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

January 20, 2015

UNITED STATES OF AMERICA, Complainant, v. EMPLOYER SOLUTIONS STAFFING GROUP II, LLC, Respondent.	))))))))	8 U.S.C. § 1324a Proceeding OCAHO Case No. 14A00005

FINAL DECISION AND ORDER

Appearances:

Jaime Diaz and Lorely Fernandez
For complainant

Rebecca Levine and Beth Tietz
For respondent

I. PROCEDURAL HISTORY

This is an action pursuant to the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a (2012), in which the United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a four-count complaint alleging that Employer Solutions Staffing Group II, L.L.C. (Employer Solutions, ESSG II, or the company) violated 8 U.S.C. § 1324a(a)(1)(B). Count I alleges that Employer Solutions failed to prepare and/or present a Form I-9 for Norma Rosas. Counts II, III, and IV allege that Employer Solutions failed to ensure that 242 employees properly completed section 1 of their I-9 forms and/or that the company itself failed to properly complete sections 2 or 3 of their forms.

Employer Solutions filed a timely answer denying the allegations and asserting thirteen affirmative defenses.

In their prehearing statements, the parties agreed to nine stipulations that are set forth herein as findings of fact. Prehearing procedures have been completed, but did not proceed smoothly. Presently pending are the government's motion for sanctions related to discovery issues, and the government's motion for summary decision. The time for responding to the motion for sanctions has expired.[1] Employer Solutions filed a response to the motion for summary decision and both motions are ripe for resolution.

II. BACKGROUND INFORMATION

ICE Auditor Donna Gutierrez states in pertinent part in her declaration that she served a Notice of Inspection (NOI) on Larsen Manufacturing Co., L.L.C., at Larsen's offices in El Paso, Texas on February 17, 2011. Gutierrez received a telephone call thereafter on February 22, 2011 from Jeff Kubas, the president of Flexicorps, Inc., which is co-located with Larsen at 12150 Rojas Drive in El Paso. Kubas told Gutierrez that Flexicorps provided temporary staffing to Larsen, and Gutierrez then served a NOI on Flexicorps on February 24, 2011. Flexicorps subsequently presented I-9s for 242 current and terminated temporary Larsen workers during the period from February 18, 2008 to February 17, 2011, as requested.

Gutierrez observed in reviewing these I-9s that the forms were actually executed by Employer Solutions Staffing Group, L.L.C., and she telephoned Kubas to inquire about this. Kubas informed Gutierrez that ESSG was a separate human resource company that Flexicorps subcontracted to provide temporary workers to Larsen, that ESSG was the actual employer, and that Kubas had provided the documentation from ESSG. Gutierrez then served a NOI on ESSG II on November 3, 2011 at their offices located at 7301 Ohms Lane in Edina, Minnesota, and the company responded saying that their original I-9 forms for the period requested had already been provided to the government by Flexicorps. A Notice of Suspect Documents (NSD) was served on ESSG II on February 6, 2013, and a Notice of Intent to Fine (NIF) was served on the company on February 9, 2013. The company made a timely request for hearing on March 6, 2013. All conditions precedent to the institution of this proceeding have been satisfied.

[1] *See* Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2012). A party has ten days in which to respond to a motion. 28 C.F.R. § 68.11(b). Where service has been made by ordinary mail, five days are added to the period. 28 C.F.R. § 68.8(c)(2). The motion for sanctions was served on November 14, 2014, and a supplement followed on November 17, 2014. A response to the motion was due on or before December 2, 2014 (counting from the latter filing).

Employer Solutions Staffing Group II identified itself in answers to interrogatories as a limited liability company incorporated in Minnesota in 2008. Darryl Peterson is identified as the owner and managing director, and also as the owner of Employer Solutions Staffing Group III, L.L.C.; Employer Solutions Staffing Group IV, L.L.C.; Employer Solutions Staffing Group V, L.L.C.; and one of three owners of Employer Solutions Group, L.L.C.; Employer Solutions Staffing Group, L.L.C.; Employer Solutions Nationwide Group, L.L.C.; and Project Resource Group, L.L.C.[2] Other interrogatory responses state that temporary employees for Larsen were recruited, screened, and interviewed by Flexicorps employees in El Paso, Texas, and that Flexicorps employees operated as agents on behalf of ESSG pursuant to an Outsource Agreement.

