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

May 27, 2021

UNITED STATES OF AMERICA, Complainant, v. PSYCHOSOMATIC FITNESS LLC; PSYCHOSOMATIC FITNESS PHOENIX LLC d/b/a PSYCHOSOMATIC TRANSFORMATION CENTER, Respondents.	)	8 U.S.C. § 1324a Proceeding OCAHO Case No. 2020A00063

ORDER ON MOTION FOR SUMMARY DECISION

I. INTRODUCTION

This action 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. On March 27, 2020, Complainant, the United States Department of Homeland Security, Immigration and Customs Enforcement (ICE) filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that Respondents, Psychosomatic Fitness, LLC, and Psychosomatic Fitness Phoenix, LLC, doing business as Psychosomatic Transformation Center, [1] violated the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a. Respondents, by way of their Answer, do not contest the facts which give rise to the allegations. Respondents do contest the civil penalty amount.

On November 2, 2020, Complainant filed Complainant's Motion for Summary Decision.

[1] At the outset, it is worth noting that Respondents are two distinct entities. One is Psychosomatic Fitness, LLC, (PFL) which does business as Psychosomatic Transformation Center and the other is Psychosomatic Fitness Phoenix, LLC (PFPL), which also did business as Psychosomatic Transformation Center prior to its closure in 2019. Opp'n Ex. R-1, 1, 4.

On December 15, 2020, Respondents filed a Response to Complainant United States of America's Motion for Summary Decision (Opposition) along with Respondents' Motion for "Judicial Notice" Regarding Complainant United States' Motion for Summary Decision. On February 19, 2021, the Court issued an Order Granting in Part and Denying in Part Respondent Motion for Official Notice.

II. PROCEDURAL HISTORY

On November 29, 2018, Complainant initiated an investigation into Respondents by serving a Notice of Inspection and an administrative subpoena. Mot. Summ. Decision 3.

On October 29, 2019, DHS served its Notice of Intent to Fine (NIF) on Brad Schneider, who is a co-manager of Respondents and owner of PFL. Compl. Ex. A. The NIF informed Respondents they had 30 days to request a hearing in writing. Compl. Ex. A.

On November 28, 2019, Schneider requested in writing, "a hearing on this matter." Compl. Ex. B. He later retained counsel. Compl. Ex. B.

On March 27, 2020, Complainant filed its Complaint with the Court. The Complaint contains two counts. Compl. 3–4. The first Count alleges Respondents failed to ensure its employees properly completed Sections 1, 2, and/or 3 of their I-9 Forms for 22 different employees. Compl. 3. Complainant characterized this as a "substantive paperwork violation." Compl. 3. The second Count alleges Respondents failed to prepare or present an I-9 Form for 88 employees. Compl. 4–6. The Complaint assigns a civil money penalty of $1,901.00 for each violation in each count. Compl. 4, 6.

On April 22, 2020, Respondents filed an Answer. Respondents admits to the facts set forth in Counts I and II of the Complaint. Answer 2. Under the "Affirmative Defenses" section of the Answer, Respondents assert that various portions of 8 U.S.C. § 1324a are "unconstitutional," and the "penalties requested by the Complainant are unreasonable and excessive . . . and . . . would effectively put the Respondent out of business." Answer 2–3.

On November 2, 2020, Complainant filed its Motion for Summary Decision requesting the Court issue a decision in its favor and enter a judgment consistent with the fine amount in the Complaint. Mot. Summ. Decision 24. In their Opposition filing, Respondents state that they "do[] not contest that [they] violated immigration record keeping laws as alleged[.]" Opp'n 1. Respondents contest the proposed penalty amount and cite both statutory and non-statutory factors in support of a penalty at the minimum of the statutory range. Opp'n 1, 3, 6.

III. POSITIONS OF THE PARTIES

Complainant states that "Respondents admit liability for the violations alleged in the Complaint, the conclusion as to the amount of the penalty is in dispute. Mot. Summ. Decision 7. Respondents "do not contest that [they] violated immigration record keeping laws as alleged[.]" Opp'n 1; *see* Answer 2. Thus, the parties do not dispute that Respondents violated 8 U.S.C. § 1324a(1)(B).

At issue before the Court is the appropriate penalty in this case.

A. Complainant's Position on the Appropriate Penalty

Complainant acknowledges that "[i]t is the government's burden to establish the existence of an aggravating factor by a preponderance of the evidence." Mot. Summ. Decision 21 (citing *United States v. New Star at Niagara Fall, Inc.*, 10 OCAHO no. 1192, 4 (2013)).[2] Complainant states that it utilizes the "methodology set forth in accordance with 83 Fed. Reg. 13826 (April 2, 2018)." *Id.* at 22.

Complainant began its analysis with the frequency of violations. Complainant determined Respondents had 110 "fineable violations" out of the 119 I-9 Forms, concluding that 92% of the time, Respondents did not properly prepare and/or maintain I-9 Forms. *Id.* Noting that Respondents have not previously violated the statute but that its violation percentage was over 50%, Complainant determined a "baseline" penalty of $1,901 per violation. *Id.*

As for aggravating factors, Complainant argues Respondents lacked good faith because they failed to register with a state E-Verify program per an Arizona program mandate. Mot. Summ. Decision 23. Complainant also cites to the magnitude of violations as an aggravating factor. *Id.* Complainant also relied on the "overall failure" percentage of 92% to aggravate the factor of "seriousness" of the violations. *Id.*

Complainant determined the "size of the business" was mitigating as it characterizes Respondents as "small size employer[s]." Mot. Summ. Decision 23. Complainant asserts

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[2] 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.

causality between business size and ability to pay, ultimately determining the initial penalty amount should be reduced by 5%. At the conclusion of its calculations, Complainant asserts a fine of $1,901.00 for each violation in each count is appropriate. *Id.* at 24.

