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

September 15, 2022

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 2020A00097
CITYPROOF CORP., Respondent.	)	

Appearances: Fen Lu, Esq., for Complainant
Joshua Elliot Bardavid, Esq., for Respondent

ORDER ON SUMMARY DECISION

I. PROCEDURAL HISTORY

This case arises under the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324a. The U.S. Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on September 25, 2020, alleging that Respondent, Cityproof Corporation, failed to timely prepare and/or present the employment eligibility form (Form I-9) for twenty-three (23) individuals, and failed to properly complete Forms I-9 for eight (8) employees. Respondent did not file an answer.

On January 21, 2021, this Court issued a Notice of Entry of Default requiring Respondent, within fifteen days of the order, to file an answer and show good cause for its failure to file a timely answer. The Administrative Law Judge (ALJ) warned that failure to file an answer and show good cause may result in the entry of a default judgment against Respondent. Respondent did not file a response or an answer. On June 3, 2021, the Court entered an order bifurcating proceedings into liability and damages proceedings. Regarding liability, the Court found that, through its failure to file an answer or otherwise respond to the show cause order, Respondent forfeited the opportunity to contest the charges and conceded liability. Thus, the Court entered a default judgment on liability. The Court issued an Order of Inquiry to Complainant seeking a memorandum regarding the assessment of penalties. On July 30, 2021, Complainant filed a Memorandum Regarding Assessment of Penalties.

On November 5, 2021, Respondent filed a reply to Complainant's memorandum. This Order will address the penalties.

II. CIVIL MONEY PENALTIES

Employers must prepare and retain Forms I-9 for employees hired after November 6, 1986, and are required to produce the Forms I-9 for inspection by the government upon three days' notice. 8 C.F.R. § 274a.2(b)(2)(ii). Employers must ensure that an employee completes 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).

The Court assesses civil penalties for violations of these regulations in accordance with the parameters set forth in 8 C.F.R. § 274a.10(b)(2) and 28 C.F.R. § 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." *United States v. 3679 Commerce Place*, 12 OCAHO no. 1296, 4 (citing *United States v. March Constr., Inc.*, 10 OCAHO no. 1158, 4 (2012); *United States v. Carter*, 7 OCAHO no. 931, 121, 159 (1997)).

The civil penalties for violations of § 1324a are intended "to set a meaningful fine to promote future compliance without being unduly punitive." *3679 Commerce Place*, 12 OCAHO no. 1296, at 7. 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 4 (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. *United States v. Metro. Enters*., 12 OCAO no. 1297, 8 (2017). While the statutory factors must be considered in every case, section 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." *United States 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 – such as the Respondent's ability to pay the fine - as appropriate in the specific case. *3679 Commerce Place*, 12 OCAHO no. 1296, at 4 (citation omitted). Finally, Complainant's "penalty calculations are not binding in OCAHO proceedings, and the [Administrative Law Judge] may examine the penalties de novo if appropriate." *United States v. Alpine Staffing, Inc.*, 12 OCAHO no. 1303, 10 (2017).

III. DISCUSSION

Complainant is seeking a total civil monetary penalty of $57,466 for the thirty-one violations alleged in the Notice of Intent to Fine (NIF), incorporated into the Complaint and found by this Court. Complaint Ex. A. Specifically, Complainant assessed a penalty of $1,850.60 for each violation of failure to timely prepare and/or present the I-9 Form relating to individuals listed in Count 1. Complainant assessed a penalty of $1,948.00 for one individual in Count 2 and $1,850.60 for seven individuals in Count 2 for failure to ensure that the employees properly completed section 1 and/or failed to properly complete section 2 or 3 of the Form I-9. *Id.*

