

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

April 3, 2015

UNITED STATES OF AMERICA,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324a Proceeding
)	OCAHO Case No. 14A00045
)	
HORNO MSJ, LTD., COMPANY)	
Respondent.)	
_____)	

FINAL DECISION AND ORDER

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). The United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a two-count complaint alleging that Horno MSJ, Ltd. Company (Horno or the company) engaged in thirty-two violations of 8 U.S.C. § 1324a(a)(1)(B). Count I alleged that Horno failed to prepare and/or present I-9 forms for nine employees upon request by the government. Count II alleged that the company failed to ensure that twenty-three employees properly completed section 1 of their I-9s or failed itself to properly complete section 2 or 3 of their forms. ICE seeks \$30,574.50 in civil money penalties for these alleged violations. Horno’s manager, Beatriz Talayero, filed a timely answer on behalf of the company.

Prehearing procedures were undertaken, after which the parties filed cross motions for summary decision. Neither party responded to the other’s motion, and both motions are ripe for resolution.

II. BACKGROUND INFORMATION

Horno MSJ Ltd. Co. is a bakery located in San Antonio, Texas that was opened in March 2006. Horno is jointly owned by Beatriz Talayero, its manager, and Antonio Talayero, her husband.

The company's answer says that Beatriz Talayero is sixty-eight years of age and her husband is seventy, and that they invested their savings into the bakery, having no previous experience in that business. Talayero states further in a sworn statement that baking has been her lifetime hobby, but that the bakery has been struggling for the last few years.

ICE served Horno with a Notice of Inspection (NOI) and subpoena on July 31, 2012, scheduling an I-9 inspection to start on August 6, 2012. In response, Horno presented twenty-six original I-9s, a wage report, and various other documents. During the ensuing inspection, ICE served Horno with a Notice of Suspect Documents (NSD) and a Notice of Discrepancies in September 2012, followed in October 2012 by a Confirmation of Notice of Inspection Results, and a Change to Notice of Inspection Results. The government served a Notice of Intent to Fine (NIF) on the company on March 5, 2013, and Horno made a timely request for hearing on April 2, 2013. All conditions precedent to the institution of this proceeding have been satisfied.

III. LIABILITY FOR THE VIOLATIONS ALLEGED

A. The Government's Motion

ICE's motion says that Horno's payroll ledger evidences that Horno employed Karla Amador, Mirna Cerfico, Manuela Cruz, Diana Haza, Ramses Maiz, Fidencio Medrano, Octavio Millan, Mario Ojeda, and Gloria Saenz Lopez, named in Count I, but the company did not present I-9 forms for any of them upon request. ICE says Horno did not present any I-9s for the employees named in Count I until it filed its prehearing statement on June 3, 2014, at which time the company provided I-9s for only five of them.¹ The government says Horno provided no reason for its failure to timely present I-9 forms for these nine individuals and never requested additional time to do so. According to the government, most of the employment eligibility documents accompanying the late-produced I-9s are fraudulent.

ICE auditor Jose M. Sodari executed a declaration explaining that the Central Index System (CIS) is a computerized record system that ICE uses to verify the alien numbers that appear on employees' I-9s. The government points to printouts of the CIS reports for the alien numbers entered on the I-9s of Karla P. Amador, Ramses A. Maiz, and Gloria Saenz Lopez, and a basic report related to the Social Security number on Diana Haza's I-9, and says the permanent resident cards presented by Karla Amador and Ramses Maiz reflect A numbers that actually pertain to other individuals; the A number used by Gloria Saenz Lopez does not exist in the CIS database; and the Social Security number used by Diana Haza belongs to a deceased individual.

¹ Karla Amador, Diana Haza, Ramses Maiz, Fidencio Medrano, and Gloria Saenz Lopez.

With respect to Count II, ICE says there are material differences between the original I-9s the company presented in response to the NOI in August 2012 and the forms that Horno presented with its prehearing statement in June 2014 for the same individuals. ICE contends that because the subsequently provided I-9s are modified versions of the originals, they are entitled to no weight. ICE says further that it is self-evident that Horno failed to sign the section 2 attestations on the original I-9s for nineteen of the employees listed in Count II,² but that the later I-9s contain post-dated signatures on all these forms. ICE also points to substantive violations on the I-9s of the remaining four employees named in Count II. Section 2 of Patricia Gaona's I-9 references only a list C document; section 1 of Antonio M. Rodriguez's I-9 is missing an attestation as to his immigration status, and section 2 fails to identify proper documents under Lists A and B; and the section 1 attestation on Maria Y. Rodriguez's I-9 is missing the employee's signature.

The I-9 form Horno initially presented for Juana Mendez Garcia shows a section 1 attestation under the name "Juana G Mendez," and the box for lawful permanent resident is checked. The government says this attestation is faulty, first, because no alien number is entered, and second, because the employee has actually been a naturalized citizen since 1988. The government says Horno submitted a corrected I-9 for Juana Mendez in June 2014 under the name "Juanito M. Garcia" with a section 1 attestation correctly showing her status as a citizen or national of the United States. ICE says there is no explanation for why two forms for the same employee would be signed on the same date with two different names.

