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

April 23, 2019

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. § 1324a Proceeding OCAHO Case No. 18A00061
INTELLI TRANSPORT SERVICES, INC. Respondent.	)	

FINAL DECISION AND ORDER

This case arises under 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). Pending before the Court are Complainant's Motion for Summary Decision and Respondent's Motion for Summary Decision. Complainant filed a response to Respondent's motion; Respondent did not file a response to Complainant's motion.

I. BACKGROUND

Respondent is a corporation incorporated in California. Complainant's Prehearing Statement at 2; Resp't Prehearing Statement at 2.[1] On January 31, 2017, Complainant served Respondent with the Notice of Inspection (NOI). Complainant's Mot. Summ. Dec. Ex. B.[2] In the NOI, Complainant requested that Respondent present its Forms I-9 no later than February 7, 2017. *Id.* On February 7, 2017, Respondent presented Forms I-9 for eleven (11) employees, Jingon Bae, Michael Chung, Gerardo Gurrola, John Jang, Hyun Jin Kim, Changsun Lee, Kwang Hee Lee, John Joonhong Park, Martin Ramos, and Taewon Park. C's Mot. Ex. G-3. Complainant's auditors inspected Respondent's I-9s and determined that Respondent prepared all of the I-9s after it received the NOI. C's PHS at 2; R's PHS at 2. On February 22, 2018, Complainant

[1] Complainant's Prehearing Statement will be abbreviated to "C's PHS" and Respondent's Prehearing Statement will be abbreviated to "R's PHS."

[2] Complainant's Motion for Summary Decision and exhibits thereto will be abbreviated at "C's Mot. Ex #." Respondent's Motion for Summary Decision and exhibits thereto will be abbreviated at "R's Mot. Ex. [Title of Exhibit]."

served Respondent with the Notice of Intent to Fine. C's Mot. Ex. A at 2. On February 26, 2018, Respondent timely requested a hearing. C's Mot. Ex. B. Complainant filed the Complaint on May 14, 2018 and alleged one count for failure to prepare Forms I-9. Complainant seeks $21,506.10 in penalties. All conditions precedent to this proceeding have been satisfied.

II. STANDARDS

A. Summary Judgment

Under the OCAHO rules, the Administrative Law Judge (ALJ) "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c).[3] "An issue of fact is genuine only if it has a real basis in the record" and "[a] genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit." *Sepahpour v. Unisys, Inc.*, 3 OCAHO no. 500, 1012, 1014 (1993) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).[4]

"Once the moving party satisfies its initial burden of demonstrating both the absence of a material factual issue and that the party is entitled to judgment as a matter of law, the nonmoving party must come forward with contravening evidence to avoid summary resolution." *U.S. v. Four Seasons Earthworks, Inc.*, 10 OCAHO no. 1150, 3 (2012) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). "[T]he party opposing the motion for summary decision 'may not rest upon the mere allegations or denials' of its pleadings, but must 'set forth specific facts showing that there is a genuine issue of fact for the hearing." *U.S. v. 3679 Commerce Place, Inc. d/b/a Waterstone Grill*, 12 OCAHO no. 1296, 4 (2017) (quoting 28 C.F.R. § 68.38(b)). The Court views all facts and reasonable inferences "in the light most favorable to the non-moving party." *U.S. v. Prima Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994) (citations omitted).

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[3] *See* Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2016).

[4] 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 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.

B. Civil Money Penalties

The Court assesses civil penalties for paperwork violations in accordance with the parameters set forth in 8 C.F.R. § 274a.10(b)(2) and 28 C.F.R. § 85.5. For civil penalties assessed after January 29, 2018, the minimum penalty for each violation that occurred after November 2, 2015 is $224, and the maximum penalty is $2,236. § 274a.10(b)(2); § 85.5. Complainant has the burden of proof with respect to penalties and "must prove the existence of an aggravating factor by a preponderance of the evidence." *3679 Commerce Place*, 12 OCAHO no. 1296 at 4 (citing *U.S. v. March Constr., Inc.*, 10 OCAHO no. 1158, 4 (2012); *U.S. v. Carter*, 7 OCAHO no. 931, 121, 159 (1997)). However, Complainant's "penalty calculations are not binding in OCAHO proceedings, and the [Administrative Law Judge] may examine the penalties *de novo* if appropriate." *U.S. v. Alpine Staffing, Inc.*, 12 OCAHO no. 1303, 10 (2017).

