id.*

Id.

The Final Order does not explain its basis for finding three separate assessment dates. *Id*. Consequently, the Chief ALJ's interpretation of the date of assessment in this case appears to be a notable and unexplained departure from the interpretation of the date of assessment in OCAHO case law since 2020. Although an agency may certainly change its position on an issue within its jurisdiction, it must both acknowledge the change and explain it. *See FCC v. Fox Television Stations, Inc*., 556 U.S. 502, 515 (2009) ("To be sure, the requirement that an agency provide reasoned explanation for its action would ordinarily demand that it display awareness that it *is* changing position. An agency may not, for example, depart from a prior policy *sub silentio* or simply disregard rules that are still on the books." (emphasis in original)); *see also Nw. Env't Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 687 (9th Cir. 2007) (noting that "an agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored" (quoting *Greater Bos. Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970))). In this case, the Final Order neither acknowledged the change in position on the date of assessment for purposes of 28 C.F.R. § 85.5 nor explained the change. As such, it contains an error of law which precludes its affirmance on review.

Although the error in the Final Order is clear, the appropriate remedy is not. If the undersigned were certain that the interpretation of the date of assessment for purposes of 28 C.F.R. § 85.5 as the date of service of the NIF was legally correct, then the Final Order could simply be

[8] The relevant penalty ranges were remade in 2016 pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, sec. 701 of the Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584 (November 2, 2015) (codified at 28 U.S.C. § 2461 note), which led to subsequent annual updates of 28 C.F.R. § 85.5 that highlight the importance of the assessment date. *See* Civil Monetary Penalties Inflation Adjustment, 81 Fed. Reg. 42491 (June 30, 2016) (providing new civil money penalty ranges for violations occurring after November 2, 2015, and assessed after August 1, 2016); *see also* Civil Monetary Penalties Inflation Adjustments for 2023, 88 Fed. Reg. 5776, 5778-81 (Jan. 30, 2023) (to be codified at 28 C.F.R. pt. 85) (providing multiple ranges of penalties depending on the date of assessment from 2020 to 2023). Consequently, OCAHO did not directly confront a question regarding the appropriate penalty range under 28 C.F.R. § 85.5 based on multiple possible dates of assessment until 2020.

modified to reflect a new penalty calculation based on that date. *See, e.g., Corrales-Hernandez*, 17 OCAHO no. 1454e, at 15 (modifying an ALJ's final order to recalculate the civil money penalty based on the correct date of the violation). However, upon closer review of the relevant law, it is not clear that the date DHS serves a NIF is necessarily the best interpretation of the date of assessment contemplated by 28 C.F.R. § 85.5. Rather, an alternative reading of the relevant law suggests that the date of the ALJ's or CAHO's final order could be considered more appropriately as the date of assessment for cases in which DHS has filed a complaint with OCAHO.[9] Accordingly, because the best interpretation of the date of assessment for purposes of 28 C.F.R. § 85.5 is uncertain after consideration of multiple legal principles, I find it appropriate to vacate and remand the Final Order to allow the Chief ALJ to address that question in the first instance.

As noted, since 2020, OCAHO decisions by both its ALJs and the CAHO have consistently asserted that the date of assessment for purposes of 28 C.F.R. § 85.5 in cases arising under 8 U.S.C. § 1324a[10] is the date DHS serves the NIF on the respondent. *See, e.g., Corrales-Hernandez*, 17 OCAHO no. 1454e, at 4 n.3 ("The date of assessment [for purposes of 28 C.F.R. § 85.5] is the date DHS serves a Notice of Intent to Fine on a respondent."). The origin of that assertion is a brief discussion and footnote in *Farias Enterprises*:

> The regulation [28 C.F.R. § 85.5] does not define how to determine the assessment date.[3] This Court finds that the assessment date is the date that [DHS] serves the NIF on a respondent. Using the NIF date is a reasonable interpretation of the regulation because this is the date that the penalty obligation ripens. The penalty rates are adjusted to account for inflation to ensure that the impact of the penalty, in this case to ensure future compliance, continues to be the same. Using an earlier date could arguably erode that impact. Further, the NIF date is a fixed, easily ascertainable date.
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> [3]Assessment is defined as, "1. Determination of the rate or amount of something, such as a tax or damages. 2. Imposition of something, such as a tax or fine, according to an established rate; the tax or fine so imposed." BLACK'S LAW DICTIONARY (11th ed. 2019).