B. Respondents' Position on the Appropriate Penalty

Respondents propose that the appropriate penalty is "$234.00, the statutory minimum, for the 22 violations in Count I (totaling $5148), and a penalty of $400.00 for the 88 violations in Count II (totaling $35,200)." Opp'n 1.

Relative to the statutory factors, Respondents characterize themselves as a "small" business; and Respondents concur with Complainant's assessment that such a characterization should have a mitigating impact on the penalty amount. Opp'n 3. Respondents diverge on the amount of the reduction, arguing the reduction in penalty should be greater than 5%. *Id*.

Respondents also assert they acted in good faith, arguing Complainant failed to demonstrate bad faith. Opp'n 4.

As to the seriousness of the violations, Respondents argue the violations described in Count I and Count II should not be assessed equally with respect to penalty calculation. Opp'n 5. Respondents assert that the Count I violations are less serious, conceding that the Count II violations are "the most serious" kinds of violations. *Id.* Respondents also argue that the Court should consider the absence of unauthorized aliens among Respondents' employees (noting that Complainant also drew the same conclusion in Exhibit G-4 at page 3) as a basis for further reducing the penalty. Opp'n 5–6.

Respondents also request the Court consider non-statutory factors, requesting the Court further mitigate the penalty. Opp'n 6. Respondents claim that federal law and OCAHO decisions "recognize a general public policy of leniency to small businesses." Opp'n 6. Additionally, Respondents request the Court "consider the ability of [Respondents] to pay the penalty requested and the state of the economy for fitness center/clubs and gyms given the COVID-19 pandemic." Opp'n 8. Respondents explain that they closed locations in 2019 and "lost money in 2019 and 2020." Opp'n 10. Respondents noted that COVID-19 caused the Arizona Governor to temporarily shut down all fitness centers and gym. *Id.* Respondents did not elect to re-open their last location when permitted to do so. *Id.*

IV. EVIDENCE CONSIDERED

A. Evidence Submitted by Complainant

Complainant submitted the following for the Court's consideration: Complaint, Notice of Intent to Fine (Form I-763), Application for Notice of Intent to Fine (Form I-761) and Attachment, Memorandum to Case File – Determination of Civil Monetary Penalty, Notice of Inspection, Respondents' I-9 Forms produced to ICE on or about December 6, 2018, Respondents' Employee Details and Employee Details, Unemployment Tax and Wage Report from Arizona Department of Economic Security for Psychosomatic Fitness LLC, and a Report of Investigation (ROI) from ICE.

Upon examination, none of the evidence put forth by Complainant raises concerns of reliability. The forms generated by Complainant are complete, with most referenced attachments included, and signed and dated where applicable.

The Memorandum to Case File's evidentiary value is low as it contains argument, not evidence. Complainant produced the relevant I-9 Forms for the Court's consideration. Mot. Summ. Decision 63–100.

Complainant also included an "Employee Summary" Report from the fourth quarter of 2018. Mot. Summ. Decision 102–24. The Summary lists 78 total employees with 36 active employees and 42 terminated employees. Mot. Summ. Decision 124. In a report labeled "Employee Details" with no date or other contextual information, Complainant provided a listing of employees and owners. Mot. Summ. Decision 126–32.

Complainant provided documents from the Arizona Department of Economic Security Unemployment Insurance Tax Section, specifically tax records from 2016, 2017, and 2018 for Psychosomatic Fitness LLC. Mot. Summ. Decision 134–57.

Finally, Complainant provided three Reports of Investigation (ROI's) in their entirety. Mot. Summ. Decision 160–73. All three ROIs provide the names of the special agent that completed the report. *Id.*

The first ROI is a three-page document providing a description of the commencement of the investigation and the service of the notice of inspection. Mot. Summ. Decision 160–62. The second ROI is a two-page document providing a description of the retrieval of the I-9 Forms from Respondents. Mot. Summ. Decision 163–64. The ROI references a DHS Form 6051R, which was executed to document the receipt of the forms; however, this document is not included in the evidence. *Id.* at 164. The third ROI is a nine-page document providing the assessment of the audit of the I-9 Forms collected from Respondent. Mot Summ. Decision 165–73. This ROI states "that there are 119 employees to be audited, 40 who are current." *Id.* at 166.

According to the ROI, of the 40 current employees, 17 have no I-9 Form on file. *Id.* Of the remaining 23 current employees with I-9 Forms, 15 have "substantive" violations; one had a "technical" violation; and seven had no violations. *Id.* at 167–69.

According to the third ROI, of the 79 former employees, 71 had no I-9 Form on file. *Id.* at 169–72. Of the remaining eight former employees with I-9 Forms on file, seven had "substantive" violations and one "technical" violation. *Id.* at 172.

B. Evidence Submitted by Respondents

Respondents submitted an Opposition to the Motion for Summary Decision with documentary evidence.