Exhibits accompanying ICE's motion for summary decision include: G-A)³ declaration of ICE auditor Jose M. Sodari (5 pp.); G-B) USCIS Central Index System and Basic Report printouts (8 pp.); G-C) payroll ledger for Horno (19 pp.); and G-D) Memorandum to Case File Determination of Civil Monetary Penalty (3 pp.). Exhibits submitted with the government's prehearing statement are: G-1)⁴ Notice of Inspection and administrative subpoena dated July 31, 2012 (5 pp.); G-2) I-9s and attachments (61 pp.); G-3) Horno's Wage Details dated July 19, 2012; G-4)

² Victorina Alvarez, Rosario J. Benavides, Mayra J. Jamarillo, Luz N. Carillo, Rafael Corona-Ruiz, Bogardo Cruz, Maricela Cruz, Mary Espinoza, Erika Gomez Gonzalez, Fanny Gonzalez, Leticia Gonzalez, Nery Haza, Norma Hernandez, Priscilla Hernandez, Juanita Mermea, Liliana Perez, Irene Reyes, (Rosario) Santos San Augustin, and Eulalia G. Zaragoza.

³ For clarity, the letter "G" is added before the government's alphabetical designations, and the letter "R" is added before the respondent's.

⁴ For clarity, the letter "G" is added before the government's numerical designation, and the letter "R" is added before the respondent's.

Horno's formation documents (3 pp.); and G-5) Notice of Intent to Fine dated March 5, 2013 (6 pp).

B. Horno's Motion for Summary Decision

Horno's motion says that at the time of the inspection, Beatriz Talayero asked the company's accountant, Luis Garza, to submit all required documents, which Garza immediately gathered from his archive and submitted. Talayero says she assumed that the paperwork Garza submitted was complete, but in fact not all the employee files were at Garza's office. Some files had been kept in a cabinet at Horno's office, which Talayero did not realize until September 2012, when the company received the NSD and Notice of Discrepancies. Talayero then searched her records and found the files for Fidencio Medrano, Diana Haza, Ramses Maiz, Gloria Saenz, and Karla Amador, but was unable to find the files for Mario Ojeda, Octavio Millan, and Marcela Cruz.

Talayero says that except for Fidencio Medrano, all the employees in Count I had actually quit prior to the ICE inspection, and that Karla Amador and Mirna Cerfico had quit even before the hiring process was complete. She says Amador attended "orientation/evaluation" for two days and submitted her ID and Social Security card for inspection, but quit before finishing the hiring process and without completing section 1 of her I-9. Talayero says that Cerfico also attended the orientation/evaluation, but only for a few hours and never returned. According to Talayero, Amador's and Cerfico's names appear on the payroll only because Horno pays individuals for attending the evaluation/orientation. Talayero says that when she contacted ICE auditor Sodari to seek advice on what the next step should be, he told her to submit paperwork only for the current employees. She met with Sodari in September 2012 and submitted an updated I-9 for Fidencio Medrano, who was then the only current employee. The I-9 forms for Diana Haza, Ramses Maiz, and Gloria Saenz were presented with the others tendered in June 2014 with Horno's prehearing statement.

As to Count II, Talayero acknowledges that the company originally failed to fill out the I-9 forms properly. She says the reason that the two sets of I-9s are materially different is that the originals were incomplete and Sodari instructed her to properly complete them, which she did to the best of her understanding. Talayero says she dated the I-9s with the hire dates of the employees because she misunderstood how the forms were supposed to be filled out. Talayero says further that Juana Mendez Garcia barely knows how to read or write and that it is apparent that the I-9 form originally submitted for her was filled out by someone who helped her with it and mistakenly marked the space for permanent resident instead of for U.S. citizen. When ICE asked for corrections, Talayero asked Garcia to fill out a new form, which she did, and Talayero signed the form and dated it December 5, 2006, the date Garcia was hired. Talayero says entering the employees' start dates was a mistake she repeated in the same pattern on all the forms that required corrections.

Exhibits accompanying Horno's motion for summary decision include: R-A) declaration of Beatriz Talayero (2 pp.); R-B) Horno's payroll ledger dated August 4, 2012 (2 pp.); and R-C) Horno's 2013 corporate tax return. Exhibits accompanying the company's prehearing statement include: R-1) certificate of service for Notice of Suspect Documents and Notice of Discrepancies, and accompanying documents (6 pp.); R-2) Change to Notice of Inspection Results and Confirmation of Notice of Inspection Results and accompanying documents (4 pp.); R-3) I-9s (62 pp.); R-4) mail correspondence between Horno and ICE (4 pp.); and R-5) electronic correspondence between Horno and ICE (6 pp.).

C. Discussion and Analysis

Employers have an affirmative duty to prepare I-9s for their employees and to make those forms available for inspection on at least three days' notice. 8 C.F.R. § 274a.2(b)(2)(ii) (2014). ICE gave Horno four business days' notice of the inspection commencing on August 6, 2012.⁵ Talayero concedes that Horno did not timely present I-9s for the employees listed in Count I. She contends, however, that Karla Amador and Mirna Cerfico were not employees because they only attended orientation, but never actually started work.

