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

August 29, 2023

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. § 1324a Proceeding OCAHO Case No. 2021A00052
KODIAK OILFIELD SERVICES, LLC, Respondent.	)	

Appearances: Martin Celis, Esq., for Complainant
Sonia Braddock, pro se Respondent

ORDER ON PENALTIES

I. BACKGROUND

This case arises under the employer sanctions provisions of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324a. On August 9, 2021, 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), alleging that Respondent, Kodiak Oilfield Services, LLC, failed to prepare and/or present the Employment Eligibility Verification Form (Form I-9) for fifty-five employees.

After Respondent failed to file an answer, the Court issued an Order of Default Judgment on Liability. *See United States v. Kodiak Oilfield Servs., LLC*, 16 OCAHO no. 1436 (2022).[1]

[1] On August 9, 2021, the Court sent Respondent's attorney's law firm a Notice of Case Assignment for Complaint Alleging Unlawful Employment, the Complaint, the Notice of Intent to Fine (NIF), and Respondent's request for a hearing. The U.S. Postal Service website indicates completed service on Respondent's attorney's law firm on August 14, 2021, making the deadline for an answer September 13, 2021. *See* 28 C.F.R. §§ 68.3(a), 68.9(a). Respondent did not file an answer by that date. On October 6, 2021, the Court issued an Order to Show Cause pertaining to the failure to file an Answer. *See* 28 C.F.R. § 68.9(b). Respondent failed to provide a response to the Order to Show Cause.

Respondent's failure to file an answer constituted a waiver of its right to contest the allegations of the complaint. *Id.* at 4. The Court entered default judgment against Respondent on the issue of liability and bifurcated the issues of liability and penalty assessment.[2] *Id.* at 4–5. The Court permitted the parties an opportunity to supplement the record on penalties, with filings due no later than June 24, 2022. *Id.* Neither party submitted a filing in advance of the deadline. On July 25, 2022, Complainant filed a Motion to Accept Late Filing. The Court granted this motion and accepted Complainant's submission on penalties.

On August 2, 2022, the Court received Respondent's Motion to Withdraw as Counsel. Respondent retained a law firm to represent it in these proceedings; however, the attorney of record died in the interim, and the remaining partner at the firm had retired and did not maintain his law license. Mot. Withdraw 2.

On September 8, 2022, the Court issued an Order Granting Motion to Withdraw Counsel. The Court then vacated the deadline for penalty submissions as to Respondent's submission and permitted Respondent an opportunity to be heard on penalties, provided her filing was submitted before November 1, 2022. Respondent did not submit a filing.

On March 14, 2023, the Court issued an Order Providing Revised Filing Deadlines. *United States v. Kodiak Oilfield Servs., LLC*, 16 OCAHO no. 1436a (2023). The Court revised the deadlines due to ambiguity in the record related to service on Respondent. *Id.* at 1–2. To ensure Respondent received the Court's orders and had an opportunity to be heard, the Court extended the deadline for a submission on penalties for Respondent and sent the order to all known contact locations for Respondent, including the new address for Respondent provided in the Motion to Withdraw and the original address from the Complaint—both mailings were returned to the Court by USPS as undeliverable. *Id.* at 2. To date, Respondent has not submitted a filing. The case is now ripe for penalty assessment.

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[2] Default judgment pursuant to 28 C.F.R. § 68.9(b) in this circumstance (vice deeming the hearing request abandoned pursuant to 28 C.F.R. § 68.37(b)), creates a real and meaningful consequence for a respondent's failure to file an answer; while still preserving their opportunity to be heard on penalties. It is a discretionary decision before the Court (*see* §§ 68.9(b), 68.37(b) (providing that an ALJ "may enter a judgment by default" and a request for hearing "may be dismissed upon its abandonment")), and in this particular instance, the Court deemed default judgement as the appropriate course of action (vice deeming the hearing request abandoned).