Respondents submitted a declaration from Mr. Schneider, a "co-manager" of both entities. Opp'n Ex. R-1, 1, 4. This declaration is signed and sworn to under penalty of perjury. Opp'n Ex. R-1, 5. It provides relevant information about the nature of the business and the state of its finances, presumably in support of an assessment of an "ability to pay" non-statutory factor. Opp'n Ex. R-1. The declaration's evidentiary value is not degraded as it appears relevant and reliable.

The declaration details (for PFL in 2019) a "net operating loss of $215,458" which it offset by a "$207,758 net gain from sales of assets[.]" Opp'n Ex. R-1, ¶ 8. PFL closed its sole physical location in March 2020 and has had "no employees since March 2020." *Id.* ¶ 9. Respondents also stated that, at the conclusion of 2019, PFL's assets were valued at $46,109. *Id.* ¶ 18.

In his declaration, Respondents' co-manager explains that COVID-19 changed the nature of how he conducted business – Respondents had no open physical locations. *Id.* ¶ 10. From March 29, 2020 through May 2020, gyms were unable to operate in Arizona. *Id.* ¶¶ 10, 14. PFL generated revenue beginning in March 29, 2020 by providing online fitness and personal training services. *Id.* ¶ 12. PFL also received revenue in 2020 from "asset purchasers who purchased assets." *Id.* ¶ 13. "For January 1, 2020 through November 30, 2020, PFL's gross revenues were $122,771.42, its cost of goods sold was $22,408.95, its expenses were $209,313.96, and its other income was $36,426.13, P[F]L suffered a net loss in 2020 of $72,525.36." *Id.* ¶ 16.

Ultimately, the co-manager states that PFL suffered a "net loss" in 2020 of $72,525.36. *Id.* At the conclusion of 2020, PFL had $53,047.68 in "current assets," the portion of which was liquid (i.e. "immediately available") totaled $23,853.27. *Id.* ¶ 19. The co-manager states PFL owes $207,259.88 in liabilities at the conclusion of 2020 and is in the process of "terminating its lease on it last remaining location." *Id.*

The co-manager also provides some information about the other entity, PFPL, which had similar ownership structure and interests and similar services to PFL. The second entity operated one

location, which was permanently closed in 2019. *Id.* ¶ 24. The co-manager states this second entity, PFPL, "is no longer in business," and has "not received or generated any income in 2020." *Id.* ¶¶ 25–26. Respondents do not provide any information about the value of the assets owned by or associated with this entity, nor does it provide any information about any liabilities owed by this entity.

Attached to the declaration is Exhibit A, which is comprised of Internal Revenue Service (IRS) Forms for 2019 for the first entity, PFL. The forms in Exhibit A are unsigned, and were prepared by a CPA firm who may have electronically submitted them. Opp'n Ex. R-1, Ex. A, 1. The IRS forms appear to be complete and reliable, and the figures match those referenced in the Declaration. Page 7 of Exhibit A appears to be a portion of a "Report" but at least one column of information is missing, thus the evidence is of limited utility. Page 13 of Exhibit A shows a distribution of $33,889. Page 16 of Exhibit A appears to be incomplete since at least one column is cut off, thus this information is of little utility. With the caveats referenced above, this Exhibit seems relevant and, on balance, reliable.

Exhibit B of the declaration contains a "Profit and Loss" document for calendar year 2019. The document provides accounting information for PFL. The document's author is unknown, but it appears complete. It states the gross profit for 2019 as $852,708.82. Opp'n Ex. R-1g, Ex. B, 1. Total expenses, including direct and "indirect" expenses total $1,010,252.02. *Id.* at 2. The document details the "net ordinary income" to be the difference between the two numbers, -$157,543.20. *Id.* Exhibit B also contains information about other sources of income and a $42,603.94 expense categorized as "ask my accountant[.]" *Id.*

Exhibit C of the declaration is a balance sheet for the year 2020 for PFL. The document's author is unknown, but it appears complete. The balance sheet lists total assets for the entity to be $155,360.28 as of November 30, 2020. Opp'n Ex. R-1, Ex. C, 1. The balance sheet lists its total current liabilities to be $207,259.88. *Id.* The balance sheet also shows a "Member Draw – Brad" for $71,390.66 and a "Total Member Draws – Josh" for $79,910.81. *Id.* These member draws result in a negative equity of $51,899.60. *Id.* at 2. Respondents provide no evidence to explain if these member draws were discretionary.

V. LEGAL STANDARDS

A. Summary Decision

28 C.F.R. § 68.38(c) establishes that an 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." OCAHO case law has held that "[a]n issue of material fact is genuine only if it has a real basis in the record" and that "[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) (first citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986); and then citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986)). "In determining whether there is a genuine issue as to a material fact, all facts and reasonable inferences to be derived therefrom are to be viewed in the light most favorable to the non-moving party." *United States v. Primera Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994) (citations omitted).

"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." *United States v. Four Seasons Earthworks, Inc.*, 10 OCAHO no. 1150, 3 (2012) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)); *see generally* Fed. R. Civ. P. 56(e).

B. Employment Verification Requirements

In cases arising under 8 U.S.C. § 1324a, the government has the burden of proving by a preponderance of the evidence that the respondent is liable for committing a violation of the employment eligibility verification requirements. *See United States v. Nebeker, Inc.*, 10 OCAHO no. 1165, 4 (2013) (citing *United States v. Am. Terrazzo Corp.*, 6 OCAHO no. 877, 577, 581 (1996)). In addition to proving liability, "[t]he government has the burden of proof with respect to the penalty, *United States v. March Constr., Inc.*, 10 OCAHO no. 1158, 4 (2012), and 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)." *United States v. Niche, Inc.*, 11 OCAHO no. 1250, 6 (2015).