An employee is an individual who provides services or labor for an employer for wages or other remuneration. 8 C.F.R. § 274a.1(f). Because Horno compensated its employees for their participation in the orientation process and paid wages to them in exchange for their attendance, Amador and Cerfico were employees of Horno for purposes of this proceeding. Whether Horno was obligated to prepare I-9s for them depends upon the individual facts and circumstances of their respective hires, including the duration of their tenure. Although there is evidence of Amador's and Cerfico's termination dates and of the dates when their final paychecks were issued, the record does not reflect their respective hire dates or rates of pay.

Regulations provide, and case law emphasizes, that an employer must ensure that a new employee completes section 1 of the I-9 form on the individual's date of hire, 8 C.F.R. § 274a.2(b)(1)(i)(A), and that the employer must complete section 2 of the form within three business days of the hire, 8 C.F.R. § 274a.2(b)(1)(ii)(B). *See United States v. Two for Seven, LLC*, 10 OCAHO no. 1208, 4 (2014).⁶ When an employee quits unexpectedly, an employer may

⁵ August 4 and 5 fell on a weekend in 2012 and are not counted.

⁶ 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

under some circumstances avoid liability for failure to prepare an I-9 where there is evidence that the individual was hired for continued employment, but quit or was terminated shortly thereafter, frustrating the company's efforts to comply with the employment eligibility verification requirements. *See, e.g., id.* at 5-6 (declining to hold employer liable for failing to complete I-9s for three individuals for whom there was no showing of any wages paid); *United States v. A&J Kyoto Japanese Rest.*, 10 OCAHO no. 1186, 7 (2013) (finding no liability for failure to complete section 2 for four individuals who worked fewer than three days); *United States v. DuBois Farms, Inc.*, 2 OCAHO no. 376, 599, 628-29 (1991) (declining to impose liability for failure to complete I-9s for employees hired in the field but separated on the first day of employment).

The Notice of Suspect Documents reflects the handwritten annotation "QUIT 7/14/12" next to Karla P. Amador's name. Horno's payroll ledger of August 4, 2012 reflects that Karla P. Amador's year-to-date gross wages were \$101.50, consisting of two paychecks, one dated Saturday, June 30, 2012, for \$41.04 (\$43.50 less deductions) and the other dated Saturday, July 14, 2012, for \$54.73 (\$58 less deductions). Because Karla P. Amador received a paycheck on June 30, 2012, she must have been hired on or before that date. Amador did not quit until July 14, 2012, and was clearly an employee for more than three days. Horno should have completed an I-9 for her.

The Notice of Discrepancies contains the handwritten notation "QUIT 7/7/12" next to Mirna Cerfico's name, and the payroll ledger reflects that Mirna Cerfico's gross wages were \$65.25, consisting of one paycheck for \$61.56 (after deductions) dated July 7, 2012. Unless Horno paid Cerfico in excess of \$20 an hour to attend the orientation, however, there is no way that a paycheck for \$65.25 can represent only the "few hours" of attendance the company acknowledges for Cerfico. Because \$65.24 exceeds the compensation for an eight hour day at the minimum wage of \$7.25 an hour, the government made a prima facie showing of at least one day of employment, and Horno has not rebutted that showing. Even assuming *arguendo* that Cerfico did not return after the first day, this would not have affected Horno's obligation to ensure that Cerfico completed section 1 of her I-9 on her first day of employment, and the company should have presented her partially completed I-9 to ICE for inspection on August 6, 2012.

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>.

Absent an extension of time, an employer cannot avoid liability for failure to timely present I-9 forms by submitting the forms at some point later in the process, whether in the course of the inspection itself or later during the ensuing litigation. *See, e.g., United States v. Liberty Packaging, Inc.*, 11 OCAHO no. 1245, 5-6 (2015); *A&J Kyoto*, 10 OCAHO no. 1186 at 7. Talayero never presented I-9s for Mario Ojeda, Octavio Millan, or Marcela Cruz at all, and neither the belated presentation of an I-9 for Fidencio Medrano in September 2012 nor the belated presentation of I-9s for Karla Amador, Diana Haza, Ramses Maiz, and Gloria Saenz in 2014 can absolve the company of liability. Horno is accordingly liable for the nine violations alleged in Count I.

Employers are also obligated to sign the attestation portion of section 2 to attest under penalty of perjury that the hiring entity reviewed appropriate documents to verify the individual's identity and employment authorization. 8 C.F.R. § 274a.2(a)(3), (b)(1)(ii). For purposes of completing section 2, employers are also required to record that they examined either a List A document, or both a List B and a List C document for each employee. 8 C.F.R. § 274a.2(b)(1)(v).⁷ Visual examination of the I-9s for the employees named in Count II reflects, however, that the section 2 attestation on the I-9 forms for Rosario J. Benevides,⁸ Mayra J. Jamarillo, Luz N. Carillo, Rafael Corona-Ruiz, Bogardo Cruz, Maricela Cruz, Mary Espinoza, Ericka Gomez Gonzalez, Fanny Gonzalez, Leticia Gonzalez, Nery Haza, Norma Hernandez, Priscilla⁹ Hernandez, Juanita Mermea, Liliana Perez, Irene Reyes, Santos San Augustin,¹⁰ and Eulalia G. Zaragoza is totally blank, lacking both a signature and any entry showing the examination of appropriate documents. The section 2 attestation on the I-9 for Victorina Alvarez has some entries but is unsigned.