Farias Enters., 13 OCAHO no. 1338, at 7 & n.3.[11] Subsequent to *Farias Enterprises*, OCAHO decisions have largely parroted this conclusion without further elaboration and without any

[9] It is undisputed that in cases in which a respondent does not timely request a hearing after being served with a NIF, the service of the NIF, which becomes the final order, would be the date of assessment. *See* 8 C.F.R. § 274a.9(f). Similarly, in cases where the respondent timely requests a hearing but then abandons that request, the NIF becomes the final order, and the NIF service date would be the date of assessment. *See, e.g., Steidle Lawn & Landscape, LLC*, 17 OCAHO no. 1457c (dismissing a request for hearing as abandoned).

[10] The same regulation also applies to cases arising under 8 U.S.C. § 1324c, and the analysis of the assessment date in 28 C.F.R. § 85.5 for cases arising under both statutes is materially identical.

[11] To the extent that the decision in *Farias Enterprises* considered an alternate date of assessment, it rejected using an earlier date—*i.e.*, the date DHS's auditor calculated the proposed penalties—than the date of service of the NIF. *Farias Enters.*, 13 OCAHO no. 1338, at 7. However, there is no indication that the decision considered the date of an OCAHO final order as the date of assessment. Moreover, because there was no inflation adjustment of the civil money penalties promulgated in 2019 and because both the date of the NIF service (March 1, 2018) and the date of the OCAHO decision (January 6, 2020) in *Farias Enterprises* fell within the same penalty range—*i.e.*, for an assessment after January 29, 2018, and on or before June 19, 2020, *see* 28 C.F.R. § 85.5 (2020)—there was no need to conduct a detailed analysis of which date was more appropriate to use as the date of assessment under 28 C.F.R. § 85.5.

detailed analysis, in part because the date of assessment has rarely, if ever, been squarely at issue in a particular case.

In the instant case, however, the date of assessment is squarely at issue, and several legal points support an alternate conclusion to the one made by *Farias Enterprises*, namely that the date of the OCAHO final order is the date of assessment under 28 C.F.R. § 85.5. First, the language of the relevant regulations applies to "civil monetary penalties provided by law within the jurisdiction of the *Department of Justice*." 28 C.F.R. § 85.1(b) (emphasis added).[12] Thus, the regulations themselves suggest that the assessment contemplated by 28 C.F.R. § 85.5 is one made by the Department of Justice, not by DHS. Further, the only civil money penalties potentially assessed under 8 U.S.C. § 1324a within the jurisdiction of the Department of Justice are those issued by OCAHO. Moreover, the issuance and service of a NIF under 8 U.S.C. § 1324a is not an action within the jurisdiction of the Department of Justice, *see* 8 C.F.R. § 274a.9(d) (regulations of DHS providing that a proceeding to assess penalties under 8 U.S.C. § 1324a is commenced when DHS issues a NIF); *cf*. 28 C.F.R. § 68.31 (prohibiting any "officer, employee, or agent of the Federal Government engaged in the performance of investigative or prosecutorial functions in connection with any [OCAHO] proceeding [*i.e*., DHS officers, employees, or agents]" from participating "in that proceeding or a factually related proceeding . . . except as a witness or counsel"); *Alamprese v. MNSH, Inc.*, 9 OCAHO no. 1094, 3 (2003) ("No private cause of action or third party enforcement mechanism was included either in the employer sanctions provision or in its implementing regulations, other than the right of an individual to submit a complaint to [DHS] for investigation."); *United States v. Carlson*, 1 OCAHO no. 264, 1695, 1698 (1990) ("Whether or not [a respondent] is civilly prosecuted by the government [under 8 U.S.C. § 1324a] is a matter of prosecutorial discretion, and is not an issue for determination by an [OCAHO] ALJ."), raising a possible contradiction with the regulations if the date of the NIF service is treated as the date of assessment for purposes of 28 C.F.R. § 85.5. Consequently, consistent with the regulatory language of 28 C.F.R. §§ 85.1(b) and 85.5, the date of assessment, arguably, appears to be the date of a final order issued by OCAHO—*i.e.*, the date OCAHO imposes a penalty within the jurisdiction of the Department of Justice—rather than the date of any action taken by DHS such as the service of a NIF.