Complainant arrived at this figure by using its fine structure which begins with a base amount that is determined by the percentage of substantive violations present in the forms required to be submitted, which in this case was 100 percent. Compl. Mem. at 3. Complainant then mitigated the fine by five percent, due to the small size of the business, and aggravated the penalty for one employee because Complainant determined that this employee did not have authorization to work in the United States. *Id.* Complainant treated all of the remaining factors as neutral in its calculations. *See* Compl. Mem. Ex. C. In its memorandum, Complainant argues that Respondent did not act in good faith because of its 100 percent violation rate, which it argues shows a disregard for the verification process, and because Respondent did not use E-Verify. Compl. Mem. 5-6. Further, Complainant argues that the violations were serious, although it notes that this was already taken into account in setting the base fine. Compl. Mem. 7-10. Lastly, Complainant notes that Respondent has not presented any evidence regarding non-statutory factors, such as ability to pay. Compl. Mem. 12.

Respondent argues that Complainant's proposed penalty amount far exceeds what is necessary and appropriate, seeking a fine of not more than $6,500. Response at 5. Respondent argues that it is a small business, it acted in good faith by verifying employment eligibility through visual inspection and maintenance of the appropriate documents, the violations are not serious, and the individual who was unauthorized had attested under penalty of perjury as to his employment status. *Id.* at 5-9. Lastly, Respondent argues that fines imposed in similar cases are significantly lower than the ones sought in this case. *Id.* at 10-11.

A. Statutory Factors

The Court considers the five statutory factors in evaluating the appropriateness of Complainant's proposed penalty.

1. Size of Business

The parties agree that Respondent is a small business with fewer than 100 employees. Compl. Mem. Ex. E; Response Ex. A. Complainant states that it had approximately eighteen employees at the time of inspection. Compl. Mem. at 4, Ex. E. OCAHO has generally considered companies with fewer than 100 employees to be small businesses. *United States v. Fowler Equipment Co., Inc.*, 10 OCAHO no. 1169, 6-7 (2013). Thus, the Court finds that mitigation is warranted based on the size of Respondent's business.

2. History of Violations

Complainant treated the history of violations factor as neutral because Respondent does not have a history of violations. Respondent argues that its lack of violations in the past warrants significant mitigation. Response at 9. However, "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.

3. Good Faith

Complainant treated the good faith factor as neutral. However, in its motion, Complainant argues that Respondent acted in bad faith because it appears that Respondent completed all of the Forms I-9 on July 15, 2019, after the Notice of Inspection was served and well beyond the hiring dates. Compl. Mem. at 5. Further, Complainant argues that Respondent did not use E-Verify until July 2019, which led to the hiring of one unauthorized worker.

A penalty aggravation based on a finding of bad faith requires Complainant to present "evidence of culpable conduct that goes beyond the mere failure of compliance with the verification requirements." *United States v. Integrity Concrete, Inc.*, 13 OCAHO no. 1307, 13 (2017)(quoting *United States v. Azterra Dunkirk Inc.*, 10 OCAHO no. 1172, 4 (2013). For example, in *United States v. Jula888, LLC*, 12 OCAHO no. 1286, 13 (2016), the ALJ aggravated the penalty due to bad faith where Respondent avoided basic recordkeeping practices, paid its employees in cash, and failed to provide ICE with any documentation, despite being ordered to do so. The ALJ determined that these practices appeared to be "an intentional effort to subvert the purposes of the employment eligibility verifications requirements." *Id*. Moreover, in *United States v. Psychosomatic Fitness LLC*, 14 OCAHO no. 1387a, 12-13 (2021), the ALJ found that Respondent's failure to use E-Verify, which was mandated by applicable Arizona state law, did not constitute bad faith because § 1324a does not require registration with E-Verify.

Nevertheless, the absence of bad faith does not show good faith. *United States v. Guewell*, 3 OCAHO no. 478, 814, 820 (1992). Instead, the primary focus of the court's good faith analysis is on the respondent's compliance *before* the investigation. *Jula888, LLC*, 12 OCAHO no. 1286, at 13. "Accordingly, OCAHO precedent 'looks primarily to the steps an employer took before issuance of the NOI, not what it did afterward.'" *Integrity Concrete, Inc.*, 13 OCAHO no. 1307, at 12 (quoting *United States v. Hartmann Studios, Inc.*, 11 OCAHO no. 1255, 12 (2015)). OCAHO case law has looked at whether an employer honestly exercised reasonable care and diligence to ascertain what the law requires and to conform its conduct to the law. *United States v. Sunshine Bldg. Maint., Inc.*, 7 OCAHO no. 997, 1122, 1177 (1998).