Visual examination of the I-9s of Patricia Gaona, Antonio M. Rodriguez, Maria Y. Rodriguez, and Juana M. Garcia, the four remaining employees named in Count II, reflects that substantive violations appear on each of these forms as well. Patricia Gaona's I-9 has a social security

⁷ List A documents establish both identity and employment eligibility, 8 C.F.R. § 274a.2(b)(1)(v)(A); List B documents establish identity only, 8 C.F.R. § 274a.2(b)(1)(v)(B); and List C documents establish only employment authorization, 8 C.F.R. § 274a.2(b)(1)(v)(C).

⁸ This employee signed her I-9 as Rosario J. Benavides. Her accompanying documents reflect the same signature on her Social Security card.

⁹ This employee's name appears on her I-9 as Priscila Hernandez. Her accompanying documents reflect the same spelling on her Social Security card.

¹⁰ This employee signed her I-9 as Rosario Sanagustin. Her accompanying documents reflect the same signature on her Social Security card.

number entered under List C, but there are no other entries in that section. Horno examined a List C document to establish Gaona's employment authorization, but failed to document the examination of a List B document to establish her identity. No box is checked in section 1 of the I-9s for either Antonio M. Rodriguez or Maria Y. Rodriguez, and Maria Y. Rodriguez did not sign the section 1 attestation.

The original I-9 for Juana G. Mendez¹¹ reflects that Mendez checked the box indicating her status as a lawful permanent resident, but no alien number is entered on the adjacent line. Unless an alien number appears in section 2 of the I-9 or a legible copy of the document accompanies the form, this is a substantive violation. *See* Paul W. Virtue, *Interim Guidelines: Section 274A(b)(6) of the Immigration & Nationality Act Added by Section 411 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (Mar. 6, 1997), available at 74 No. 16 Interpreter Releases 706 (Apr. 28, 1997); *United States v. Ketchikan Drywall Servs., Inc.*, 10 OCAHO no. 1139, 6 (2011). No alien number appears in section 2 of Mendez' I-9 form, and no copy of her permanent resident card is attached to her I-9.

Horno is accordingly liable for failure to ensure the proper completion of section 1 or failure to properly complete section 2 of the I-9 forms for the twenty-three individuals named in Count II.

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. The permissible penalties for the thirty-two violations found in this case accordingly range from a low of \$3520 to a high of \$35,200.

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).

A. The Government's Motion

ICE set a baseline penalty of \$935 for each of the thirty-two substantive violations based on internal agency guidelines setting that penalty amount when the error rate exceeds fifty percent; here, Horno's error rate was more than ninety percent. The government treated the issues of

¹¹ Mendez is named in the complaint as Juana M. Garcia.

good faith and the lack of any history of previous violations as neutral, neither aggravating nor mitigating the penalties based on those factors. The government says it mitigated all the penalties by five percent based on the size of Horno's business, but then aggravated them by five percent based on the seriousness of the violations, leaving the baseline assessment at \$935. For each of the violations ICE says involved unauthorized aliens, however, the base rate was aggravated by another five percent (\$46.75), so a penalty of \$981.75 is sought for each of those fourteen violations. The total penalty ICE seeks is \$30,574.50.

Although ICE says it treated the issue of good faith as neutral, the government nevertheless suggests that the company acted in bad faith by submitting a second set of modified, backdated I-9s and says the company didn't make a sincere attempt to ensure compliance with the statute. ICE also suggests that Beatriz Talayero, as a lawful permanent resident who recently naturalized as a U.S. citizen on March 14, 2013, should be familiar with immigration documents and processes, and that this fact undermines any claim of ignorance of the immigration process.

The government says in addition that the alien numbers and/or Social Security numbers for fourteen of Horno's thirty-five employees could not be verified. ICE says that when an alien number and/or Social Security number entered on an employee's I-9 either did not have a match in the CIS database or matched up to a different individual, a printout showing the no-match or mismatch was attached to the I-9. The declaration of auditor Sodari says that when ICE determines that an employee's documents are not valid, or that a recorded alien number does not "return to" the employee, a Notice of Suspect Documents is prepared and the employee is afforded an opportunity to present valid documents. In cases where not enough information is provided to make that clear a determination, a Notice of Discrepancies is prepared. This too affords the employee an opportunity to present valid documents.

Sodari points to Horno's response to the NSD, which says all fifteen employees¹² listed in the NSD quit or were terminated. Sodari points in addition to Horno's response to the Notice of Discrepancies, which reflects that of the eleven employees¹³ listed in that notice, seven quit and four presented additional documents. According to the Confirmation of Notice of Inspection Results, three of the four who presented additional documents, Rosario J. Benavides, Liliana

¹² Victorina Alvarez, Karla P. Amador, Mayra J. Jamarillo, Rafael Corona-Ruiz, Bogardo Cruz, Marcela Cruz, Ericka G. Perez, Fanny Gonzalez, Leticia Gonzalez, Nery Haza, Norma Hernandez, Pricilla Hernandez, Juan C. Ramos, Antonio M. Rodriguez, and (Rosario) Santos San Agustin.