To determine the appropriate penalty amount, "the following statutory factors must be considered: 1) the size of the employer's business, 2) the employer's good faith, 3) the seriousness of the violations, 4) whether or not the individual was an unauthorized alien, and 5) the employer's history of previous violations." *Id.* at 9 (citing 8 U.S.C. § 1324a(e)(5)). The Court considers the facts and circumstances of the individual case to determine the weight it gives to each factor. *U.S. v. Metro. Enters.*, 12 OCAHO no. 1297, 8 (2017). While the statutory factors must be considered in every case, § 1324a(e)(5) "does not mandate any particular outcome of such consideration, and nothing in the statute or the regulations requires . . . that the same weight be given to each of the factors in every case . . . or that the weight given to any one factor is limited to any particular percentage of the total." *U.S. v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6–7 (2011) (internal citations omitted). Further, the Court may also consider other, non-statutory factors as appropriate in the specific case. *3679 Commerce Place*, 12 OCAHO no. 1296 at 4 (citation omitted).

III. DISCUSSION

A. Liability

Complainant contends that Respondent failed to prepare Forms I-9 for eleven employees and that Respondent only prepared those Forms I-9 after Complainant served the NOI. Respondent stipulates that it prepared the eleven Forms I-9 after it received the Notice of Inspection. R's PHS at 2. "An I-9 form is timely prepared when the employee completes section 1 on the day the employee is hired, and the employer completes section 2 within three business days of the hire." *U.S. v. A&J Kyoto Japanese Rest., Inc.*, 10 OCAHO no. 1186, 5 (2013) (citing 8 C.F.R. § 274a.2(b)(1)(i)(A), (ii)(B)).

A visual inspection of the I-9s reveals that Respondent prepared section 2 of all eleven I-9s on February 1, 2017, after Complainant served the NOI. C's Mot. Ex. G-3. Respondent's employees' hire dates ranged from June 15, 2009 to December 1, 2016. C's Mot. Ex. G-4. Two of Respondent's employees completed section 1 on January 31, 2017, while the remaining employees completed section 1 on February 1, 2017. C's Mot. Ex. G-3. Based on Respondent's

concession and a visual inspection of the I-9s, the Court finds that Respondent failed to prepare the Forms I-9 for any of its employees at the time of hire, rather Respondent did not prepare the I-9s until after Complainant served the NOI.

Respondent asserts that it is not liable for failing to complete a Form I-9 for Taewon Park because he is the "100% owner" of Intelli Transport. R's PHS at 2; Answer at 1. Complainant acknowledges that Taewon Park is the president. C's Mot. at 8. However, Complainant contends it included Taewon Park in the violations because Respondent listed him on its employee list and the quarterly wage report shows he received remuneration. *Id.*