ESSG II's interrogatory answers also explained the division of responsibility for hiring Larsen's temporary employees, the standard operating procedures, and the respective roles of Flexicorps and ESSG in completing I-9 forms. Robert Contreras and Irene Ordonez, employees of Flexicorps in El Paso, made all the hiring decisions for temporary workers at the Larsen Manufacturing facility between April 13, 2010 and September 28 or 29, 2010, and Roberto Maldonado, Flexicorps' branch manager, made the decisions thereafter. The employees completed and dated section 1 of Form I-9, and Flexicorps personnel examined the documents the workers presented. In examining the workers'documents, Flexicorps personnel verified that those documents were on the list of acceptable documents, appeared genuine and related to the employees, and evidenced unexpired employment eligibility. Flexicorps personnel copied the employees' documents, returned the originals to the employees, and sent the copies to ESSG's payroll administrators in Edina, Minnesota.

A payroll administrator at ESSG then examined the documents again and completed section 2 of the employees' I-9 forms. An email from Shannon Peterson at Employer Solutions Group[3] confirmed that the procedure was that the Flexicorps hiring agent in El Paso examines the employees' documents to determine if they are reasonable and genuine, then copies the documents and attaches the copies to a New Hire Packet, which Flexicorps then sends to ESSG. The ESSG payroll administrator in Edina completes section 2 of the I-9 form "using the identification determined to be reasonably genuine by the hiring agent."

The deposition of Roberto Maldonado says in pertinent part that Flexicorps takes the lead on posting, searching, screening, and hiring the temporary employees for Larsen pursuant to a staffing agreement between ESSG and Larsen. Maldonado says he made color copies of the

[2] Employer Solutions Group, L.L.C. and Project Resource Group, L.L.C. are identified as professional employer organizations; Employer Solutions Nationwide Group, L.L.C. is identified as an associated services organization, and the other entities are identified as staffing agencies.

[3] ESSG II's prehearing statement identifies Peterson as the COO for ESSG, L.L.C.

documents the employees presented, and sent them to Teresa Nichols at ESSG. Maldonado said he never signed the section 2 attestation of the I-9s during the period at issue. Elsewhere in the same deposition, Maldonado said he sent the documents by FedEx to Mr. Piper and that Mr. Piper signed the I-9 forms. ESSG's payroll administrators were elsewhere identified as Teresa Nichols, Doyle Piper, and Carrie Fischer, but examination of the I-9s reflects that virtually all the section 2 attestations are signed by Doyle Piper. One is unsigned (Roberto A. Flores); eight are signed by Rachel Piper (Carlos Cordova, Luis Escalante, Anthony Holmes, Julia Sanchez, Ruben Torres, Veronica Vaquera, Luis Villarreal, and Griselda Villegas); and none is signed by Teresa Nichols or Carrie Fischer.

III. THE ISSUE OF LIABILITY

A. The Government's Motion

ICE says that ESSG listed Norma Rosas as an employee but did not present an I-9 form for her and that the company also failed to properly complete section 2 of the I-9 for 242 employees listed in Counts II, III, and IV of the complaint. The government says it is evident that ESSG never examined the employees' original identity or work authorization documents, but that ESSG personnel nevertheless signed section 2 of the I-9s attesting that they had done so.

ICE points out that nothing in the statute or regulations proves a basis for examining copies in lieu of original documents, and that 8 C.F.R. § 274a.2(b)(1)(v) (emphasis added) expressly provides that "[t]he individual may present either an *original* document which establishes both employment authorization and identity, or an *original* document which establishes employment authorization and a separate *original* document which establishes identity." Roberto Maldonado said he made copies of the original identity and work authorization documents, but never signed section 2 to attest that he had reviewed the original documentation presented. ESSG personnel signed section 2, but never examined the employees' original identity and work authorization documents. ICE says that failure to review and verify proper List A, B, or C documents is a substantive violation, and that copies are not proper documents. ESSG accordingly cannot prove that it examined original, valid documentation, and failed to properly complete section 2 of the I-9s for the 242 employees named in the complaint.