Employers must prepare and retain I-9 Forms for employees hired after November 6, 1986, and are required to produce the I-9 Forms for inspection by the government upon three days' notice. 8 C.F.R. § 274a.2(b)(2)(ii); *United States v. Keegan Variety, LLC*, 11 OCAHO no. 1238, 2 (2014). The form must be retained for current employees and with respect to former employees "only for a period of three years after that employee's hire date, or one year after that employee's termination date, whichever is later." *United States v. H & H Saguaro Specialists*, 10 OCAHO no. 1144, 6 (2012) (first citing § 1324a(b)(3); then citing § 274a.2(b)(2)(i); and then citing *United States v. Ojeil*, 7 OCAHO no. 984, 982, 992 (1998)).

> Employers must ensure that an employee complete section 1 of the Form I-9 and attest to his or her citizenship or immigration status in the United States by signing and dating the Form I-9 no later than the first day of employment. 8 C.F.R. § 274a.2(a)(3) (attestation under penalty of perjury), (b)(1)(i)(A). For employees employed for three business days or more, an employer must sign section 2 of the Form I-9 within three days of the employee's first day of employment to attest under penalty of perjury that it reviewed the appropriate documents to verify the individual's identity and employment authorization. 8 C.F.R. § 274a.2(a)(3), (b)(1)(ii).

United States v. Alpine Staffing, Inc., 12 OCAHO no. 1303, 9 (2017).

"Failures to satisfy the requirements of the employment verification system are known as "paperwork violations," which are either "substantive" or "technical or procedural." *Id.* (citing Memorandum from Paul W. Virtue, INS Acting Exec. Comm'r of Programs, *Interim Guidelines: Section 274A(b)(6) of the Immigration & Nationality Act Added by Section 411 of the Illegal Immigration Reform & Immigrant Responsibility Act of 1996* (Mar. 6, 1997) (Virtue Memorandum)[3] *available at* 74 No. 16 *Interpreter Releases* 706 (Apr. 28, 1997)).

C. Civil Money Penalty

The applicable penalty range depends on the date of the violations and the date of assessment. *See* 8 C.F.R. § 274a.10(b)(2); 28 C.F.R. § 85.5. When a violation occurs after November 2, 2015, and the penalty is assessed between January 30, 2018 and June 19, 2020, the minimum penalty is $224 and the maximum is $2,236. *Id.*

"Generally, paperwork violations are 'continuous' violations until they are corrected or until the employer is no longer required to retain the Form I-9 pursuant to IRCA's retention requirements." *United States v. Visiontron Corp.*, 13 OCAHO no. 1348, 5 (2020) *citing* §274a.2(b)(2)(i)(A); *United States v. Curran Eng'g Co., Inc.*, 7 OCAHO no. 975, 874, 895 (1997); *United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1061, 11 (2000)).

"[T]he date of assessment is the date that ICE serves the NIF on a respondent." *United States v. Farias Enters. LLC*, 13 OCAHO no. 1338, 7 (2020).

"OCAHO case law has long recognized that there is no single preferred method of calculating penalties. *United States v. Felipe, Inc.*, 1 OCAHO no. 108, 726, 732 (1989) (affirmance by CAHO). The primary focus is on the reasonableness of the result achieved[.]" *United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 4 (2013). "The civil penalties for violations of § 1324a are intended 'to set a meaningful fine to promote future compliance without being unduly punitive.'" *United States v. 1423 Ave. J Foods Inc.*, 14 OCAHO no. 1361, 3 (2020) (quoting *United States v. 3679 Commerce Place, Inc.*, 12 OCAHO no. 1296, 7 (2017)).

1. Statutory Factors

In assessing an appropriate penalty, 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

[3] OCAHO is not bound by the Virtue Memo. *United States v. PM Packaging, Inc.*, 11 OCAHO no. 1253, 7 (2015) (citing *United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1071, 12 (2001)).

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).

As stated above, the government bears the burden of proving the existence of any aggravating factor by a preponderance of the evidence. "ICE's penalty calculations are not binding in OCAHO proceedings, and the ALJ may examine the penalties de novo if appropriate." *Alpine Staffing, Inc.*, 12 OCAHO no. 1303 at 10 (citing *United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6 (2011)).

> Although 8 U.S.C. § 1324a(e)(5) "requires due consideration of the enumerated factors, it does not mandate any particular outcome of such consideration, and nothing in the statute or the regulations requires in OCAHO proceedings either 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."

Id. (quoting *Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142 at 6–7.

The weight placed on each factor varies depending on the facts of case. *Id.* (citing *United States v. Raygoza,* 5 OCAHO no. 729, 48, 51 (1995). The failure to affirmatively establish the aggravation of a statutory factor does not require mitigation of that factor. *Id.* (citing *United States v. Romans Racing Stables, Inc.*, 11 OCAHO no. 1232, 5 (2014) (affirmance by the CAHO)).