¹³ Rosario J. Benavides, Mirna Cerfico, Manuela Cruz, Diana Haza, Ramses A. Maiz, Fidencio Medrano, Octavio Millan, Mario I. Ojeda, Liliana Perez, Maria Y. Rodriguez, and Gloria Saenz Lopez.

Perez, and Maria Y. Rodriguez were determined to be unauthorized. Only Fidencio Medrano was determined to be eligible for employment, as stated in the Change to Notice of Inspection Results. ICE says further that although Karla P. Amador was determined to be unauthorized, the employment eligibility of the remaining eight employees named in Count I could not be determined at that time.

ICE attached printouts to the I-9s of fourteen of the fifteen employees named in the NSD: Karla Amador, Victorina Alvarez, Mayra J. Jaramillo, Rafael Carona-Ruiz, Bogardo Cruz, Maricela Cruz Morales, Ericka Gomez Gonzalez, Fanny Gonzalez, Leticia Gonzalez, Nery Haza, Norma Hernandez, Priscilla Hernandez, Antonio M. Rodriguez, and (Rosario) Santos San Augustin. No documentary evidence was presented, however, as to the status of Rosario J. Benavides, Liliana Perez, or Maria Y. Rodriguez.

B. Horno's Motion for Summary Decision

Talayero takes issue with ICE's suggestion of bad faith, and says the high rate of violations may demonstrate the company's incompetence, but it does not reflect bad faith. Talayero points out that the original I-9s were presented "just the way they were kept in the records," and that any subsequent modifications were made only after Sodari told her to correct the forms. Talayero says the company has made every effort possible to comply with what she characterizes as a "very confusing scheme." Talayero also says that while she filled out an application for lawful permanent residence decades ago and recently naturalized as a U.S. citizen, this experience does not make her an expert on I-9 paperwork. Talayero did not challenge the unauthorized status of the workers named in the NSD, but says the company has neither the means nor the expertise to distinguish between genuine and fraudulent documents.

Talayero also says that she had never previously hired employees and that she hired an accountant, Luis Garza, to help with the administrative tasks due to her lack of expertise. Talayero says in her declaration that Horno has been operating at a loss for the past two years. Talayero describes herself as a small business entrepreneur fighting to stay afloat. Horno's 2013 corporate tax return shows gross receipts or sales of \$532,409, a total income of \$338,231, and a loss of \$58,516 for the year.

C. Discussion and Analysis

I note at the outset that quite apart from any analysis or consideration of the statutory penalty factors, OCAHO case law has consistently held that penalties so close to the maximum permissible as those proposed here should be reserved for more egregious violations than have been demonstrated on this record. *See, e.g., United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013). Consideration is also afforded to the nonstatutory factor of the general public

policy of leniency toward small entities reflected in the Regulatory Flexibility Act, 5 U.S.C. 601 note (2006), *amended by* § 223(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, 110 Stat. 864 (1996). The parties here agree that Horno is a small family business with no history of previous violations; the company is a quintessential “mom and pop” operation that is modest both in terms of its number of employees as well as its resources. ICE appropriately treated Horno’s size as a mitigating factor.

Although the government did not aggravate the penalties based on a lack of good faith, it nevertheless made a number of suggestions of bad faith that are not supported in this record. While ICE asserts that the high rate of violations “demonstrates that Horno was not engaged in a good faith effort to comply with the law,” OCAHO case law has long held that bad faith requires a showing of culpable conduct beyond merely a high rate of violations, and that even a dismal rate of I-9 compliance is not sufficient to make that showing. *See United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 477, 480 (1995) (modification by the Chief Administrative Hearing Officer). Talayero candidly acknowledged, moreover, that she misunderstood Sodari’s instructions when she attempted to correct the company’s I-9 forms. It appears exceedingly unlikely, moreover, that the experience of naturalizing as a citizen would provide an individual with any expertise in how to hire employees or properly complete I-9 forms. I thus cannot concur in any suggestion of bad faith, and weigh this factor more favorably to the company than the government does.

While all the violations are serious, seriousness may be evaluated on a continuum because not all violations are equally serious. *See United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 8 (2010) (citing *United States v. Carter*, 7 OCAHO no. 931, 121, 169 (1997)). A total failure to prepare an I-9 is one of the most serious violations. *See United States v. Metro Warehouse, Inc.*, 10 OCAHO no. 1207, 7 (citing *United States v. Reyes*, 4 OCAHO no. 592, 1, 10 (1994)). While slightly less serious, failure to sign the section 2 attestation is also a very serious violation. *See United States v. Emp’r Solutions Staffing Grp. II, LLC*, 11 OCAHO no. 1242, 11 (2015) (describing section 2 as “the very heart” of the verification process); *Ketchikan*, 10 OCAHO no. 1139 at 10 (finding that failure to sign section 2 is serious because it implies avoidance of liability for perjury) (citing *United States v. J.J.L.C., Inc.*, 1 OCAHO no. 154, 1089, 1098 (1990)).