Relatedly, it is well-established in OCAHO jurisprudence that DHS penalty calculations in cases under 8 U.S.C. § 1324a, which are reflected in a NIF, are not binding on OCAHO adjudicators. *See*, *e.g*., *United States v. Ice Castles Daycare Too, Inc*., 10 OCAHO no. 1142, 6 (2011) (noting that "[DHS's penalty] guidelines have no binding effect in this forum, and OCAHO may exercise its authority to review the penalty question de novo" (citations omitted)); *accord United States v. Corrales-Hernandez*, 17 OCAHO no. 1454c, 2 n.2 (2023) (reiterating that DHS penalty calculations "are not binding in OCAHO proceedings and OCAHO ALJs owe no deference to DHS's proposed penalties and supporting arguments"). Thus, the assertion that the date of those calculations as reflected in a NIF *is* binding as the date of assessment for purposes of 28 C.F.R. § 85.5, even though the calculations themselves are not binding, rests uneasily in tension with that

[12] The Department of Justice maintains jurisdiction to impose civil money penalties for over fifty types of violations enumerated in 28 C.F.R. § 85.5, including for violations of 8 U.S.C. § 1324a. OCAHO's own regulations direct adjudicators to 28 C.F.R. § 85.5 in order to calculate civil money penalties "assessed after August 1, 2016." 28 C.F.R. § 68.52(c)(8). The placement of this language in OCAHO's regulations also suggests that it is OCAHO adjudicators, rather than DHS, who assess civil money penalties for purposes of 28 C.F.R. § 85.5.

jurisprudence. Indeed, DHS's penalty calculations may be "re-assessed" by OCAHO—and they frequently are, *see, e.g.*, Final Order at 13-14 (re-assessing DHS's proposed penalty from $90,387.20 to $55,024)—making it difficult to assert as a matter of both law and logic that DHS's initial calculations in the NIF are determinative of the imposition of an assessment under 28 C.F.R. § 85.5.[13] Additionally, as recently reiterated, DHS lacks legal authority to issue a final order assessing penalties while an OCAHO case is pending, *see United States v. Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416c, 7-8 (2023), further suggesting that it is the final OCAHO order which makes the relevant determination of penalties and is, thus, the assessment contemplated by 28 C.F.R. § 85.5. In short, DHS's NIF may be better understood as a "proposed" penalty assessment, *see* 28 C.F.R. § 68.9(c) ("Any respondent . . . contending that the amount of a proposed penalty or award is excessive or inappropriate . . . shall file an answer in writing."); *see also Edgemont Grp.,* 17 OCAHO no. 1470, at 1 (describing the NIF in Respondent's case as containing a "proposed penalty"), rather than as the final penalty determination or imposition which would constitute an assessment under 28 C.F.R. § 85.5.

Similarly, even the definitions cited in *Farias Enterprises*, 13 OCAHO no. 1338, at 7 n.3, which speak in terms of a "determination" or "imposition," suggest that an assessment does not occur until a final order is issued by OCAHO. The ordinary usage of these terms connotes a finality which a NIF issuance and service does not entail if the respondent has timely requested a hearing before OCAHO. In such cases, it is OCAHO that determines both whether the violations alleged in a NIF have been proven and the appropriate penalty to pay for those violations. It is also OCAHO that imposes such a penalty. *See* 8 U.S.C. § 1324a(e)(4)-(5) (authorizing OCAHO to order the payment of civil money penalties for violations of 8 U.S.C. § 1324a); *cf.* 5 U.S.C. §§ 557(c)(flush language), 551(10)(C) (noting that in proceedings conducted pursuant to the APA, the agency decisionmaker "shall include a statement of . . . the appropriate . . . sanction," which is defined as the "*imposition* of penalty or fine" (emphasis added)). Although the issuance of a NIF triggers a process by which obligations are determined, *Farias Enters.*, 13 OCAHO no. 1338 at 7, for respondents who timely request a hearing, those obligations are ultimately determined by OCAHO, not by DHS. In other words, although the service of a NIF may, arguably, ripen a potential penalty obligation, *see id*., the service of the NIF neither determines nor imposes an actual civil money penalty if a respondent timely requests a hearing before OCAHO.