2. Non-Statutory Factors

Additionally, "this administrative tribunal may also consider other, non-statutory factors, such as inability to pay and the public policy of leniency toward small businesses, as appropriate in the specific case." *United States v. Imacuclean Cleaning Servs., LLC*, 13 OCAHO no. 1327, 4 (2019) (citing *3679 Commerce Place*, 12 OCAHO no. 1296 at 4). "A party seeking consideration of a non-statutory factor, such as ability to pay the penalty, bears the burden of proof in showing that the factor should be considered as a matter of equity, and that the facts support such a favorable exercise of discretion." *United States v. Pegasus Family Rest.*, 12 OCAHO no. 1293, 10 (2016) (citing *United States v. Buffalo Transp., Inc.*, 11 OCAHO no. 1263, 11 (2015)). If the burden is met, then "as a matter of equity, the ALJ may weigh the facts to determine whether discretion warrants adjustment of the fine." *United States v. Integrity Concrete, Inc.*, 13 OCAHO no. 1307, 18 (2017) (citations omitted).

On ability to pay, OCAHO case law has held that "penalties are not meant to force employers out of business or result in the loss of employment for workers." *United States v. Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355a, 7 (2020) (citation omitted). To establish inability to pay, the employer should provide "detailed financial statements so that the Court can consider the 'complete picture of [the business's] financial health.'" *Id.* (citation omitted); *see Integrity*

Concrete, Inc., 13 OCAHO no. 1307 at 17 ("Without an audited financial history or more detailed information concerning [Respondent's] overall financial health, I find that [Respondent] has failed to establish financial inability to pay the total civil penalty at issue in this matter.").

VI. DISCUSSION

A. Propriety of Summary Decision

As both parties have indicated, there are no material facts in dispute. Mot. Summ. Decision 17; *see* Opp'n 1. Liability is not contested. The parties do not put forth any controversies related to the timing of the violations, the size of the business, or the permissibility of all individuals employed by Respondents to work in the United States. Rather, the parties dispute the application of the facts to the law and the appropriate penalty given the statutory and non-statutory factors. Because there is no genuine issue of material fact, summary decision is appropriate. 28 C.F.R. § 68.38(c); *Sepahpour*, 3 OCAHO no. 500 at 1014 (citing *Matsushita Elec. Indus. Co.*, 475 U.S. at 586–87; *Anderson*, 477 U.S. at 248).

B. Liability

Federal Rule of Civil Procedure 56(c) "permits consideration of 'admissions on file' for the basis of summary decision." *United States v. St. Croix Pers. Servs., Inc.*, 12 OCAHO no. 1289, 9 (2016) (citations omitted).

In Count I, Complainant alleges Respondents failed to ensure their employees properly completed Sections 1, 2, or 3 of the I-9 Form for 22 current or former employees hired after November 6, 1986. Compl. 3. Respondents admitted to Count I. Answer 2; Opp'n 1.

In Count II, Complainant alleges Respondents failed to prepare or present an I-9 Form for 88 current or former employees hired after November 6, 1986. Compl. 4–6. Respondents admitted to Count II. Answer 2; Opp'n 1.

Based on Respondents' admissions, Complainant has met its initial burden to establish liability and that it is entitled to a judgment as a matter of law. The Court finds that Respondents are liable for the 22 violations outlined in Count I and the 88 violations outlined in Count II.

C. Civil Money Penalty

Respondents argue that Complainant's proposed penalty amount is excessive and asks the Court to impose a lesser penalty of $234 per violation for the twenty-two violations in Count I and $400 per violation for the eight-eight violations in Count II. Opp'n 1.

In this case, the Court deems it appropriate to conduct a de novo review. *Alpine Staffing, Inc.*, 12 OCAHO no. 1303 at 10 (citing *Ice Castles Daycare*, 10 OCAHO no. 1142 at 6).

1. Size of Business[4]

There is no dispute that Respondents are small businesses. Mot. Sum. Dec. 23. "OCAHO has generally considered companies with fewer than 100 employees to be small businesses." *1523 Ave. J Foods Inc.*, 14 OCAHO no. 1361 at 6 (citations omitted). The Court concurs with the arguments provided by both parties that the size of the business warrants mitigation. This factor is mitigating in the penalty assessment. *See id.*

2. History of Violations

Respondents do not have a history of previous violations. Complainant assessed this factor as neutral. Mot. Summ. Decision Ex. G-4. Respondents do not contest this assessment. Opp'n 6.

Compliance with the law is the expectation. Indeed, "never having violated the law before does not necessarily warrant additional leniency, and it is still appropriate to treat [the history of violations factor] as a neutral one." *United States v. New China Buffet Rest.,* 10 OCAHO no. 1133, 6 (2010). As such, the history of violations is a neutral factor. *See 1523 Ave. J Foods Inc.*, 14 OCAHO no. 1361 at 6.

3. Good Faith

Complainant assessed the "intent" factor as aggravating, finding "bad faith" on the part of Respondents because many I-9 Forms were not produced; several I-9 Forms were produced after service of the Notice of Inspection. Mot. Summ. Decision 23. Additionally, Respondents were not registered in the state E-Verify program. *Id.*

"A low compliance rate, alone, does not warrant a finding of bad faith." *Eriksmoen Cottages, Ltd*., 14 OCAHO no. 1355a at 5 (citing *Farias Enters. LLC*, 13 OCAHO no. 1338 at 4).

[4] Prior ALJs have considered the "general public policy of leniency toward small entities, as set out in the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq. (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)" as a non-statutory factor. *Keegan Variety*, LLC, 11 OCAHO no. 1238 at 6 (citation omitted). But the undersigned finds that Congress has already required her to consider "the general public policy of leniency toward small entities" with the statutory factor of "size of business." *See generally Pegasus Family Rest.*, 12 OCAHO no. 1293 at 13 (citations omitted) ("[I]t is well-settled that prior OCAHO ALJ decisions do not necessarily bind a different ALJ in a future case."). Therefore, the undersigned will give weight to the small size of Respondents only as a statutory factor.