The record shows that Taewon Park received wages, lists his hire date as February 2, 2011, and shows he did not complete his I-9 until February 1, 2017. C's Mot. Ex. G-3, G-4. However, in the record, Taewon Park is identified as Respondent's "President" and "CEO." Answer at 2; R's PHS at 4. Additionally, he signed all of the I-9s as "President" and he represented Respondent in these proceedings as "President, CEO." Answer at 2; R's PHS at 4; C's Mot. Ex. G-3. "As a general rule, OCAHO case law has recognized that an individual is not an employee of an enterprise if he or she has an ownership interest in, and control over, all or part of the enterprise." *U.S. v. Alpine Staffing, Inc.*, 12 OCAHO no. 1303, 11 (2017) (citing *U.S. v. Speedy Gonzalez Constr. Inc.*, 11 OCAO no. 1228, 9 (2014)). "Whether an individual is an employee is a fact-intensive inquiry because '[n]either the form of the business entity nor the individual's title is determinative. It is the function of the individual within the enterprise that governs, and all the incidents of the relationship must be considered." *Id.* (quoting *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 450–51 (2003)). Further, to determine an individual's status as an employee, remuneration may be considered, but it is not a determinative factor. *U.S. v. Santiago's Repacking, Inc.*, 10 OCAHO no. 1153, 6 (2012). Since Taewon Park acted on behalf of the company during Complainant's investigation and these proceedings, it is evident that he has substantial ownership interests in and substantial control over Respondent. Viewing the evidence in the light most favorable to the non-moving party, Complainant failed to establish by the preponderance of the evidence that Taewon Park is Respondent's employee and that Respondent was required to present his I-9. As such, Respondent is not liable for any violation involving Taewon Park's Form I-9.

Additionally, Respondent argues it was only required to retain Forms I-9 for three years after the hire date. R's PHS; Answer at 1. Respondent appears to misunderstand the I-9 retention requirement. An employer must retain an employee's Form I-9 for "three years after the date of hire or one year after the date of the individual's employment is terminated, *whichever is later*[.]" § 274a.2(b)(2)(i)(A) (emphasis added). If an employee does not have a termination date "and remains a current employee, the employer is still required to retain an I-9 form for that individual for the duration of his or her employment and for a set period thereafter. The retention period for an I-9 form comes into play only after an individual actually becomes a former employee." *U.S. v. Dr. Robert Schaus, D.D.S.*, 11 OCAHO no. 1239, 7 (2014) (citing § 274a.2(b)(2)(i)(A)). Respondent's employee list and its quarterly wage report for December 2016 show that at the time of inspection, Respondent employed all of the individuals whose I-9s are at issue. C's Mot. Ex. G-4. Thus, Respondent was obligated to retain I-9s for all of its employees at issue.

The Court finds Respondent is liable for failure to prepare Forms I-9 for ten employees: Jingon Bae, Michael Chung, Gerardo Gurrola, John Jang, Hyun Jin Kim, Yoobin Kim, Changsun Lee, Kwang Hee Lee, John Joonhong Park, and Martin Ramos.

B. Penalties

Complainant seeks $1,862 per violation and a total of $21,506.10 in penalties. Respondent argues Complainant's proposed penalty amount is excessive, Complainant applied the wrong penalty range, and that Complainant failed to consider the five statutory factors. In response, Complainant asserts that it considered the five statutory factors when it determined the proposed penalty amount. Specifically, Complainant contends that it treated the size of the business, the presence of unauthorized workers, the history of violations, and Respondent's good faith as neutral factors, but enhanced the total penalty based on the seriousness of the violations.

The parties agree that Respondent is a small business with no previous history of violations and that Respondent did not employ any unauthorized workers. However, Respondent disputes Complainant's treatment of the business as a neutral factor. Respondent is a small business as it only employed ten (10) individuals. *U.S. v. Carter*, 7 OCAHO no. 931, 121, 160–62 (90 to 100 employees is considered a small business); *U.S. v. Hanna*, 1 OCAHO no. 200, 1327, 1332 (1990) (three to six employees). Complainant argues that treated the size of the business as neutral because, with so few employees, it should have been easier for Respondent to complete the Forms I-9 than a larger business, and Respondent did not have a designated human resources employee to help with the I-9 process. Complainant's Response to Resp't Mot. Summ. Dec. at 2. OCAHO has regularly mitigated penalties when the respondent is a small business. *See*, *e.g.*, *3679 Commerce Place*, 12 OCAHO no. 1296 at 8; *U.S. v. Pegasus Family Rest.*, 12 OCAHO no. 1293, 8 (2016). Thus, based on the very small size of the business, mitigation of the penalty is warranted.