I. COMPLAINANT'S POSITION[3]

According to the Complainant, Respondent prepared no Forms I-9 in advance of the inspection. C's Penalties Br. 3.[4] Respondent provided Complainant with twenty-four (24) Forms I-9, which it prepared after receipt of the Notice of Inspection (NOI). *Id.*

Complainant calculated a civil monetary penalty of $107,140.00 for failure to prepare and/or present fifty-five Forms I-9.[5] *Id.* at 3–4 (citing Exh. D (Memorandum to Case File, Violations Fine Schedule and Fine Calculation)). Complainant considered the statutory factors at § 1324a(e)(5) in reaching this fine amount. First, as to the size of the business, Complainant recognized that Respondent is a small business, and treated this factor as neutral. *Id.* at 4. As to good faith, Complainant recommended the penalty be mitigated.[6] *Id.* As to seriousness, Complainant recommended aggravating the fine. Respondent "completely failed with its legal

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[3] While Respondent requested a hearing before OCAHO, it has not kept the Court apprised of its current address, despite its responsibility to do so. *See United States v. Cordin Co.*, 10 OCAHO no. 1162, 4 (2012) ("It is the Respondent's responsibility (indeed, the responsibility of all parties before OCAHO) to file a notice of change of address or other contact information directly with the ALJ, as well as serving that notice on the opposing party."). By failing to keep the Court apprised of its current address and failing to respond to any Court orders, 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.

[4] According to the Employer's Employee Contact List and Wage Details Submission Reports Quarters 1–4 for 2018, Complainant anticipated fifty-five Forms I-9 at inspection. *Id.* (citing Exh. A (Homeland Security Investigations Report of Investigation), B (Employee Contact List), C (Employment and Wage Detail Reports)).

[5] Complainant arrived at this figure by using its fine structure which begins with a base amount that is determined by the percentage of substantive violations present in the forms required to be submitted, which in this case was 100%, for a standard fine amount for each violation of $1,948. C's Penalties Br. 3. Complainant mitigated the penalty by 5% for Respondent's good faith, aggravated it by 5% for seriousness, noting that Respondent's I-9 practices resulted in hiring two unauthorized employees, *see id.* at 5 (citing Exh. E, Notice of Unauthorized Aliens (NOUA)), and treated Respondent's size and history of previous violations as neutral, *id.* at 3–5.

[6] Complainant erroneously considers Respondent's actions after service of the NOI, which is not the relevant timeframe. *See infra* Section IV.A.2.

obligation[s] prior to service of the NOI, given its 100% violation rate, and the twenty-four Forms I-9 completed after the NOI were all completed long after the employees were hired." *Id.* at 4–5. Moreover, Respondent's lack of verification compliance resulted in hiring two unauthorized workers. *Id.* at 5. Finally, Complainant noted Respondent had no prior history of Form I-9 verification violations. *Id.*

II. LEGAL STANDARDS

A. Considerations in Penalty Assessment

After finding liability, the Court 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 Place, Inc.*, 12 OCAHO no. 1296, 4 (2017) (citations omitted). The Court must consider statutory factors when analyzing paperwork violations, *see* 8 U.S.C. § 1324a(e)(5), and may consider non-statutory factors as appropriate.[7] "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 Commerce Place, Inc.*, 12 OCAHO no. 1296, at 7).

IV. DISCUSSION

A. Failure to Prepare and/or Present

To determine the appropriate penalty, the Court considered the statutory factors at § 1324a(e)(5).[8] No party raised any additional factors for consideration.

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[7] 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 Court to grant a favorable exercise of discretion. *United States v. Pegasus Family Rest.*, 12 OCAHO no. 1293, 10 (2016) (citation omitted).

[8] "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 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)).

1. Size of Business

A penalty may be 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)). "OCAHO has generally considered companies with fewer than 100 employees[9] to be small businesses." *1523 Ave. J Foods, Inc.*, 14 OCAHO no. 1361, at 6 (citation omitted). The Respondent is a small business.[10] Complainant acknowledges that Respondent had "approximately twenty-two (22) employees on payroll at the time of inspection." C's Penalties Br. 4. The penalty will be mitigated based on this factor.

2. Good Faith

The good faith factor 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 Court considers "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) (citations omitted). Complainant points to Respondent's cooperation *after* service of the NOI,[11] which is not dispositive.

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[9] The Court can consider many factors when determining the size of a business, such as the number of employees, revenue or income, payroll, nature of ownership, or length of time in business. *See Fowler Equip. Co., Inc.,* 10 OCAHO no. 1169, at 6–7.

[10] *See* C's Penalties Br. Exh. B (Employee Contact List from March 26, 2018 through March 26, 2019 reflecting twenty-three active employees), C (Employer's Quarterly Wage and Contribution Reports listing the earnings of thirty-four employees for the quarter ending March 31, 2018, thirty-three employees for the quarter ending June 30, 2018, twenty-nine employees for 2018 Quarter 3 (July, August, and September), and thirty-eight employees for 2018 Quarter 4 (October, November, December)); *see also* Compl. 6 (containing the NIF which alleges that Respondent employed 55 employees from March 25, 2018 to March 25, 2019).