E-Verify is voluntary under current federal immigration law; Arizona state law makes E-Verify mandatory. *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 860 (9th Cir. 2009), *aff'd sub nom. Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582 (2011). An employer's requirements under Arizona law are independent of requirements imposed by the INA at § 1324a. *See id.* at 867. The analysis here must focus "on whether or not the employer reasonably attempted to comply *with its obligations under § 1324a* prior to issuance of the Notice of Inspection." *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 10 (2010) (emphasis added) (citations omitted). Because § 1324a does not require registration with E-Verify, Respondent's lack of registration (even though required by Arizona law) is not relevant to the penalty assessment. The state of Arizona may consider whether, if at all, it will enforce Arizona law related to E-Verify.

The record as developed by the parties ultimately does not demonstrate bad faith; however, it also does not demonstrate good faith. Mindful of the burden of proof allocation, Complainant has not met its burden to establish bad faith or a factor in aggravation. E-Verify registration is irrelevant, and low compliance rates alone do not demonstrate bad faith. Ultimately, the Court finds this factor to be neutral.

4. Seriousness

Complainant argued the violations were serious in nature and presented sufficient evidence on that point, both in referencing the volume of violations relative to employee numbers and by articulating the specific nature of the Respondent's shortcomings to include failures associated with timely completion of the forms (indeed, only completing a portion of them after notice of inspection). Mot. Summ. Decision 10–17. Ultimately, Complainant aggravated the penalty based on this factor because of Respondent's high overall failure rate and the seriousness of the violations. *Id.* at 23.

Given that "not all violations are equally serious[,]" "the seriousness of violations may be evaluated on a continuum[.]" *United States v. Senox Corp.*, 11 OCAHO no. 1219, 9 (2014) (citations omitted). "[V]iolations for failure to prepare I-9 forms . . . are more serious than are the paperwork violations . . . because the failure to prepare the forms completely subverts the purpose of the law." *Id.* (citing *United States v. Skydive Acad. of Hi. Corp.*, 6 OCAHO no. 848, 235, 246 (1996)); *see also United States v. Speedy Gonzalez Constr., Inc.*, 11 OCAHO no. 1243, 5 (2015) (holding that failure to ensure proper completion of I-9 Forms are serious but somewhat less serious than failure to prepare).

While the Court finds the violations in Count I are significant and serious, the violations outlined in Count II are, based on the rationale above, more serious. The Complainant met its burden of proof relative to the aggravating nature of the seriousness of the offense on both counts, with a higher aggravation for Count II as the violations are evaluated on a continuum.

5. Presence of Unauthorized Workers

Both Complainant and Respondents confirm there were no unauthorized workers. Mot. Summ. Decision Ex. G-4 at 4; Opp'n 5. Complainant confirmed this information by way of "social security number checks on [Respondent] reported wage reports." Mot. Summ. Decision Ex. G-4 at 3. Similar to the "history of violations" factor, compliance with the law is the expectation. *Romans Racing Stables, Inc.*, 11 OCAHO no. 1232 at 5. The Court finds this factor to be neutral in its evaluation of the appropriate penalty. *See id.*

6. Non-statutory Factors

a. Proffered Evidence

Respondents submitted a signed and sworn declaration providing details related to business decisions, assets, profits, and the effect of the COVID-19 pandemic on the business' overall health. The information provided is largely confirmed and bolstered by tax documents and profit and loss statements. As noted above, several documents and pages have missing information, which diminish their utility. Several documents appear to be of unknown origin as they are undated and unsigned. The documents with minimal indicia of authenticity carry diminished weight; however, on balance, when these documents are coupled with the detailed declaration, the totality of the evidence sufficiently meets the preponderant evidence standard. Thus, Respondents have provided sufficient evidence for the Court to consider the non-statutory factor of ability to pay. A discussion of whether, if at all, this evidence further mitigates the penalty now follows.

b. Equity and Discretion

"[P]enalties are not meant to force employers out of business or result in the loss of employment for workers." *United States v. Two for Seven, LLC*, 10 OCAHO no. 1208, 8–9 (2014). Nevertheless, the facts presented must support a favorable exercise of discretion. *Pegasus Family Rest.*, 12 OCAHO no. 1293 at 10. A determination related to ability to pay is not automatic; rather the ALJ "weigh[s] the facts to determine whether discretion warrants adjustment of the fine." *Integrity Concrete, Inc.*, 13 OCAHO no. 1307 at 18.

Respondents, comprised of two business entities, submitted detailed information for one of the two entities (PFL) but not for the other (PFPL), which, permanently closed in 2019 (after Complainant initiated the investigation into Respondents). Opp'n Ex. R-1, ¶ 8. Respondents provide no information about whether PFPL had any assets or funds at the time of closure. Respondents did provide detailed information about PFL, the entity currently in business.

PFL asserts it was impacted by the COVID-19 pandemic, explaining that the Governor of Arizona issued several orders which impacted businesses in the state, including orders requiring businesses to "shut down" and orders which required businesses to institute additional measures to keep patrons safe. Opp'n Ex. R-1, ¶ 10. PFL explained that it "reduced" its staff due to the pandemic. *Id.* ¶ 12 In fact, it had "no employees" after the start of the pandemic and it moved to a revenue stream involving online fitness coaching. *Id.* ¶ 12. PFL also stated that it elected not to resume in-person operations in 2020, even when permitted to do so, based on a perception of elevated costs exceeding profit. *Id.* ¶ 14.