Exhibits accompanying the government's motion for summary decision include: G-1)[4] the declaration of ICE Auditor Donna Gutierrez dated November 17, 2014 (4 pp.); G-2) excerpts

[4] Because both parties identified their exhibits numerically, to distinguish between them the letter "G" has been added to the government's designations and the letter "R" has been added to Employer Solutions' designations.

from the deposition of Roberto Maldonado dated June 12, 2014 (12 pp.); G-3) Employer Solutions' response to ICE's interrogatories and requests for production of documents (37 pp.); G-4) the Certificate of Organization for Employer Solutions Staffing Group II, L.L.C.; G-5) email from Shannon Peterson to Donna Gutierrez dated November 14, 2011, with attachment (3 pp.); and G-6) 2011, 2012, and 2013 Tax Returns for Employer Solutions Staffing Group II and I-9s (132 pp.).

B. ESSG II's Response

ESSG II first asserts that the company has an absolute right to a hearing and that summary decision procedures may not be utilized to preclude a hearing because a hearing is compelled by federal common law and constitutional due process, as well as by 8 U.S.C. § 1324a(e)(3)(A). The company contends that to the extent OCAHO rules permit otherwise, they should not be followed. ESSG II asserts in addition that legacy INS improperly promulgated the regulation requiring employers to complete section 2 of Form I-9 within three business days of an employee's hire, 8 C.F.R. § 274a.2(b)(1)(iii), and that the rule cannot stand. ESSG II contends further as a matter of affirmative defense that it is protected pursuant to 8 U.S.C. § 1324a(b)(6) as to any allegation of failure to sign section 2 of an I-9 within three days of an employee's hire. The company also contends that many of the other violations alleged are technical and procedural, and that it substantially complied with all the requirements of the employment eligibility verification system.

The company explains that at the time it started providing temporary employees to Larsen, it was operating in about twenty-two states and had approximately six to eight thousand temporary employees on its payroll. In order to create a centralized I-9 process, ESSG established a process whereby recruiting agents were the first point of contact. Once an employee accepted the job, the employee completed, signed, and dated section 1 of the I-9 form, and presented the form in person to the agent representative (on-site staffing recruiter or hiring agent) on or before the first day of employment. The representative examined the documents in the presence of the employee, and if the representative determined that the documents were reasonably genuine, related to the employee, and evidenced unexpired employment eligibility, the representative photocopied the original documents, attached the copies to the employee's I-9, and forwarded them to ESSG in Edina, Minnesota. The payroll administrator in Edina then completed section 2 based on an independent review of the I-9 and supporting documentation.

The company asserts that the rules of agency permit this procedure because general agency law attributes the principal's knowledge to the agent, and the agent's knowledge to the principal. ESSG II accordingly concludes that "[t]he knowledge of both agents and principals creates a type of enterprise knowledge such that the entity knows the sum total of what its agents and

employees know." For this reason, the company says that using more than one person to carry out the task of completing an entity's I-9 obligations is a proper procedure.

ESSG II provides a comprehensive chart of the E-Verify results for the employees, as well as of the time elapsed between each employee's first date of work and the date section 2 of the individual's I-9 form was signed. The company also provided a detailed list of specific errors ICE identified in section 1 and section 2 of ESSG II's I-9 forms. The company's response was accompanied by the Certification of Rebecca Levine together with exhibits consisting of R-1) Notice of Inspection dated February 17, 2011 (4 pp.); R-2) email from Donna Gutierrez to Shannon Peterson dated November 7, 2011; R-3) 64 Fed. Reg. 7066 1999 (8 pp.); R-4) selection from U.S. Code Congressional and Administrative News, 99th Congress, Second Session 1986 (17 pp.); R-5) 52 Fed. Reg. 2115 1987 (2 pp.); R-6) 52 Fed. Reg. 8762 1987 (9 pp.); R-7) 52 Fed. Reg. 16216 1987 (14 pp.); R-8) I-9 form dated March 20, 1987 (2 pp.); R-9) Bill Summary & Status H.R. 2202 1995-96 (18 pp.); R-10) Public Law 104-208 September 30, 1996 (10 pp.); and R-11) deposition of Roberto Maldonado (100 pp.). Also accompanying the response was the Certification of Lindsay Miyamoto, together with an Excel spreadsheet, and the Certification of Ross Plaetzer, together with a Staffing Agreement between EESG and Larsen Manufacturing, as well as an Outsource Agreement between ESSG and Flexicorps.