[11] Complainant treated the good faith factor as mitigating. Respondent's violation rate was 100%; however, it "took action to complete all twenty-four necessary Forms I-9 for its current employees" after service of the NOI. C's Penalties Br. 4; *id.* Exh. D (Memorandum to Case File indicating mitigation for good faith because the business was "upfront and immediately stated the company did not have any Form I-9's on file" upon service of the NOI, and "took action and completed a Form I-9 for all current employees once the discrepancy was discovered").

Here, a 100% violation rate could certainly be considered circumstantial evidence of a business' failure to take steps to reasonably ascertain what the law requires. Indeed, Respondent informed Complainant that "the company had not completed any Form I-9's for any employee of the company; both past and current." C's Penalties Br. Exh. D, 1 (Memorandum to Case File). However, "[a] low compliance rate, alone, does not warrant a finding of bad faith," even when the violation rate is 100%. *United States v. Maverick Constr.*, 15 OCAHO no. 1405a, 7 (2022) (treating good faith factor as neutral even though the respondent "did nothing prior to the investigation to ascertain the requirements of the law" because "[t]here must be some evidence of culpable conduct beyond the mere failure to comply," and there was "no additional evidence of bad faith") (citations omitted); *see also United States v. Farias Enters. LLC*, 13 OCAHO no. 1338, 5 (2020) (finding good faith to be a neutral factor despite a 100% violation rate); *Exec. Cleaning Servs. of Long Island Ltd.*, 13 OCAHO no. 1314, at 3 (same). There is nothing in the record pertaining to Respondent's conduct prior to the investigation, and Complainant did not argue in favor of aggravating the penalty based on this factor. The penalty will be neither mitigated nor aggravated based on this factor.

3. Seriousness

"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 Acad. of Haw. Corp.*, 6 OCAHO no. 848, 235, 246 (1996).

Complainant argued for aggravation based on this factor, noting that Respondent "completely failed with its legal obligation" under § 1324a, with a 100% violation rate, and two unauthorized workers. C's Penalties Br. 4–5; *id.* Exh. D (Memorandum to Case File noting that a Form I-9 audit revealed that the company had never completed a Form I-9 for any employee since its inception in 2011). The Court concurs with the Complainant's assessment. While the Court does not calculate penalties pursuant to the formulaic guidance used by Complainant, the Court arrives at a similar conclusion.[12] The penalty will be aggravated based on this factor.

[12] "Failure to complete any I-9[] forms prior to the issuance of a Notice of Inspection . . . cannot be treated as anything less than a serious violation." *United States v. Siam Thai Sushi Rest.*, 10 OCAHO no. 1174, 4 (2013). This is because "a failure to complete any Forms I-9 whatsoever fundamentally undermines the effectiveness of the employer sanctions statute," *United States v. Wu*, 3 OCAHO no. 424, 425 (1992) (CAHO modification), as "an individual whose eligibility is unverified could be unauthorized for employment," *Siam Thai Rest.*, 10 OCAHO no. 1174, at 4. *See also United States v. Banafsheha*, 3 OCAHO no. 525, 1266, 1282 (1993) (aggravating for seriousness and finding that the employer's "attempt to comply within one week of notification

4. Employment of Unauthorized Workers

Complainant noted Respondent's "lack of verification compliance resulted in hiring two (2) deemed unauthorized aliens" should aggravate the penalty. C's Penalties Br. 5; *see also id.* Exh. D (Memorandum to Case File treating the presence of unauthorized workers as neutral, indicating that some current and former employees were identified as "suspect and/or unauthorized alien workers during the I-9 audit"). To meet its burden, Complainant attaches a Notice of Unauthorized Aliens (NOUA) served on Respondent on June 13, 2019, indicating that on May 30, 2019, ICE apprehended two of Respondent's employees and they were "deemed by ICE to be unauthorized to work in the United States." *See id.* Exh. E. The two unauthorized employees listed on the NOUA are both listed in the NIF.[13] Compl. 6–9.

This matter, procedurally, is at summary decision. Thus, the Court must determine if there are genuine issues of material fact which would warrant a hearing. Complainant has the burden with respect to penalties and "must prove the existence of any aggravating factors by a preponderance of the evidence." *3679 Commerce Place, Inc.*, 12 OCAHO no. 1296, at 4 (citations omitted).