Further, Complainant treated the good faith factor as neutral. "[T]he primary focus of a good faith analysis is on the respondent's compliance *before* the investigation." *U.S. v. New China Buffet Rest.*, 10 OCAHO no. 1133, 5 (2010). The record does not show that Respondent took any actions regarding the employment verification process prior to the receipt of the NOI, rather the record indicates that Respondent prepared all of the I-9s after Complainant served the NOI. Thus, the record lacks evidence that Respondent acted in good faith and Complainant properly treated this factor as neutral.

Complainant aggravated the penalty based on the seriousness of the violations. "Failure to prepare an I-9 at all is among the most serious of paperwork violations . . . , and while not as serious as total failure to prepare the form, failure to prepare an I-9 within three business days of hiring an employee is still a serious violation." *Metro. Warehouse, Inc.*, 10 OCAHO no. 1207 at 7 (2013) (citations omitted). "Timely completion of the I-9 is crucial to the employment

verification process because the longer an employer delays in completing an individual's I-9, the longer that individual could be working without authorization." *Schaus*, 11 OCAHO no. 1239 at 9. Here, Respondent prepared several employees' I-9s months after their hire dates, and prepared others years after the employees' hire dates.[5]

Additionally, Respondent argues that Complainant seeks penalties above the permissible penalty range of $110 to $1100 per violation. In support of its argument, Respondent cites the penalty range effective in 2008. R's Mot. at 1-2; R's Mot. Ex. R-7 (including Inflation Adjustment for Civil Monetary Penalties Under §§ 274A, 274B, and 274C of the INA, 73 Fed. Reg. 10130, 10134 (Feb. 26, 2008)). The penalty amounts have been adjusted since 2008 and the Federal Register Respondent cites does not reflect the current penalty range. *See* 28 C.F.R. §§ 68.52(c)(8); 85.5. The regulations state that the applicable penalty range for violations that occurred between September 29, 1999 and November 2, 2015 is $110 to $1100. 8 C.F.R. § 274a.10(b)(2). Further, the current regulations state that "[f]or penalties assessed after January 29, 2018, whose violations occurred after November 2, 2015[,]" the applicable penalty range is $224 to a maximum of $2,236 per violation. § 85.5; § 68.52(c)(8).

However, Respondent appears to argue that the applicable penalty range is $110 to $1100 because some of the violations occurred before November 2, 2015. OCAHO has held that the duty to prepare an I-9 does not terminate on the third day after hire, rather "the failure to prepare an I-9 for an employee continues until such time as the form is actually completed, and thereafter until the retention period expires." *Schaus*, 11 OCAHO no. 1239 at 12. Although Respondent hired several individuals prior to November 2, 2015, this case rests on "the continuing failure to prepare I-9s, and the penalties assessed are for contemporaneous violations; no penalties are predicated on stale violations that were already complete before [November 2, 2015.]" *Id.* As such, the appropriate penalty range is $224 to $2,236 per violation. § 85.5.

IV. CONCLUSION

Based on the ten violations for which Respondent is liable, penalties in this case range from $2,240 to $22,360. Complainant seeks a penalty of $1,862 for each violation, which is only $374 short of the maximum permissible penalty per violation. "OCAHO case law makes clear that penalties approaching the maximum permissible fine amount should be reserved for the most egregious violations." *U.S. v. Int'l Packaging, Inc.*, 12 OCAHO no. 1275A, 8 (2016) (citing *U.S. v. Fowler Equip.*, 10 OCAHO no. 1169, 6 (2013)). Penalties "should be sufficiently meaningful to accomplish the purpose of deterring future violations . . . [,]" but penalties should not be unduly punitive. *A&J Kyoto Japanese Rest.*, 10 OCAHO no. 1186 at 8 (citations omitted). While Respondent's violations are serious, "they are not so egregious as to call for a maximum penalty." *Schaus*, 11 OCAHO no. 1239 at 12.