C. Discussion and Analysis

Contrary to ESSG II's claim of an absolute right to a hearing, parties in this forum are not ordinarily put to the burden and expense of a hearing absent a showing by the nonmoving party that there is a genuine, specific, material factual issue requiring a hearing. *United States v. Nebeker, Inc.*, 10 OCAHO no. 1165, 2 (2013) (citing *United States v. Aid Maint. Co.*, 7 OCAHO no. 951, 475, 478 (1997) (stating that the purpose of summary adjudication is to avoid an unnecessary hearing)).[5] Once a party moving for summary decision satisfies its initial burden of demonstrating both the absence of a material factual issue and entitlement to judgment as a

[5] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been 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.

matter of law, the nonmoving party must come forward with specific contravening evidence to avoid summary resolution. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).

An issue of fact is genuine only if it has a real basis in the record. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). A genuine issue of fact is material only if, under governing law, it might affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *United States v. Primera Enters., Inc.*, 4 OCAHO no. 615, 259, 260-61 (1994). ESSG II pointed to no material factual issue with respect to liability for the violations to which ICE's motion is actually addressed.

There is no genuine issue involving ESSG II's attack on the three-day regulation because the government's motion for summary decision is not based on any alleged failure to complete the form within three days,[6] nor is it based on any specific omissions ESSG sets forth and characterizes as technical or procedural. The motion is addressed to the methodology ESSG used in completing its I-9 forms and raises the question of whether that methodology complies with the requirements of the employment eligibility verification system. This is a question of law.

The parties do not dispute, and the record clearly reflects, that ESSG II's standard operating procedure was for its personnel in Edina, Minnesota to sign the section 2 attestation after reviewing copies of the employees' documents without ever seeing the individuals whose documents they examined. ESSG II acknowledges this procedure and describes it in detail. The problem with this procedure is that it does not comply with the requirements of the employment eligibility verification system. To begin with, examining copies of the employees' documents to complete section 2 is insufficient where the regulations clearly provide that the originals must be examined. 8 C.F.R. § 274a.2(b)(1)(ii)(A),(v). The *Handbook for Employers*[7] similarly states clearly that individuals must present original documents, and employers must examine original documents. The section 2 certification contains affirmative attestations under the penalty of perjury saying that "I have examined the document(s) presented by the above-named employee," and that the documents presented "appear to be genuine and to relate to the employee named." The I-9 form does not say that the certifier examined copies of the employees' documents, it says that the certifier examined *the documents presented by the above-named employee*. It is simply impossible, moreover, for a payroll administrator in Edina, Minnesota to determine whether a document reasonably appears to relate to an individual when the administrator never saw the

[6] The short answer to ESSG II's attack on the regulation is that the company lacks standing to pursue this claim absent some issue respecting the application of this provision.

[7] *See Handbook for Employers*, U.S. Citizenship and Immigration Services (rev. Apr. 3, 2009).

individual and the individual only presented original documents to a different person more than a thousand miles away in El Paso, Texas.

While the company's general appeal to agency law is creative, it is nevertheless unpersuasive. It is unexceptional black letter law that the knowledge of a principal may under appropriate circumstances be imputed to an agent, and vice versa. Restatement (Third) of Agency Intro. (2006). Our case law recognizes in addition that where a corporate manager reviews specific records, the manager may properly testify to the facts reflected therein. *See Stubbs v. DeSoto Hilton Hotel*, 8 OCAHO no. 1005, 148, 155-56 (1998). Nothing in the case law or in the Restatement suggests, however, that this authorizes the principal or the agent to attest under oath that he or she personally performed actions that the individual did not in fact perform. ESSG II points to no provision of agency law that would endorse such a result. The attestations made in section 2 of these I-9s are patently false.

An employer does not substantially comply with the employment eligibility verification system by completing a false certification, and nothing in the E-Verify system justifies such a practice. Neither can use of the E-Verify program excuse a failure to properly complete section 2 of the I-9 forms; in fact, the first requirement of the E-Verify system is for the employer to properly complete an I-9 form.[8] The affirmative defense provided by 8 U.S.C. § 1324a(b)(6) is unavailable to ESSG II because it applies only to technical or procedural violations, not to substantive violations. The creation of false section 2 attestations is not a technical or procedural violation.

ESSG II points to no case holding that an employer that examines copies of documents outside the presence of the individual presenting them can satisfy the employment eligibility verification requirements. Neither does the company cite any case holding that an employer substantially complies with the statute by having a long-distance agent examine the original documents and not sign the section 2 certification. What was implicit in prior versions of the I-9 form instructions has been made explicit in the March 8, 2013 version of those instructions which now expressly provide that in completing an I-9 form, "[t]he person who examines the documents must be the same person who signs Section 2."