Respondent does not contest this factual assertion by Complainant (i.e. there is no genuine issue as to the unauthorized workers). *See Brown v. Pilgrim's Pride Corp.*, 14 OCAHO no. 1379a, 3 (2022) (outlining different options when a party fails to address another party's assertion of fact under Federal Rule of Civil Procedure 56(e), including finding the fact undisputed for purposes of the motion).

Even though it is uncontested, the NOUA must still be both reliable and probative evidence to be considered. *See United States v. Commander Produce, LLC*, 16 OCAHO no. 1428d, 8–10 (2023).[14] This document contains indicia of reliability: it appears on ICE letterhead, the Court

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of the inspection requirements does not mitigate the seriousness of its total failure to prepare any Forms I-9 prior to that time").

[13] Complainant did not charge Respondent with a knowing hire violation (and at no point moved to amend its Complaint to include such a charge), *see* 8 U.S.C. § 1324a(a)(2), and the Court has not made any findings of liability regarding hiring unauthorized individuals. This evidence is only used, then, to conduct the penalty assessment, as the Court must provide "due consideration" to this factor when it is present in the record. 8 U.S.C. § 1324a(e)(5).

[14] "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

was provided with the document in its entirety, it is signed and dated, and it appears to have been produced in the normal course of business. *See United States v. R&SL Inc.*, 13 OCAHO no. 1333b, 24 (2022). There is nothing facially about this document that would cause the Court to conclude it is unreliable. Further, it is probative it tends to prove two individuals identified in the NIF were unauthorized to work in the United States.[15]

The Court finds, in this circumstance, that Respondent employed two unauthorized workers, and Complainant's evidence is sufficient to meet its burden. This will serve to aggravate the penalty. Presence of unauthorized workers is extremely serious and concerning – the level of aggravation of the penalty will be commensurate with the egregious nature of Respondent's employment of unauthorized workers.[16] While the penalty will be aggravated for this reason, it will be limited to the penalty linked to just those two individual workers. As to the remaining workers who appear to be authorized, this factor will be treated as neutral. *See United States v. East Coast Foods, Inc*., 12 OCAHO no. 1281, 11 (2016) ("[P]enalties are not to be enhanced across the board even if there is a finding that some individuals were unauthorized; rather, an enhancement is only appropriate for the specific violations that involve an unauthorized employee"); *United States v. Saeed Rahimzadeh Corp.*, 3 OCAHO no. 551, 1494, 1501 (1993).

5. History of Violations

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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).

[15] *Cf. United States v. Integrity Concrete, Inc.*, 13 OCAHO no. 1307, 16 (2017) ("OCAHO case law has repeatedly held that Notices of Suspect Documents and Notices of Discrepancies do not suffice to establish that an individual is necessarily an unauthorized alien," because "'suspicion alone' does not warrant aggravation of the statutory factory of whether an individual was an unauthorized alien" (citations and internal quotations omitted)).

This case is distinguishable from *Integrity Concrete*. Here we have a reliable document which provides the agency (ICE) determination that the workers were in fact unauthorized (and not merely documenting the agency's suspicion that they were unauthorized). While this issue could be analyzed differently in a case where the Respondent raised a genuine issue of material fact, that has not transpired here.

[16] *See United States v. Durable, Inc.*, 11 OCAHO no. 1231, 8 (2014) (CAHO order) ("The very purpose of the employment eligibility verification requirements is to ensure that employers verify and certify the identity and employment authorization of every new hire in order to prevent the hiring of unauthorized workers.").

The record does not indicate a history of violations. C's Penalties Br. 5; *id.* Exh. D (Memorandum to Case file indicating "no history of previous Form I-9 verifications or violations"). This factor neither mitigates nor aggravates the penalty. *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[.]").

B. Penalty Amount

Complainant seeks a penalty of $1,948 for each of the fifty-five failure to prepare/present violations, for a total penalty of $ 107,140.

The record reflects that the paperwork violations were continuing violations. *See Commander Produce, LLC*, 16 OCAHO no. 1428d, at 11. 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).
The Court will impose a penalty of $1500 per violation for the fifty-three employees with work authorization, for a total of $79,500.[17]

As to the violations involving the two unauthorized individuals, the Court shall provide a penalty of $2,000 per violation, for a total of $4,000.