Although to a lesser degree, failure to ensure that the employee checks a box in section 1 is also a serious substantive violation, *Ketchikan*, 10 OCAHO no. 1139 at 6, 15, as are failure to properly verify documents in section 2 and to ensure that an employee who attests to lawful permanent residence in section 1 enters an alien number on the form. *See United States v. Durable, Inc.*, 11 OCAHO no. 1229, 15 (2014); *see also United States v. Super 8 Motel & Villella Italian Rest.*, 10 OCAHO no. 1191, 14 (2013) (citing *United States v. DJ Drywall, Inc.*, 10 OCAHO no. 1136, 12-13 (2010)).

ICE met its burden of proving the unauthorized status of some, but not all, of the fourteen employees it alleges are unauthorized. The government's evidence reflects that a permanent resident card with a number ending in 522 is entered under List A on Victorina Alvarez' I-9, and a copy of the card is attached. The CIS printout shows that the alien number entered on Alvarez' I-9 and card is associated with a different individual whose name in no way resembles Alvarez' name and whose date of birth is more than twenty years before hers. Section 2 of Mayra J. Jaramillo's I-9 is blank, but a copy of Jaramillo's permanent resident card with an alien number ending in 453 accompanies her I-9. The attached CIS printout reflects that the A number on Jaramillo's card corresponds to a male whose name in no way resembles hers and whose date of birth is more than ten years earlier than hers. Section 2 of Rafael Carona-Ruiz' I-9 is blank, but a permanent resident card bearing an alien number ending in 241 accompanies his I-9. The attached CIS printout reflects that the A number on that card corresponds to an individual whose name does not resemble Carona-Ruiz' name and whose date of birth is almost ten years after his. Section 2 of Ericka Gomez Gonzalez' I-9 is blank, but a copy of Gonzalez' permanent resident card with an alien number ending in 178 accompanies her I-9. The attached CIS printout reflects that the A number on her card corresponds to a male whose name and date of birth do not resemble hers.

Section 2 of Fanny Gonzalez' I-9 is blank, but a copy of Fanny Gonzalez' permanent resident card with an alien number ending in 490 accompanies her I-9. The attached CIS printout reflects that the A number on her card does not correspond to any individual. Section 2 of Leticia Gonzalez' I-9 is blank, but a copy of Gonzalez' permanent resident card with an alien number ending in 668 accompanies her I-9. The attached CIS printout reflects that the A number on Gonzalez' card corresponds to a different individual whose name and date of birth bear no resemblance to hers. Section 2 of Norma Hernandez' I-9 is blank, but a copy of Hernandez' resident alien card with an alien number ending in 891 accompanies her I-9. The attached CIS printout reflects that the A number on Hernandez' card corresponds to another individual whose name and date of birth do not resemble hers.

Section 2 of Priscilla Hernandez' I-9 is blank, but a copy of a permanent resident alien card with an alien number ending in 797 accompanies her I-9. The attached CIS printout reflects that the number on her card corresponds to a male whose name and date of birth do not resemble hers. Section 2 of Rosario Santos Sanagustin's I-9 is blank, but a copy of a permanent resident card with an alien number ending in 765 accompanies her I-9. The attached CIS printout reflects that the A number on her card corresponds to a male with a totally different name and birthdate. Section 2 of Karla P. Amador's late-submitted I-9 reflects an A number ending in 684, and a copy of her permanent resident card accompanies the I-9. The CIS printout reflects that the A number on Amador's I-9 and card corresponds to a different individual whose name in no way resembles hers and whose date of birth is in 1921.

There are, however, discrepancies and ambiguities on the printouts for other employees. Section 2 of Bogardo Cruz' I-9 is blank, but a copy of Cruz' resident alien card with the alien number ending in 453 accompanies his I-9. The attached CIS printout, however, reflects two different A numbers, both the number on Cruz' resident alien card and another number ending in 241. The second number is the same as the alien number on Rafael Corona-Ruiz' permanent resident card, and the name that appears is the same name that appeared when ICE ran Rafael Corona-Ruiz' alien number.

Similarly, the printout attached to Maricela Cruz' I-9 is also inconclusive. Section 2 of Maricela Cruz' I-9 is blank, but a copy of her permanent resident card with the alien number ending in 221 accompanies her I-9. The attached CIS printout once again contains two different A numbers, the one appearing on Cruz' card, and the same number ending in 241 that appears on Rafael Corona-Ruiz' permanent resident card. Once again, the name that appears is the same one that resulted from running Rafael Corona-Ruiz' number.

The CIS printouts attached to Nery Haza's and Antonio M. Rodriguez' I-9s are also uninformative and there is no explanation of any kind from ICE. Nery Haza checked the box for U.S. citizen in section 1 of her I-9, section 2 is blank, and copies of Haza's Social Security card and Texas driver's license accompany her I-9. The attached CIS printout reflects that an A number ending in 895¹⁴ corresponds to an individual named Nery Fabiola Haza Ortiz whose birthdate is the same birthdate entered on Haza's I-9 form. The CIS report reflects that Haza was not a U.S. citizen although she checked a box attesting that she was. A second printout reflects that a "BCC" was issued to Haza on November 7, 1994, but ICE offers no explanation as to the meaning of this term or what effect, if any, it has. Its significance is not self-evident.