In 2019, PFL had a "net operating loss" which was offset by "net gain from sale of assets" resulting in a $7,700 shortfall. *Id.* ¶ 8 (citing Opp'n Ex. R-1, Ex. A). In 2019, PFL also distributed $33,889 as indicated by its IRS Form 1120S. Opp'n Ex. R-1, Ex. A, 4. In 2019, the business also had a $43,603 expense categorized as "ask my accountant." Opp'n Ex. R-1, Ex. B, 2.

PFL entered 2020 with assets valued at $46,109. Opp'n Ex. R-1, ¶ 18 (citing Opp'n Ex. R-1, Ex. A). PFL states it suffered a "net loss" in 2020 of $75,525.36 and had $53,047.68 in "current assets" with $23,853.27 "immediately available." Opp'n Ex. R-1, ¶¶ 16, 19 (citing Opp'n Ex. R-1, Ex. B). Of note, in 2020, PFL issued a "member draw" for "Brad" and "Josh" totaling approximately $150,000. Opp'n Ex. R-1, Ex. C, 1. The balance sheet shows negative equity of $51,899. *Id.* at 2.

Initially, the Court finds the kind of evidence presented (inability to pay because PFL has been adversely impacted by the COVID-19) may warrant mitigation in some circumstances. From an equity standpoint, however, mitigation based on inability to pay is not warranted in this case.

"Penalties are not meant to force employers out of business or result in the loss of employment for workers." *Two for Seven, LLC*, 10 OCAHO no. 1208 at 8–9. Here, Respondents had the opportunity to re-open PFL with additional protocols in place, but elected not to do so.

Additionally, Respondents did not retain its staff on payroll during the pandemic, rather they "reduced" the staff to zero at the outset of the pandemic. Opp'n Ex. R-1 ¶¶ 9,12. The Respondent should not and will not now be permitted to seek mitigation under the auspices of safeguarding employment opportunities for those who work at an impacted business.

Furthermore, the Court notes with concern that Respondents provided a distribution in 2019, knowing they were in violation of § 1324a and knowing they would be responsible for a civil penalty. Additionally, in 2020, Respondents issued member draws of over $150,000 while Complainant's investigation and this litigation were both pending. Draining funds from a business just before a civil penalty is imposed should not be rewarded with a mitigated civil penalty, in fact, equity considerations demand the opposite.

7. Penalty Calculation

The applicable penalty range depends on the date of the violations and the date of assessment. *See* § 274a.10(b)(2); 28 C.F.R. § 85.5. Violations are assessed when the government serves the NIF. *Farias Enters. LLC*, 13 OCAHO no. 1338 at 7. The Complainant served the NIF on October 29, 2019. Compl. Ex. A. When a violation occurs after November 2, 2015, and the penalty is assessed between January 30, 2018 and June 19, 2020, the minimum penalty is $224 and the maximum is $2,236. *See* § 274a.10(b)(2); 28 C.F.R. § 85.5.

Complainant's proposed penalty of $1,901 per violation for both Counts I and II is approximately 85% of the maximum of the range of $2,236. OCAHO case law directs "that penalties approaching the maximum should be reserved for the most egregious violations." *Fowler Equip. Co.*, 10 OCAHO no. 1169 at 6 (citation omitted).

The proposed penalty is approaching the maximum level of the range because of the formula Complainant uses to calculate the "base" fine, which is the number of violations as the numerator and the total number of employees as the denominator to generate a percentage of compliance. *1523 Ave. J Foods Inc.*, 14 OCAHO no. 1361 at 8. Complainant's "calculation gives the strongest weight to a factor that is not explicitly set out in the statute, and relegates the statutory factors to relatively small five percent adjustments. As a consequence, the most aggravated cases are those with the highest percentage of violations, regardless of the other factors." *Id.* at 8–9. The rate of violations, much like the ability to pay, is a factor considered by previous ALJs, and it is not expressly enumerated in the statute. *Id.* at 9.

In calculating an appropriate fine, the Court weighs the seriousness of the offenses most heavily, the weight of which can be lessened but not completely offset by the size of the business. *See generally Senox Corp.*, 11 OCAHO no. 1219 at 8 (citations omitted) ("The statute does not require that equal weight be given to each factor."). Additionally, the Court concludes that the penalties levied for Count II should be higher per violation than the penalties levied for Count I as the Count II violations are among the most egregious types of violations.

The undersigned gives no weight to the non-statutory factor of inability to pay for the reasons explained above.

Therefore, the Court imposes a fine of $1,000 per violation of Count I. The Court imposes a fine of $1,300 per violation of Count II.

VII. CONCLUSION

Complainant's Motion for Summary Decision is GRANTED in part. Respondents are liable for 22 violations in Count I, and 88 violations in Count II. After considering the statutory and non-

statutory factors and the totality of the evidence, the undersigned finds that Complainant's proposed penalty should be adjusted.

The penalty amount for the violations in Count I is $22,000. The penalty amount for the violations in Count II is $114,400. Respondents are directed to pay civil penalties in the total amount of $136,400. The parties are free to establish a payment schedule in order to minimize the impact of the penalty on the operations of PFL.