[17] 28 C.F.R. § 68.52(c)(8) provides: "For civil penalties assessed after August 1, 2016, whose associated violations . . . occurred after November 2, 2015, the applicable civil penalty amounts are set forth in 28 C.F.R. 85.5." While the Court is mindful that another, unrelated, case raises the issue of the appropriate date selection for the "date of assessment," (which bears on the correct penalty range), discussion of this issue is unnecessary here as the appropriate penalty falls within either possible penalty range, and would be appropriate within either range. *See United States v. Edgemont Grp., LLC*, 17 OCAHO no. 1450b, 4–11 (2023) (CAHO Order) (discussing possible interpretations of the relevant date for penalty assessment); *United States v. Edgemont Grp., LLC*, 17 OCAHO no. 1450c (2023) (order for briefing on this question on remand).

In the present case, ICE served the NIF on Respondent on August 7, 2019, Compl. 6, and the Court issues this Order after January 30, 2023. Therefore, whether the Court selected a range of $234–$2,332 using the date of the NIF as the date of assessment, or a range of $272–$2,701 using the date of the final order as the date of assessment, *see* 28 C.F.R. § 85.5, the penalty falls within both ranges and is appropriate in either range.

C. 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. 3. For the reasons first identified in 1988, and reiterated in numerous subsequent decisions, the Court will not enter 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).

V. CONCLUSION

The ALJ has given each statutory factor due consideration for the paperwork violations.

The Court **ORDERS** Respondent to pay $83,500 for failing to prepare and/or present Forms I-9 for fifty-five individuals.

VI. FINDINGS OF FACT

1. This Order incorporates the Findings of Fact from the June 2, 2022 Order of Default Judgment on Liability. *United States v. Kodiak Oilfield Servs., LLC*, 16 OCAHO no. 1436 (2022).

Procedural History

2. On August 9, 2021, the U.S. Department of Homeland Security filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against Kodiak Oilfield Services, LLC.

3. Respondent did not file an answer to the Complaint.

4. The Court issued an Order of Default Judgment on Liability on June 2, 2022. *United States v. Kodiak Oilfield Servs., LLC*, 16 OCAHO no. 1436 (2022).

5. In its Order of Default Judgment, the Court bifurcated the issues of liability and penalty assessment, and provided the parties with an opportunity to submit supplemental filings on penalties by June 24, 2022. *Id.* at 5.

6. On March 14, 2023, the Court issued an Order Providing Revised Filing Deadlines, extending the deadline for Respondent's supplemental filing to May 13, 2023, and cautioned that failure to provide a filing on penalties shall constitute a waiver of its opportunity to be heard on penalties. *United States v. Kodiak Oilfield Servs., LLC*, 16 OCAHO no. 1436a (2023).

7. In addition to Respondent's failure to file an answer, Respondent also failed to respond to an Order to Show Cause, and declined to submit a supplemental filing on penalties.

Penalties

8. Respondent had twenty-two (22) employees on payroll at the time of inspection.

9. Respondent cooperated with Complainant after it received the Notice of Inspection.

10. Respondent had a 100% violation rate.

11. The steps Respondent took to ascertain its legal responsibilities under the INA are unknown.

12. On May 30, 2019, Complainant apprehended two employees who were deemed by ICE as unauthorized to work in the Unites States.

13. On June 13, 2019, Complainant served Respondent with a Notice of Unauthorized Aliens.

14. This document contains indicia of reliability: it appears on ICE letterhead, the Court was provided with the document in its entirety, it is signed and dated, and it appears to have been produced in the normal course of business.

15. The two individuals identified in the Notice of Unauthorized Aliens are also identified as Respondent's employees in the Notice of Intent to Fine.

16. Respondent has no previous history of 8 U.S.C. § 1324a violations.

VII. CONCLUSIONS OF LAW

1. This Order incorporates the Conclusions of Law from the June 2, 2022 Order of Default Judgment on Liability.

2. While Respondent requested a hearing before OCAHO, it failed to keep the Court apprised of its current address. Respondent has waived its right to be heard on penalties, and the Court will not infer its position. *See United States v. Cordin Co.*, 10 OCAHO no. 1162, 4 (2012).

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); *United States v. Alpine Staffing, LLC*, 12 OCAHO no. 1303, 10 (2017) (citation omitted).

4. 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 Place, Inc.*, 12 OCAHO no. 1296, 4 (2017) (citations omitted).

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).

6. The administrative law judge did not consider nonstatutory factors in paperwork violations penalty assessment, because the parties did not raise any for consideration. *See United States v. Pegasus Family Rest.*, 12 OCAHO no. 1293, 10 (2016) (citation omitted).

7. 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).

8. The Court can consider many factors when determining the size of a business, such as the number of employees, revenue or income, payroll, nature of ownership, or length of time in business. *See Fowler Equip. Co., Inc.,* 10 OCAHO no. 1169, at 6–7.