Antonio M. Rodriguez' I-9 did not contain an alien number either, but ICE provided one for him. Section 2 of Rodriguez' I-9 reflects that he presented a Mexican "Matricula Consular" card as a List B document and a Social Security card as a List C document, copies of which accompany his I-9. The attached CIS printout reflects that the A number ending in 156 that ICE provided corresponds to an individual named Antonio Magdaleno Rodriguez. Rodriguez did not enter his date of birth on his I-9, however, so it is not entirely clear whether the CIS printout relates to him or to some other individual with a similar name. Sodari's declaration suggests that both the number and the date of birth are required to run a definitive report. A second CIS printout reflects that an individual named Antonio Magdaleno Rodriguez was apprehended on August 2,

¹⁴ Haza did not enter an alien number on her I-9, but ICE agent Sodari explains that an employee's name and date of birth are sometimes queried to determine whether an alien number exists for an individual who did not provide one.

1989, but even assuming *arguendo* that it relates to Rodriguez, an apprehension in 1989 does not speak to Rodriguez's current employment status.

The declaration of ICE auditor Sodari reflects that Sodari was initially unable to determine the status of eight of the nine individuals in Count I for whom no I-9 was presented, and ICE initially aggravated the penalty for failure to present an I-9 only for Amador, and not for the other Count I employees. However, the government did subsequently submit CIS printouts generated from the late-submitted I-9s for some of the other employees in Count I, and demonstrated that three of them were also unauthorized for employment in the United States.

Although section 1 of Diana Haza's I-9 says she is a U.S. citizen born on January 28, 1980, a Basic Report reflects that the Social Security number ending in 8916 that Haza entered on her I-9 and that is shown on the copy of the document she presented was actually issued between the years 1934 to 1951 to an individual with a different name who was born in 1929. That individual is deceased, and death benefits are being paid on the individual's Social Security number.

Section 2 of Ramses A. Maiz' I-9 reflects the entry of a permanent resident card with an A number ending in 103, and a copy of the card with the same A number accompanies the I-9. ICE's printout shows that this A number corresponds to a female with a different name whose date of birth is more than thirty years before his. Section 2 of Gloria Saenz Lopez' I-9 reflects the entry of a permanent resident card with an alien number ending in 8432 and a copy of the card with the same A number accompanies the I-9. ICE's printout reflects that this A number does not correspond to any individual.

The government has accordingly shown that thirteen Horno employees were unauthorized for employment in the United States during the period at issue.

Horno has raised an additional issue as to the company's ability to pay, and the record supports a finding that the company has modest resources. A penalty needs to be sufficiently meaningful to accomplish the purpose of deterring future violations, *United States v. Jonel, Inc.*, 8 OCAHO no. 1008, 175, 201 (1998), but should not be "unduly punitive" in light of the respondent's resources, *United States v. Minaco Fashions, Inc.*, 3 OCAHO no. 587, 1900, 1909 (1993). Based on the record as a whole and the statutory factors in a particular, the penalties in this case should be adjusted to an amount closer to the midrange of permissible penalties.

For each of the four violations involving the failure to prepare and/or present I-9s for the unauthorized workers named in Count I, Karla P. Amador, Diana Haza, Ramses A. Maiz, and Gloria Saenz Lopez, the penalties will be assessed at the rate of \$600, and for the five remaining violations in Count I, the penalties are assessed at the rate of \$500 each. For each of the nine violations in Count II involving failure to sign section 2 of the I-9s for unauthorized workers, the

penalty is \$500; for the remaining ten failures to sign section 2 the penalty is \$400 each. The other four Count II violations are assessed at the rate of \$300 each. The total penalty is \$14,600.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Horno MSJ Ltd. Co., is a bakery located in San Antonio, Texas that was opened in March 2006.
2. Beatriz Talayero, Horno MSJ Ltd. Co.'s manager, and Antonio Talayero, her husband, co-own Horno.
3. The Department of Homeland Security, Immigration and Customs Enforcement served Horno MSJ Ltd. Co. with a Notice of Inspection and administrative subpoena on July 31, 2012.
4. The Department of Homeland Security, Immigration and Customs Enforcement served Horno MSJ Ltd. Co. with a Notice of Suspect Documents and a Notice of Discrepancies in September 2012.
5. The Department of Homeland Security, Immigration and Customs Enforcement served Horno MSJ Ltd. Co. with a Notice of Intent to Fine on March 5, 2013.
6. Horno MSJ Ltd. Co. made a timely request for hearing on April 2, 2013.
7. Horno MSJ Ltd. Co. hired Karla P. Amador, Mirna Cerfico, Manuela Cruz, Diana Haza, Ramses A. Maiz, Fidencio Medrano, Octavio Millan, Mario I. Ojeda, and Gloria Saenz Lopez and failed to present I-9 forms for them within four days after being requested to do so by the Department of Homeland Security, Immigration and Customs Enforcement.
8. Horno MSJ Ltd. Co. hired Rosario J. Benevides, Mayra J. Jamarillo, Luz N. Carillo, Rafael Corona-Ruiz, Bogardo Cruz, Maricela Cruz, Mary Espinoza, Ericka Gomez Gonzalez, Fanny Gonzalez, Leticia Gonzalez, Nery Haza, Norma Hernandez, Priscilla Hernandez, Juanita Mermea, Liliana Perez, Irene Reyes, Santos San Augustin, and Eulalia G. Zaragoza, and left section 2 of their I-9 forms totally blank.
9. Horno MSJ Ltd. Co. hired Victorina Alvarez and failed to sign the section 2 attestation on her I-9 form.