Complainant asserts that the nature and extent of the violations demonstrate that Respondent took no steps to comport with the law, citing to *Metro. Enters*., 12 OCAHO no. 1297. Compl. Mem. at 6. In response, Respondent argues that it acted in good faith. Respondent's owner and President, Michael Damelin, indicated in his affidavit that the company's human resources manager obtained a social security number, visually inspected and maintained copies of proof of

either US citizenship or employment authorization cards, and verified proof of identity of all employees. Response Ex. A. Damelin admitted that the company was unaware of the Form I-9 requirements relating to deadlines and mandatory reporting, but as soon as the company was made aware, it immediately rectified the non-compliance and instituted a company policy to use E-Verify for all hires. *Id.*

As the Respondent concedes that it did not take steps to ascertain the legal requirements for employment verification, this Court does not find that it acted with good faith. However, Complainant has not provided any evidence of culpable conduct warranting a finding of bad faith. In *Metro Enters.,* the ALJ determined that the extent and nature of the errors strongly suggested that the Respondent had not taken steps to ascertain the legal requirements and conform its conduct to the law. 12 OCAHO no. 1297, at 15. The ALJ ultimately treated the factor as neutral and noted that 8 U.S.C. § 1324a(e)(5) does not require good faith to be considered solely on a binary scale. *Id*. (*citing Int'l Packaging*, 12 OCAHO no. 1275a, at 6; *Romans Racing Stables*, 11 OCAHO no. 1232, at 5). While the Respondent took steps to verify the employment eligibility of its employees, it took no steps to determine its legal requirements. Thus, the Court finds that Complainant is not entitled to a penalty mitigation based on good faith. Nevertheless, Complainant has not demonstrated that Respondent's conduct amounted to bad faith warranting a penalty aggravation. Although Respondent's conduct did not conform to the law, nothing from the record indicates that Respondent's conduct was an intentional disregard of the law. Therefore, the good faith factor is treated as neutral in this case.

4. Seriousness of the Violations

Complainant treated the seriousness factor as neutral because it had already considered this factor in determining its base fine but, nevertheless, argues that the violations are serious. "Paperwork violations are always potentially serious." *United States v. Skydive Acad. Haw. Corp.*, 6 OCAHO no. 848, 235, 245 (1996). The Court evaluates the seriousness of violations "on a continuum since not all violations are necessarily equally serious." *United States v. Solutions Group Int'l, LLC*, 12 OCAHO no. 1288, 10 (2016) (quoting *United States v. Siam Thai Sushi Rest.*, 10 OCAHO no. 1174, 4 (2013)). "The complete failure to prepare a Form I-9 for an employee is among the most serious of paperwork violations[.]" *Id.* (citations omitted). Furthermore, "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." *United States v. Metro. Warehouse, Inc.*, 10 OCAHO no. 1207, 7 (2013) (citations omitted). All of the Forms I-9 in Count 1 were untimely, and, therefore, these violations are considered to be serious. Compl. Mem. Ex. A.

The failure to sign the section 2 employer attestation is "among the most serious of possible violations." *Solutions Group*, 12 OCAHO no. 1288, at 11 (quoting *United States v. Hartmann Studios, Inc.*, 11 OCAHO no. 1255, 14 (2015)). Failure to ensure that the employee signs the section 1 attestation is also serious because the employee "has not attested to being authorized to work in the United States." *Hartmann Studios, Inc.*, 11 OCAHO no. 1255 at 14 (citation omitted). All the Forms I-9 in Count II were missing either a part 1 employee attestation (four) or a part 2 employer attestation (two) or both (two). In addition, three forms had a list B but no list A or C document. Compl. Mem. Ex. A. All of the violations at issue are serious.