Further, the original statutory basis for inflation-based adjustments to civil money penalty ranges made clear that a penalty assessment may occur pursuant to an administrative proceeding such as one conducted by OCAHO. *See* Federal Civil Penalties Inflation Adjustment Act of 1990, Pub. L. No. 101-410, § 3(2)(C), 104 Stat. 890 (1990) (codified as amended at 28 U.S.C. § 2461 note) (defining civil monetary penalty to mean, *inter alia*, "any penalty, fine, or other sanction that . . . is assessed or enforced pursuant to *an administrative proceeding* or a civil action in the Federal courts" (emphasis added)). To be sure, that statute also authorizes civil money penalties "assessed . . . by an agency pursuant to Federal law" without an administrative proceeding, *id*. § 3(2)(B), and

[13] Although it is more common for an ALJ to "assess" a lower civil money penalty than the one proposed by DHS, nothing prohibits an ALJ from "assessing" a higher penalty if warranted by the evidence in a particular case. *See United States v. Hudson Delivery Serv., Inc.,* 7 OCAHO no. 945, 368, 400 (1997) ("Neither the Administrative Procedure Act (APA), the INA, nor the OCAHO Rules of Practice prohibit an Administrative Law Judge from assessing a penalty per violation, or even a total penalty, greater than that requested in a complaint. Moreover, in several cases Administrative Law Judges have assessed a penalty greater than that requested by the complaint.").

the interplay between the two provisions is not fully clear because an administrative proceeding would also constitute an agency assessment of a penalty pursuant to federal law. Nevertheless, the statutory language does suggest that OCAHO's determination of a civil money penalty could constitute an assessment for purposes of 28 C.F.R. § 85.5 because it occurs pursuant to an administrative proceeding. Further, although that statute was modified in 2015, *see* Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, sec. 701 of the Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584 (2015) (codified at 28 U.S.C. § 2461 note), those modifications did not alter the statutory language authorizing a penalty assessment pursuant to an administrative proceeding.

Additionally, although case law directly on point interpreting 28 C.F.R. § 85.5 is minimal because the multiple penalty ranges in that regulation based on annual inflation adjustments are a relatively recent phenomenon, what case law there is suggests that the date of final adjudication of a complaint may be the relevant date of assessment—even when there has been an intervening increase in the penalty ranges after the case was filed—rather than the date the case was initiated. *See*, *e.g.*, *United States ex rel Holsey v. Elite Healthcare Enters., Inc.*, No. 1:18-CV-2318-JPB, 2023 WL 1993781, *4 (N.D. Ga. Feb. 13, 2023) ("As mentioned above, the Court assesses the Government's requested minimum penalties . . . at the *current* minimum level [in 28 C.F.R. § 85.5] which has been updated since the Government filed its Motion for Default Judgment." (emphasis added)).[14] Drawing an analogy from that admittedly scant case law, the date of assessment in 28 C.F.R. § 85.5 would be the date of the OCAHO final order, rather than the date of the service of the NIF that initiated the case.

Similarly, although an assessment in the context of tax law is not perfectly analogous to a civil penalty assessment, the definition of a tax assessment as "the official recording of liability that triggers levy and collection efforts," *Hibbs v. Winn*, 542 U.S. 88, 101 (2004), does track the tenor of the definitions relied on in *Farias Enterprises*, though its suggestion of final liability likewise cuts against the conclusion that the date of the NIF is the date of assessment for purposes of 28 C.F.R. § 85.5. In other words, by analogy, if a tax assessment is the final determination of liability which triggers subsequent collection efforts, then the final OCAHO decision, rather than the service of a NIF, is similarly an assessment because it triggers the availability of collection efforts of a civil money penalty. *See* 8 U.S.C. § 1324a(e)(9) (authorizing enforcement of a final order issued by OCAHO through a civil suit filed in federal district court). To be sure, the analogy is not perfect; however, viewing a civil money penalty assessment as an act triggering liability similar to that of a tax assessment nevertheless supports the suggestion that the date of assessment in 28 C.F.R. § 85.5 is the date of the OCAHO final order, rather than the date of the service of the NIF by DHS.