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[5] Additionally, a visual inspection of the Forms I-9 reveals that Respondent failed to ensure two of its employees, Gerardo Gurrola and Yoobin Kim, signed section one of their Forms I-9. "[F]ailure to ensure that the employee signs section 1 is a serious violation because the employee has not attested to being authorized to work in the United States." *U.S. v. Durable, Inc.*, 11 OCAHO no. 1229, 15 (2014).

Based on the record as a whole and the statutory factors, a penalty adjustment to the lower range of permissible penalties is warranted due to the small size of the business. Accordingly, the proposed penalty in this case should be reduced to $450 for each of the ten violations for failure to prepare Forms I-9. Respondent is liable for a total penalty of $4500.

V. FINDINGS OF FACT

1. On January 31, 2017, the government served a Notice of Inspection on Intelli Transport Services.

2. On February 7, 2017, Intelli Transport Services presented eleven Forms I-9 for inspection and the government inspected the forms.

3. On February 22, 2018, the government served Intelli Transport Services a Notice of Intent to Fine alleging eleven (11) violations of 8 U.S.C. § 1324a and seeking a total of $21,506.10 in penalties.

4. Intelli Transport Services filed a timely request for hearing on February 26, 2018.

5. The government filed the Complaint on May 14, 2018.

6. Intelli Transport Services hired its employees between June 15, 2009 and December 1, 2016, but did not complete their Forms I-9 until February 2, 2017.

7. Intelli Transport Services is a small business.

8. Intelli Transport Services did not employ unauthorized workers.

9. Intelli Transport Services does not have a history of previous violations under 8 U.S.C. § 1324a.

VI. CONCLUSIONS OF LAW

1. Intelli Transport Services is an entity within the meaning of 8 U.S.C. § 1324a(a)(1)(B).

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

3. Intelli Transport Services is liable for ten (10) violations of 8 U.S.C. § 1324a(a)(1)(B).

4. Intelli Transport Services is not liable for any violations regarding Taewon Park's Form I-9.

5. An employer must ensure an employee completes section 1 of the Form I-9 on the date of hire, and the employer must complete section 2 within three business days of the hire. *U.S. v. A&J Kyoto Japanese Rest., Inc.*, 10 OCAHO no. 1186, 5 (2013); 8 C.F.R. § 274a.2(b)(1)(i)(A) (2018).

6. To determine the appropriate penalty amount, "the following statutory factors must be considered: 1) the size of the employer's business, 2) the employer's good faith, 3) the seriousness of the violations, 4) whether or not the individual was an unauthorized alien, and 5) the employer's history of previous violations." *U.S. v. Alpine Staffing, Inc.*, 12 OCAHO no. 1303, 9 (2017) (citing 8 U.S.C. § 1324a(e)(5)).

7. An employer is required to retain an employee's Form I-9 for three years after hire or one year after termination, whichever is later. 8 C.F.R. § 274a.2(b)(2)(i)(A) (2018).

8. "Failure to prepare an I-9 at all is among the most serious of paperwork violations . . . , and while not as serious as total failure to prepare the form, failure to prepare an I-9 within three business days of hiring an employee is still a serious violation." *U.S. v. Metro. Warehouse, Inc.*, 10 OCAHO no. 1207, 7 (2013).

9. For violations that occurred after November 2, 2015 and assessed after January 31, 2018, the applicable penalty range is $224 to $2,236. 28 C.F.R. § 85.5 (2018).

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

Intelli Transport Services, Inc. is liable for ten violations of 8 U.S.C. § 1324a(a)(1)(B) and is ordered to pay a total civil penalty of $4500.

SO ORDERED.

Dated and entered on April 23, 2019.

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Priscilla M. Rae
Administrative Law Judge

Appeal Information

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

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

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

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