The company stipulated that Norma Rosas was employed at some time during the period from February 18, 2008 and February 17, 2011 and did not deny that it failed to present an I-9 for her upon request. ESSG II is accordingly liable for the allegation in Count I. The record also reflects

[8] *See Background and Overview*, *E-Verify User Manual for Employers*, U.S.C.I.S. (2008). The manual has since been updated, but the version in effect at the time of the events in question was the 2008 manual.

that the company failed to properly complete section 2 of Form I-9 for 292 employees and ESSG II is liable for the violations in Counts II, III and IV as well.

IV. PENALTY ASSESSMENT

Civil money penalties are assessed for paperwork violations according to the parameters set forth at 8 C.F.R. § 274a.10(b)(2): the minimum penalty for each individual with respect to whom a violation occurred after September 29, 1999, is $110, and the maximum is $1100. Because the government has the burden of proof with respect to the penalty, *United States v. March Construction, Inc.*, 10 OCAHO no. 1158, 4 (2012), ICE must prove the existence of any aggravating factor by a preponderance of the evidence, *United States v. Carter*, 7 OCAHO no. 931, 121, 159 (1997).

In assessing an appropriate penalty, the following 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. § 1324a(e)(5). The statute neither requires that equal weight be given to each factor, nor rules out consideration of additional factors. *See United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000).

A. The Government's Position

Based on internal agency guidance, ICE calculated a baseline penalty of $935 for each violation. The government treated the size of ESSG's business, the company's good faith, the absence of unauthorized workers, and ESSG's lack of history of previous violations as neutral factors warranting neither aggravation nor mitigation of the penalties. ICE's motion for summary decision seeks to aggravate the penalty only for the violation in Count I involving the failure to present an I-9 form for Norma Rosas, for which it seeks $981.75.

B. ESSG II's Position

ESSG II contends that the due process clause of the Fifth Amendment, as well as the excessive fines clause of the Eighth Amendment, precludes enforcement of the penalty proposed because no evidence was shown that the paperwork violations facilitated or permitted the employment of unauthorized workers. The company says that *United States v. Bajakajian*, 524 U.S. 321, 334 (1998) provides the framework for assessing the penalty and that, like the defendant in *Bajakajian*, employers such as itself are not the principal target of the statute in question. ESSG II points out that it was neither an employer of unauthorized aliens nor a trafficker or contractor in unauthorized aliens, and says that there was virtually no harm done, no fraud, and no

correlation between the penalty and any alleged injury. The company compares its situation to employers in other cases who were fined for failing either to sign section 2 or to complete I-9 forms within three days of the date of hire.

ESSG II argues that the penalties should be substantially reduced because it acted in good faith and had no unauthorized workers or history of previous violations. The company says with respect to the seriousness of the violations that it failed to sign only six of the I-9s, and five other unsigned forms were for employees rolled over from a previous staffing service. The company says the majority of the violations for which it was cited involved the failure to date section 2 of the form, and this is a technical or procedural violation that the company should have been afforded an opportunity to correct.

C. Discussion and Analysis

Generally speaking, when a civil money penalty falls below the statutory maximum, the party protesting it would have to make a very compelling case in order to prevail on a claim that the penalty is constitutionally excessive. *See United States v. Chaplin's Inc*., 646 F.3d 846, 852 (11th Cir. 2011); *see also CFTC v. Levy*, 541 F.3d 1102, 1112 (11th Cir. 2008) (penalty is not excessive when it falls within the range of permissible statutory and regulatory limits and is rationally related to the offense charged or to the need for deterrence). The *Levy* court referred with approval to language in *Monieson v. CFTC*, 996 F.2d 852, 862 (7th Cir. 1993) stating that when a penalty is within the limits set by the statute, the agency has made an allowable judgment. *See also United States v. Aleff*, 772 F. 3d 508, 512 (8th Cir. 2014) (noting that legislative intent is relevant to proportionality); *accord Qwest Corp. v. Minn. Pub. Util. Comm'n*, 427 F.3d 1061, 1069 (8th Cir. 2005). Substantial deference to congressional judgments means that the statutorily enacted penalties in question come to us with a presumption of validity.