[14] At least one court, however, has declined to apply the current penalty range in 28 C.F.R. § 85.5 when it scheduled a hearing for final consideration of a penalty under that regulation, the hearing was continued, and the penalty range changed in the interim due to the annual inflation adjustments. *See United States ex rel. Walthour v. Middle Ga. Fam. Rehab, LLC*, No. 5:18-CV-378 (TES), 2022 WL 2127831, *1 n.1 (N.D. Ga. June 9, 2022). Although that decision nevertheless suggests that the date of assessment for purposes of 28 C.F.R. § 85.5 is the date of an adjudicator's determination rather than the date of the case's initiation, *see id.*, the specific factual scenario in that case regarding the precise date of the adjudicator's determination is not present in the instant case. Similarly, if OCAHO ultimately determines that the date of assessment is the date of the OCAHO final order, it may need to refine that formulation in future cases to account for atypical or unique factual scenarios not present in the instant case.

Finally, OCAHO decisions themselves, dating back almost to OCAHO's inception, frequently describe an ALJ's analysis of relevant criteria and decision to impose a civil money penalty in cases under 8 U.S.C. § 1324a in terms of an assessment. *See*, *e.g.*, *United States v. Felipe, Inc*., 1 OCAHO no. 108, 726, 731 (1989) ("The Administrative Law Judge has, in his discretion, chosen to implement a mathematical formula in order to *assess* civil money penalties for Respondent's eight paperwork violations." (emphasis added)); *see also United States v. Niche, Inc.*, 11 OCAHO no. 1250, 10 (2015) ("As set forth in relevant OCAHO precedent, the 'size of the business' is determined based on the current business size at the time the Administrative Law Judge *assesses* the penalty." (emphasis added)); *Corrales-Hernandez*, 17 OCAHO no. 1454c at 2 ("After finding the Respondent liable for the two violations charged, the ALJ *assessed* civil money penalties for the two violations based on the adjusted penalty amounts in 28 C.F.R. § 85.5, which apply to violations that occurred after November 2, 2015." (emphasis added)); *cf. Hudson Delivery Service, Inc*., 7 OCAHO no. 945, at 400 (collecting cases in which an ALJ imposed a higher penalty than the one sought in a complaint and describing each one as an "assessed penalty" (compared to the amount sought by the government, which was described as a "requested penalty")). In fact, the Final Order under review in the instant case used the term "assessment" to describe the Chief ALJ's decision. *See* Final Order at 5 (labeling section IV as "Penalty Assessment"). It is undisputed that there can be only one date of assessment per violation for purposes of 28 C.F.R. § 85.5; thus, OCAHO's repeated description of its decisions in cases under 8 U.S.C. § 1324a as penalty "assessments" strongly suggests that its decisions are the assessments of civil money penalties, rather than the service of NIFs by DHS.[15] Although OCAHO's longstanding use of the term "assessment" to describe its evaluation and imposition of a civil money penalty under 8 U.S.C. § 1324a may simply be a semantic descriptor without legal significance—albeit now an odd and misleading one due to the importance of assigning a date of assessment under 28 C.F.R. § 85.5—it may just as likely reflect an accurate legal conclusion. In any event, OCAHO will need to be clearer going forward in its use of the concept of a penalty assessment to describe its decisions in cases arising under 8 U.S.C. § 1324a.

In short, there is significant support for the conclusion that that the date of the OCAHO final order is the date of assessment under 28 C.F.R. § 85.5, though that support is not incontestable. As the decision in *Farias Enterprises* pointed out, using the date of the service of a NIF as the date of assessment under 28 C.F.R. § 85.5 provides "a fixed, easily ascertainable date" as the relevant date of assessment. *Farias Enters.*, 13 OCAHO no. 1338, at 7. Further, there may be additional legal or policy arguments as to why that date constitutes the best interpretation of the date of assessment for purposes of 28 C.F.R. § 85.5. However, that decision did not grapple with countervailing arguments regarding the use of the date of the OCAHO final order as the date of assessment, nor did it need to. *See supra* note 11. Moreover, it did not address the implications, if any, of OCAHO's longstanding practice—and, arguably, policy—of considering the determination of a civil money penalty in cases under 8 U.S.C. § 1324a as an assessment. Consequently, although *Farias Enterprises* is well-considered and may ultimately be recognized as providing the correct interpretation of the relevant date of assessment for purposes of calculating the civil money penalty range in 28 C.F.R. § 85.5, it is not currently dispositive of that question.

[15] From this perspective, *Farias Enterprises* may have represented an unexplained departure from OCAHO's prior position, though I do not resolve that question at this time.