A. Findings of Fact

1. On November 29, 2018, the Department of Homeland Security, Immigration and Customs Enforcement, served Respondents with a Notice of Inspection.

2. On October 29, 2019, the Department of Homeland Security, Immigration and Customs Enforcement served Respondents with a Notice of Intent to Fine.

3. On March 27, 2020, the Department of Homeland Security, Immigration and Customs Enforcement, filed a complaint with the Office of the Chief Administrative Hearing Officer.

4. Respondents failed to ensure proper completion of section 1 and/or failed to properly complete section 2 and/or section 3 of the I-9 Form for twenty-two employees.

5. Respondents failed to prepare and/or present an I-9 Form for eight-eight employees.

6. Respondents are small businesses.

7. Respondents do not have a history of previous violations.

8. Respondents did not employ unauthorized workers.

9. Psychosomatic Fitness Phoenix LLC operated one location, which was permanently closed in 2019.

10. Psychosomatic Fitness LLC was impacted by the COVID-19 pandemic and closed all of its physical locations for a period of time in 2020.

11. Psychosomatic Fitness LLC has had "no employees" since the beginning of the pandemic.

12. Psychosomatic Fitness LLC moved to a revenue stream involving online fitness coaching.

13. Psychosomatic Fitness LLC voluntarily did not resume in-person operations in 2020, even when permitted to do so, based on a perception of elevated costs exceeding profits.

14. In 2019, Psychosomatic Fitness LLC had a "net operating loss" which was offset by "net gain from sale of assets" resulting in a $7,700 shortfall.

15. In 2019, Psychosomatic Fitness LLC distributed $33,889 as indicated by its IRS Form 1120S.

16. Psychosomatic Fitness LLC suffered a "net loss" in 2020 of $75,525.36.

17. In 2020, Psychosomatic Fitness LLC issued a "member draw" for "Brad" and "Josh" totaling approximately $150,000.

B. Conclusions of Law

1. Respondents are entities 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. Respondents are liable for 110 violations of 8 U.S.C. § 1324a(a)(1)(B).

4. Respondents are small businesses.

5. The history of violations is treated as a neutral factor.

6. "A low compliance rate, alone, does not warrant a finding of bad faith." *Eriksmoen Cottages, Ltd*., 14 OCAHO no. 1355a at 5 (citing *Farias Enters. LLC*, 13 OCAHO no. 1338 at 4).

7. While E-Verify is voluntary under current federal immigration law, Arizona law makes E-Verify mandatory. *Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 860 (9th Cir. 2009), *aff'd sub nom. Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582 (2011).

8. An employer's requirements under Arizona law are independent of the requirements imposed by § 1324a. *See Chicanos Por La Causa, Inc. v. Napolitano*, 558

F.3d 856, 867 (9th Cir. 2009), *aff'd sub nom. Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582 (2011).

9. OCAHO case law dictates that good faith focuses "on whether or not the employer reasonably attempted to comply *with its obligations under § 1324a* prior to issuance of the Notice of Inspection." *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 10 (2010) (emphasis added) (citations omitted).

10. Respondents' lack of registration with the E-Verify program, as required by Arizona law, is irrelevant to the penalty analysis set forth in 8 U.S.C. § 1324a.

11. Complainant has not met its burden to establish bad faith as a factor in aggravation, thus, the Court finds this factor to be neutral.

12. In calculating an appropriate fine, the Court weighs the seriousness of the offenses most heavily, the weight of which can be lessened but not completely offset by the size of the business. *See generally Senox Corp.*, 11 OCAHO no. 1219 at 8 (citations omitted) ("The statute does not require that equal weight be given to each factor.").

13. The penalties levied for Count II should be higher per violation than the penalties levied for Count I as the Count II violations are among the most egregious types of violations.

14. Respondents' non-employment of unauthorized workers is treated as a neutral factor.

15. Evidence demonstrating inability to pay because a business has been adversely impacted by the COVID-19 may warrant mitigation of a civil penalty.

16. Even if a Respondent provides sufficient evidence on the non-statutory factor of inability to pay, the Court must still conduct an equity analysis to determine whether mitigation is appropriate.

17. "Penalties are not meant to force employers out of business or result in the loss of employment for workers." *Two for Seven, LLC*, 10 OCAHO no. 1208 at 8–9.

18. The Court considers probative to its equity analysis that Respondents had the opportunity to re-open his business with additional protocols in place, but elected not to do so based on the perception costs would not exceed profit.

19. The Court considers probative to its equity analysis that Respondents did not retain its staff on payroll during the pandemic, rather they "reduced" staff to zero employees at the outset of the pandemic.

20. A business should not be able to seek mitigation under the auspices of safeguarding employment opportunities for those who work at an impacted business if they have "reduced" staff to zero.

21. The Court considers probative to its equity analysis that Respondents provided a distribution in 2019, knowing they were in violation of § 1324a and knowing they would be responsible for a civil penalty.

22. The Court considers probative to its equity analysis that Respondents issued member draws of over $150,000 while Complainant's investigation and this litigation were both pending.

23. Draining funds from a business after the commencement of litigation should not be rewarded by way of mitigation of a civil penalty, in fact, equity considerations demand the opposite.

24. Because of the equity considerations unique to this case, the Court gave no weight to the non-statutory factor of inability to pay.

SO ORDERED.

Dated and entered on May 27, 2021.

_____

Honorable Andrea R. Carroll-Tipton
Administrative Law Judge

Appeal Information

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

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