Unlike the criminal forfeiture at issue in *Bajakajian*, moreover, the civil money penalties in this case are remedial in nature and not merely punitive as ESSG II suggests. As explained in *Aleff*, 772 F.3d at 511, the excessive fines clause applies to civil penalties that are punitive in nature, and a facial evaluation of the particular statute informs the analysis of whether a statute is punitive or remedial. *See also United States v. Lippert*, 148 F.3d 974, 977-78 (8th Cir. 1998). ESSG II's constitutional claims are premised on a view that minimizes both the seriousness of its conduct and the intended reach of the governing statute. Nothing in the statute or the implementing regulations requires a finding that an employer be a trafficker or an employer of unauthorized workers before the range of statutory penalties provided by 8 U.S.C. § 1324a(e)(5) may be imposed for a paperwork violation. Employment of unauthorized workers is only one of the criteria for consideration in setting penalties. 8 U.S.C. § 1324a(e)(5). Contrary to ESSG II's contentions, the statute is aimed at virtually every employer in the United States, not just traffickers or employers of undocumented workers. Congress enacted a system designed to

ensure that all employers take seriously their obligation to complete the prescribed verification procedures. There are other statutes that impose higher penalties on employers who knowingly hire unauthorized workers or traffic in unauthorized aliens. *See, e.g.*, 8 U.S.C. § 1324a(e)(4) (imposing higher range of civil money penalties for knowing hire violations than for paperwork violations); 8 U.S.C. § 1324(a)(1)(A) (imposing criminal penalties for trafficking).

As explained in *United States v. Guewell*, 3 OCAHO no. 478, 814, 823-24 (1992), case law construing § 1324a(e)(5) has consistently recognized that the purpose of imposing penalties for paperwork violations is at least twofold: deterring repeat violations by the employer in question and encouraging other employers to comply with the employment eligibility verification system. OCAHO cases have repeatedly emphasized the principle that a penalty should be sufficiently meaningful to deter future violations without being unduly punitive. *See United States v. Jonel, Inc.*, 8 OCAHO no. 1008, 175, 201 (1998). A meaningful penalty enhances the probability of future compliance. *Id*. This means that a penalty cannot be set so low that the employer can comfortably pay it simply as a cost of doing business; the prophylactic purpose of a penalty is best served when a penalty is sufficiently significant to motivate a change of behavior. Some employers will require a more substantial penalty than others to effect such a result.

The record reflects that ESSG is a sizeable company. In response to the government's motion, the company said it has six to eight thousand temporary employees on its payroll, and its 2013 tax return reflects gross income of $144,830,081. While no unauthorized workers were identified and no previous history was alleged, the violations are far more serious than ESSG II acknowledges. Notwithstanding ESSG's characterizations, ICE does not seek penalties here for the company's failure to sign a few I-9s or failure to enter a date on many of its I-9 forms. The government seeks relief because the company systematically executed false attestations in section 2 of 242 I-9 forms. These violations are exceedingly serious because the section 2 attestation is appropriately described as "the very heart" of the verification process. *United States v. Acevedo*, 1 OCAHO no. 95, 647, 651 (1989). ESSG II's attempt to compare itself to employers that failed to sign a few I-9 forms or to enter dates on some of the forms is wholly inapposite.

Why the government treated the good faith factor as neutral is unexplained. The company apparently chose to design its own methodology instead of complying with the verification system established by the statute and the regulations. For purposes of assessing an employer's good faith, OCAHO case law has traditionally looked to the question of whether an employer honestly exercised reasonable care and diligence to ascertain what the law requires and to conform its conduct to the law. *See, e.g., United States v. Sunshine Bldg. Maint., Inc.*, 7 OCAHO no. 997, 1122, 1177 (1998) (citing *United States v. Riverboat Delta King, Inc.*, 5 OCAHO no. 738, 126, 130 (1995)). The standard has both a subjective component (honesty) and an objective component (reasonableness). *United States v. Felipe, Inc*., 1 OCAHO no. 93, 626, 634 (1989). While I construe the facts most favorably to ESSG II with respect to the subjective

component, there is no way that the knowing creation of false attestations in section 2 of Form I-9 can be characterized as objectively reasonable.