9. Although Respondent had a 100% violation rate, a low compliance rate, alone, does not warrant a finding of bad faith. *United States v. Maverick Constr.*, 15 OCAHO no. 1405a, 7 (2022); *United States v. Farias Enters. LLC*, 13 OCAHO no. 1338, 5 (2020); *United States v. Exec. Cleaning Servs. of Long Island Ltd.*, 13 OCAHO no. 1314, 3 (2018) (same).

10. 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).

11. 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).

12. "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 Acad. of Haw. Corp.*, 6 OCAHO no. 848, 235, 246 (1996).

13. Respondent's failure to prepare/present any Forms I-9 is serious and warrants aggravation. *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. Siam Thai Sushi Rest.*, 10 OCAHO no. 1174, 4 (2013); *United States v. Banafsheha*, 3 OCAHO no. 525, 1266, 1282 (1993).

14. While the Court does not calculate penalties pursuant to the formulaic guidance used by Complainant, the Court arrives at a similar conclusion as to the seriousness of the offense.

15. This matter, procedurally, is at summary decision. Thus, the Court must determine if there are genuine issues of material fact which would warrant a hearing. Complainant has the burden with respect to penalties and "must prove the existence of any aggravating factors by a preponderance of the evidence." *3679 Commerce Place, Inc.*, 12 OCAHO no. 1296, at 4 (citations omitted).

16. Respondent does not contest the factual assertion by Complainant that two of Respondent's employees were unauthorized to work, as evidenced by the NOUA (i.e. there is no genuine issue). *See Brown v. Pilgrim's Pride Corp.*, 14 OCAHO no. 1379a, 3 (2022) (outlining different options when a party fails to address another party's assertion of fact under Federal Rule of Civil Procedure 56(e)).

17. This case is distinguishable from *United States v. Integrity Concrete, Inc.*, 13 OCAHO no. 1307, 16 (2017). Here we have a reliable document which provides the agency (ICE) determination that the workers were in fact unauthorized (and not merely documenting the agency's suspicion that they were unauthorized). While this issue could be analyzed differently in a case where the Respondent raised a genuine issue of material fact, that has not transpired here.

18. Even though it is uncontested, the NOUA must still be both reliable and probative evidence to be considered. *See United States v. Commander Produce, LLC*, 16 OCAHO no. 1428d, 8–10 (2023).

19. This document contains indicia of reliability: it appears on ICE letterhead, the Court was provided with the document in its entirety, it is signed and dated, and it appears to have been produced in the normal course of business. *See United States v. R&SL Inc.*, 13 OCAHO no. 1333b, 24 (2022).

20. "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)).

21. The Notice of Unauthorized Aliens has indicia of reliability and is probative. *See United States v. Commander Produce, LLC*, 16 OCAHO no. 1428d, 8–10 (2023); *United States v. R&SL Inc.*, 13 OCAHO no. 1333b, 24 (2022).

22. The administrative law judge will aggravate the penalty for the two unauthorized workers, and will treat this factor as neutral for the remaining workers. *See United States v. East Coast Foods, Inc*., 12 OCAHO no. 1281, 11 (2016); *United States v. Saeed Rahimzadeh Corp.*, 3 OCAHO no. 551, 1494, 1501 (1993).

23. Presence of unauthorized workers is extremely serious and concerning, and the level of aggravation will be commensurate. *United States v. Durable, Inc.*, 11 OCAHO no. 1231, 8 (2014) (CAHO order).

24. While the penalty will be aggravated for this reason, it will be limited to the penalty linked to just those two individual workers. As to the remaining workers who appear to be authorized, this factor will be treated as neutral. *See United States v. East Coast Foods, Inc*., 12 OCAHO no. 1281, 11 (2016)

25. 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).

26. The record reflects that the paperwork violations were continuing violations. *See United States v. Commander Produce, LLC*, 16 OCAHO no. 1428d, 11 (2023).

27. Whether the Court uses the date of the Notice of Intent to Fine or the date of this order as the date of assessment, the Court's penalty falls within either range. *See United States v.*

Edgemont Grp., LLC, 17 OCAHO no. 1450b, 4–11 (2023) (CAHO Order); 28 C.F.R. § 85.5; 28 C.F.R. § 68.52(c)(8).

28. The Court will impose a penalty of $2,000 per violation for the two unauthorized workers, and a penalty of $1,500 for the remaining workers, for a total Civil Money Penalty of $83,500.

29. 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. *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 August 29, 2023.

_____
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.