While Complainant did not advocate for a penalty aggravation based on the seriousness of the violations, this was because it already factored in an increased penalty based on the non-compliance percentage. As this Court does not use the same formula, but starts with a mid-range penalty and adjusts up and down based upon the factors, *see infra* § C, the Court will aggravate the penalty based on seriousness.

5. Presence of Unauthorized Workers

Complainant aggravated the penalty for the violation in Count II.A based on the presence of an unauthorized worker. Complainant provided the declaration of its auditor, Dariusz Solecki, who states that he ran Respondent's employees' names and Alien numbers through "immigration databases such as the Treasury Enforcement Communications System (TECS), and Central Index System (CIS)." Compl. Mem. Ex. D. Solecki stated that the database results showed that, for the individual in Count II.A, the name and date of birth provided came back as having been issued a Non-Immigrant H2B Visa which expired in 2001. Compl. Mem. Ex. D. Solecki does not indicate which database revealed this information, nor did the Complainant provide the database results. *Id.* The Form I-9 and documents on file demonstrated that this individual presented a list B document, but not a list C document. Compl. Mem. Ex. A. Also included is an E-Verify tentative no-match determination. *Id.* Complainant issued a Notice of Suspect Document (NSD) alerting Respondent to the findings and informing it that unless the worker provided valid documentation, he would be considered "unauthorized." *Id.* However, Respondent did not provide the documents. Respondent does not contest the finding, stating that it asked this employee to reproduce his employment documents and, after asking for more time, the employee stopped coming to work and could not be reached through any of his contact information. Response, Ex. A.

Respondent argues only that the employee's deception to the company should not be considered an aggravating factor for all other violations. The Respondent is correct, aggravation of a civil penalty due to an alien's unauthorized status is appropriate only as to a paperwork violation relating to that particular individual, and is not broadly applicable to aggravate the penalty for other violations involving different individuals. *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 8 n.6 (2010).

As Respondent does not contest that this employee was not authorized for employment, the penalty is aggravated as to this employee.

B. Non-statutory factors

OCAHO may consider non-statutory factors to determine appropriate penalties. *United States v. 1523 Avenue J. Foods, Inc.*, 14 OCAHO no. 1361, 7 (2020). "The party seeking consideration of non-statutory factors 'bears the burden of showing that the factor should be considered as a matter of equity and that the facts support a favorable exercise of discretion." *Id.* (quoting *United States v. Buffalo Transp.*, 11 OCAHO no. 1263, 11 (2015)). OCAHO has explained that "penalties 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, 9 (2014). Accordingly, OCAHO ALJs have often considered the employer's ability to pay a proposed fine. *Integrity Concrete*, 13 OCAHO no. 1307, at 18; *United States v. Raygoza*, 5 OCAHO no.

729, 49, 52 (1995). "The ability to pay as a non-statutory factor is governed by (1) the fact that the burden of proof is placed on the company; and (2) that as a matter of equity, the ALJ may weigh the facts to determine whether discretion warrants adjustment of the fine." *Integrity Concrete*, 13 OCAHO no. 1307, at 18 (citations omitted).

In its Response, Respondent cites only to factors previously considered in the good faith and seriousness analysis, such as the company's compliance through other documentary means, the company's actions in rectifying the violations and instituting a rigorous policy. In his affidavit, however, Mr. Damelin indicates that the company is experiencing a slow down due to the pandemic, lack of personnel, supplies and building materials, and restrictions due to the COVID pandemic. Response, Ex. A. Mr. Damelin states that the company was 20 percent down in sales in 2021 as compared to 2019, that the fines would be onerous and extremely damaging, constituting 25 percent of annual net income in a normal year, and exceeding that in 2021.