Considering the record as a whole and the statutory factors in particular, I find no compelling reason to adjust the penalties set by the government in this case. The penalty for failure to present an I-9 for Norma Rosas is $981.75. The penalties for the false attestations in section 2 of the I-9s for the remaining 242 employees will be $935 each, totaling $226,270. Penalties will accordingly total $227,251.75.[9]

V. ICE's Motion for Sanctions

A. Background Information

ICE served interrogatories and document requests on ESSG on June 23, 2014, and responses were due on or about July 28, 2014. ESSG sent the government an email dated July 16, 2014 and a letter dated July 31, 2014 representing, respectively, that the company was "working on" responses and "should have thorough responses along with objections to you within the next two weeks." When responses were still not forthcoming, ICE filed a motion to compel discovery. ESSG sought an extension of time to respond to the government's motion, and I granted the extension based on the company's representations that it was "diligently working" on the responses. That extension turned out to be ill-advised because the response ESSG finally made answered not a single interrogatory and produced not a single document, but recited boilerplate objections so broad as to be meaningless, and requested a protective order relieving the company from discovery altogether. The government's motion to compel was granted, but the prior scheduling order had to be vacated and procedures prolonged because of the extended delay. *See United States v. Emp'r Solutions Staffing Grp. II, L.L.C.*, 11 OCAHO no. 1234, 6 (2014).

B. ICE's Motion for Sanctions

ICE's motion for sanctions asserts that the responses ESSG II finally made after the order to compel were both untimely and inadequate because some of the answers were still unresponsive, and a number said only "see deposition of Roberto Maldonado," or "the information will be provided shortly." The government requests that a full range of sanctions pursuant to 28 C.F.R. § 68.23(c) be imposed. The government filed a supplement to the motion shortly thereafter reporting that the company subsequently provided the government with additional responses. ICE nevertheless asserts that a full range of sanctions should still be imposed.

[9] The government did not explain why it requested $227,251.74. This appears to be a typographical error.

C. Discussion and Analysis

The company's conduct in discovery did not conform to the standards expected of parties in this forum. After stonewalling all the interrogatories and document requests with boilerplate objections until after the close of discovery, eventual compliance was evidently grudging and untimely. The fact that no sanctions are imposed for this conduct should not be read either as approval of such cavalier tactics or as precedent for immunity from sanctions for any similar abuse of the litigation process by subsequent litigants. ICE's motion for sanctions, however, is denied as moot because any such sanctions would have no effect on this case.

VI. STIPULATIONS, ADDITIONAL FINDINGS OF FACT, AND CONCLUSIONS OF LAW

A. Stipulations Agreed to By the Parties

1. A Notice of Inspection (NOI) was served upon Employer Solutions Staffing Group II, L.L.C. (ESSG or respondent) at 7301 Ohms Lane, Suite 405, Edina, Minnesota, 55439 on November 3, 2011.

2. In the NOI, respondent was requested to present for inspection Employment Eligibility Verification forms (Forms I-9) to DHS no later than November 8, 2011 for current and terminated employees in El Paso, Texas for the time period between February 18, 2008 and February 17, 2011.

3. On February 6, 2013, complainant served upon respondent a Notice of Suspect Documents.

4. A Notice of Intent to Fine was served upon respondent on February 9, 2013.

5. The two-hundred forty three (243) employees listed in the Notice of Intent to Fine were employed by respondent during some or all of the period between February 18, 2008 and February 17, 2011.

6. The two-hundred and forty-three (243) employees listed in the Notice of Intent to Fine were employed by respondent after November 6, 1986.

7. On or about March 6, 2013, respondent requested a hearing before an administrative law judge.

8. Complainant filed a complaint with the Office of the Chief Administrative Hearing Officer on

October 31, 2013.

9. On December 5, 2013, respondent filed an answer to the complaint.

B. Additional Findings of Fact

10. Employer Solutions Staffing Group II, L.L.C. is a limited liability company located in Edina, Minnesota.

11. Employer Solutions Staffing Group II, L.L.C. was incorporated in 2008 and operates as a temporary employment staffing agency.

12. Flexicorps, Inc., located in El Paso, Texas, recruited, screened, interviewed, and hired the 243 individuals named in the complaint to work temporarily at Larsen Manufacturing, L.L.C., also located in El Paso, Texas.

13. Flexicorp, Inc. acted as an agent of Employer Solutions Staffing Group II, L.L.C. pursuant to an Outsource Agreement between Employer Solutions and Flexicorps, Inc.

14. Robert Contreras and Irene Ordonez, employees of Flexicorps, Inc., made all the hiring decisions for temporary workers at the Larsen Manufacturing facility in El Paso between April 13, 2010 and September 28 or 29, 2010, and Roberto Maldonado, branch manager of Flexicorps, Inc., made all the hiring decisions after September 28 or 29, 2010.