10. Horno MSJ Ltd. Co. hired Patricia Gaona and entered only a List C document in section 2 of her I-9 form.
11. Horno MSJ Ltd. Co. hired Antonio M. Rodriguez and Maria Y. Rodriguez and failed to ensure that they checked a box in section 1 of their respective I-9 forms to indicate their status as a U.S. citizens, lawful permanent residents, or aliens authorized to work in the United States.
12. Horno MSJ Ltd. Co. hired Juana M. Garcia and failed to ensure that she entered an alien number in section 1 of her I-9 after she checked the box indicating status as a lawful permanent resident, and no copy of her permanent resident card was attached to her I-9.
13. Karla P. Amador, Diana Haza, Ramses A. Maiz, Gloria Saenz Lopez, Victorina Alvarez, Mayra J. Jaramillo, Rafael Carona-Ruiz, Ericka Gomez Gonzalez, Fanny Gonzalez, Leticia Gonzalez, Norma Hernandez, Priscilla Hernandez, and (Rosario) Santos San Augustin were at the time of the events in question unauthorized for employment in the United States.
14. Horno MSJ Ltd. Co. has no history of previous violations of the employment eligibility verification system.

B. Conclusions of Law

1. Horno MSJ Ltd. Co. is an entity within the meaning of 8 U.S.C. § 1324a(a)(1) (2012).
2. Horno MSJ Ltd. Co. is liable for thirty-two violations of 8 U.S.C. § 1324a(a)(1)(B) (2012).
3. An employee is an individual who provides services or labor for an employer for wages or other remuneration. 8 C.F.R. §274.1(f).
4. Employers are obligated to prepare and retain Employment Eligibility Verification Forms for new employees and to make those forms available for inspection on at least three business days' notice. 8 C.F.R. § 274a.2(b)(2)(ii).
5. Absent an extension of time, an employer cannot avoid liability for failure to timely present I-9 forms by submitting the forms at some point later in the process, whether in the course of the inspection itself or later during the ensuing litigation. *See, e.g., United States v. A&J Kyoto Rest.*, 10 OCAHO no. 1186, 7 (2013).
6. When an employee quits unexpectedly, an employer may avoid liability for failure to prepare that employee's I-9 only where there is evidence that the individual was hired for continued employment, but quit or was terminated shortly thereafter, frustrating the company's efforts to

comply with the employment eligibility verification requirements. *See, e.g., United States v. Two for Seven*, 10 OCAHO no. 1208, 4 (2014); *United States v. A&J Kyoto Japanese Rest.*, 10 OCAHO no. 1186, 5-6 (2013); *United States v. DuBois Farms, Inc.*, 2 OCAHO no. 376, 599, 625-29 (1991).

7. Employers are obligated to sign the attestation portion of section 2 to attest under penalty of perjury that the hiring entity reviewed appropriate documents to verify the individual's identity and employment authorization. 8 C.F.R. § 274a.2(a)(3), (b)(1)(ii).

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 seriousness of a violation is evaluated on a continuum because not all violations are equally serious. *See United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 8 (2010) (citing *United States v. Carter*, 7 OCAHO no. 931, 121, 169 (1997)).

10. A total failure to prepare an I-9 is one of the most serious violations. *See United States v. Metro. Warehouse, Inc.*, 10 OCAHO no. 1207, 7 (citing *United States v. Reyes*, 4 OCAHO no. 592, 1, 10 (1994)).

11. Failure to sign section 2 is a very serious violation. *See United States v. Emp'r Solutions Staffing Grp. II, LLC*, 11 OCAHO no. 1242, 11 (2015); *United States v. Ketchikan Drywall Servs., Inc.*, 10 OCAHO no. 1139, 10 (2011) (citing *United States v. J.J.L.C.*, 1 OCAHO no. 154, 1089, 1098 (1990)).

12. The following violations are considered serious: failure to properly verify an employee's documents in section 2; failure to ensure that an employee attests to his or her status in section 1; and failure to ensure that an employee includes an alien number after attesting to status as a legal permanent resident. *See United States v. Durable, Inc.*, 11 OCAHO no. 1229, 15 (2014); *see also United States v. Super 8 Motel & Villella Italian Rest.*, 10 OCAHO no. 1191, 14 (2013) (citing *United States v. DJ Drywall, Inc.*, 10 OCAHO no. 1136, 12-13 (2010)).

13. Bad faith requires a showing of culpable conduct beyond the mere failure of compliance with the verification requirements, and even a dismal rate of I-9 compliance is not sufficient to make that showing. *See United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 477, 480 (1995) (modification by the Chief Administrative Hearing Officer).

14. Penalties approaching the maximum permissible should be reserved for the most egregious violations. *See, e.g., United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013).

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

Horno MSJ, Ltd. Company is liable for thirty-two violations of 8 U.S.C. § 1324a(a)(1)(B) and is ordered to pay a civil money penalty totaling \$14,600. The parties are encouraged to set up a payment schedule that will minimize the impact of the penalty on the operation of the business.

SO ORDERED.

Dated and entered this 3rd day of April, 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.