For similar reasons, Complainant's argument regarding the date of assessment is also not dispositive. Complainant's Br. at 1-2. Complainant's position is based on prior OCAHO case law beginning with *Farias Enterprises*. *Id*. However, as discussed, *supra*, that case law is not determinative and does not persuasively rule out alternative interpretations of 28 C.F.R. § 85.5. Moreover, Complainant's reliance on its own public guidance does not bolster its position. *See id*., Attachment ("The date when [DHS] serves the NIF on the employer is the fine assessment date that determines the civil penalty range that [DHS] administers."). To the extent that guidance is based on recent OCAHO case law, it is not dispositive for the reasons discussed at length above. Alternatively, to the extent that guidance applies only to final orders issued by DHS—*i.e.*, to the civil penalties that *DHS* administers—it is inapposite because it does not address final orders issued by OCAHO, including orders to pay civil money penalties for violations of 8 U.S.C. § 1324a. *See supra* note 9 (discussing circumstances in which a NIF served by DHS becomes a final order such that the date of assessment is the date of service of the NIF); *see also Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416c, at 7-8 (reiterating longstanding OCAHO case law that DHS lacks legal authority to issue a final order assessing penalties while an OCAHO case is pending); *accord* 28 C.F.R. § 85.1(b) (adjusting the ranges of civil money penalties "provided by law within the jurisdiction of the *Department of Justice*," including penalties imposed by OCAHO for violations of 8 U.S.C. § 1324a (emphasis added)). Consequently, Complainant's argument is unavailing in the present posture of this case, though it and Respondent may have the opportunity to present additional arguments on remand if the Chief ALJ determines that such an opportunity would be appropriate.

In sum, the determination of civil money penalties under 28 C.F.R. § 85.5 has prompted significant confusion in certain, recent OCAHO cases, *see, e.g., Corrales-Hernandez*, 17 OCAHO no. 1454c, at 2 n.2 (explaining the sources of some of that confusion), and this case is no exception. Notwithstanding OCAHO's recent case law to the contrary beginning with *Farias Enterprises*, there is considerable—though not wholly incontrovertible—legal support for the argument that the date of assessment for purposes of 28 C.F.R. § 85.5 is the date OCAHO determines a civil monetary penalty, rather than the date DHS proposes such a penalty through the service of a NIF. However, because the Final Order follows neither argument in its determination of the date of assessment and does not explain the basis for its determination, I cannot affirm it in its current posture and need not resolve which argument posits the best interpretation of 28 C.F.R. § 85.5. Rather, I will remand the case to allow the Chief ALJ to address the issue of the appropriate date of assessment in the first instance.

V. CONCLUSION

Although the undersigned possesses *de novo* review authority and the instant case presents a possible vehicle for resolving the legal question of the relevant date of assessment for purposes of 28 C.F.R. § 85.5, the statutory time constraint for reviewing ALJ decisions, 8 U.S.C. § 1324a(e)(7), Complainant's limited briefing and Respondent's lack of briefing on review, and the novelty and complexity of the issue under consideration all caution against issuing a final decision and order. Moreover, the relative newness of this issue and the lack of a prior detailed analysis of

it within OCAHO's jurisprudence also indicate that it would benefit from further development.[16] Accordingly, I find it more prudent to vacate the Final Order and remand this case to the Chief ALJ for further proceedings. *See United States v. Crescent City Meat Co.,* 11 OCAHO no. 1217, 6 n.6 (CAHO 2014) (vacating and remanding the case to an ALJ rather than determining a civil money penalty in the first instance). To be clear, I express no opinion on the overall civil money penalty warranted in this case and make no determination as to the relevant date of assessment for purposes of calculating that penalty under the applicable regulations. Moreover, although I have discussed two possible interpretations of the relevant date of assessment above, nothing in my decision should be read to foreclose consideration of any other possible interpretations appropriately supported by applicable law.

Accordingly, for the reasons set forth above, the Chief ALJ's Final Order on Penalties of May 18, 2023, is hereby VACATED, and the case is REMANDED for further proceedings consistent with this order.

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James McHenry
Chief Administrative Hearing Officer

[16] The nature of this issue may also be an appropriate one on which to solicit amicus briefs. Although logistical and legal hurdles precluded a request for such briefs during administrative review, nothing prohibits the Chief ALJ from seeking amicus input on remand if she believes it is warranted. *See* 28 C.F.R. § 68.17.