15. When the employees were hired, they completed, signed, and dated section 1 of the I-9 form and presented the form in person to Robert Contreras, Irene Ordonez, or Roberto Maldonado at Flexicorps, Inc., on or before their first day of employment at Larsen Manufacturing, L.L.C.

16. Robert Contreras, Irene Ordonez, or Roberto Maldonado referred employees to the list of acceptable documents and asked them to present either an original document from List A, or original documents from List B and List C.

17. Robert Contreras, Irene Ordonez, or Roberto Maldonado examined the original documents presented by the employees to verify that the documents were on the list of acceptable documents, that they appeared genuine and to relate to the employee, and that they evidenced the employee's unexpired employment eligibility.

18. Robert Contreras, Irene Ordonez, or Roberto Maldonado made color copies of the employees' documents and sent the copies, via FedEx delivery, to Doyle Piper, Carrie Fischer, or Teresa Nicols, payroll administrators of Employer Solutions Staffing Group II, L.L.C.

19. Roberto Maldonado never certified in section 2 of Form I-9 that he reviewed the original documents the employees presented, but instead he sent copies of the documents to payroll administrators at Employer Solutions Staffing Group II, L.L.C.

20. Upon receiving copies of the employees' documents, a payroll administrator at Employer Solutions Staffing Group II, L.L.C. examined the copies and signed section 2 of the I-9 forms.

21. Employer Solutions Staffing Group II, L.L.C. hired Norma Rosas for employment and failed to present an I-9 form for her upon request of the Department of Homeland Security, Immigration and Customs Enforcement.

22. Employer Solutions Staffing Group II, L.L.C. hired 242 employees named in the complaint and signed the certification in section 2 of their I-9 forms under penalty of perjury without ever seeing the individuals in person or examining their original documents.

C. Conclusions of Law

1. Employer Solutions Staffing Group II, L.L.C. is an entity within the meaning of 8 U.S.C. § 1324a(a)(1).

2. All conditions precedent to the institution of this proceeding have been satisfied.

3. Employer Solutions Staffing Group II, L.L.C is liable for 243 violations of 8 U.S.C. § 1324a(a)(1)(B).

4. Failure to prepare an I-9 at all is one of the most serious violations because it completely subverts the purpose of the employment verification requirements. *See United States v. M & D Masonry, Inc.*, 10 OCAHO no. 1211, 11 (2014); *see also United States v. Skydive Acad. of Haw.*, 6 OCAHO no. 848, 235, 248-49 (1996).

5. Failure to review an individual's original documents before signing section 2 of Form I-9 constitutes a failure to properly complete section 2 of the form I-9. 8 C.F.R. § 274a.2(b)(1)(v).

6. Failure to properly complete section 2 of Form I-9 is a serious violation. *Cf. United States v. Four Seasons Earthworks, Inc.*, 10 OCAHO no. 1150, 9 (2012) (citing *United States v. Alyn Indus., Inc.*, 10 OCAHO no. 1141, 8-10 (2011)).

7. Section 2 of Form I-9 is properly completed only when the person who signs the section 2 attestation is the same person as the person who examines the employee's original documents.

8. In assessing an appropriate penalty, the following 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. § 1324a(e)(5).

9. The excessive fines clause of the Eighth Amendment applies to civil money penalties that are punitive in nature. *United States v. Aleff*, 772 F. 3d 508, 512 (8th Cir. 2014).

10. Case law construing § 1324a(e)(5) has consistently recognized that the purpose of imposing penalties for paperwork violations is at least twofold: deterring repeat violations by the employer in question and encouraging other employers to comply with the employment eligibility verification system. *United States v. Guewell*, 3 OCAHO no. 478, 814, 823-24 (1992).

11. The statutory scheme enacted by 8 U.S.C. § 1324a reflects that the principal purpose of its penalty provisions is prophylactic and corrective rather than punitive.

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.

ORDER

Employer Solutions is liable for 243 violations of 8 U.S.C. § 1324a(a)(1)(B) and is ordered to pay civil money penalties totaling $227,251.75. The government's motion for sanctions is denied.

SO ORDERED.

Dated and entered this 20th day of January, 2015.

_____

Ellen K. Thomas
Administrative Law Judge

Appeal Information

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

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

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

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