Respondent did not submit any financial documents, and Mr. Damelin's description of the impact of the penalties is vague and does not provide the full picture of the company's financial situation. *See Integrity Concrete*, 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."). To the extent the Respondent argues it does not have the ability to pay the fine, the Respondent has not provided sufficient evidence to warrant mitigation based upon this factor. *See United States v. Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355a, 7-8 (2020) (finding that Respondent's vague statement regarding its financial state, without detailed financial information, was insufficient for a finding of inability to pay).

C. Penalty Range

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. The date of assessment is the date that the Government serves the Notice of Intent to Fine on a respondent. *See United States v. Sanjay Jeram Corp.*, 15 OCAHO no. 1412a, 5 (2022) (quoting *United States v. Farias Enters. LLC*, 13 OCAHO no. 1338, 7 (2020)). Accordingly, in this case, all of the penalties were assessed on February 12, 2020. *See* Compl. Ex. A.

If the violation occurred before September 29, 1999, the minimum penalty amount is $100 and the maximum is $1000. If the violation occurred between September 30, 1999, and November 2, 2015, the minimum penalty amount is $110 and the maximum is $1,100. 8 C.F.R. § 274a.10(b)(2). For violations that occur after November 2, 2015, the adjusted penalty range set forth in § 85.5 applies. *See* § 85.5. When a violation occurs after November 2, 2015, and the penalty is assessed between January 29, 2018, and June 16, 2020, the minimum penalty is $224 and the maximum is $2,236. Civil Monetary Penalties Inflation Adjustment, 83 Fed. Reg. 3944, 3947 (Jan. 29, 2018).

The accrual date of a violation depends on the specific violation. OCAHO precedent "establishes that a paperwork violation is not a one-time occurrence, but a continuous violation until corrected." *United States v. Rupson of Hyde Park*, 7 OCAHO no. 940, 332 (1997); *United*

States v. W.S.C. Plumbing, Inc., 9 OCAHO no. 1071, 9 (2001). "[A] verification failure occurs not at a single moment in time, but rather throughout the period of non-compliance." *Id.* A paperwork violation involving the failure to ensure proper completion of section 1 or failure to properly complete section 2 continues until the violation is corrected. *United States v. Curran Engineering Co., Inc.,* 7 OCAHO no. 975, 895 (1997).

Here, Count II asserted paperwork violations, and, accordingly, are continuing violations. Therefore, they occurred after November 2, 2015, and as they were assessed on February 12, 2020; the $224 - $2,236 penalty range applies. *See Farias Enters. LLC*, 13 OCAHO no. 1338, at 7 (Violations are assessed when the government serves the NIF); Compl. Ex. A.

Count I, on the other hand, asserted failure to timely prepare and/or present the employment eligibility forms. A timeliness violation is frozen in time at the point when the employer "fail[s] to complete, or to ensure completion, of an I-9 form by the date that the completion is required." *WSC Plumbing*, 9 OCAHO no. 1061, at 11-12 (quoting *Curran Eng'g*, 7 OCAHO no. 975, at 897). Unlike other kinds of paperwork violations, timeliness verification failures cannot be cured. *WSC Plumbing,* 9 OCAHO no. 1061, at 15 ("Once the requisite deadlines for completion of the I-9 form have passed, the timeliness violation is 'perfected,' and the employer is powerless to 'cure' it."); *see also United States v. Durable, Inc*., 11 OCAHO no. 1229, 12–13 (2014); *New China Buffet Rest*., 10 OCAHO no. 1133, at 5. Therefore, if a timeliness violation involves the employee's failure to sign section 1 of the I-9, the violation occurred on the first business day after hiring. *Curran Eng'g*, 7 OCAHO no. 975, at 897. If the violation involves the employer's failure to sign section 2, the violation occurred on the fourth business day after hiring. *Id.*

Accordingly, the penalty range for the violations in Count I of the complaint depend upon (a) the date the employee was hired and (b) which section of the form was not timely signed. In this case, section 2 was signed on the same date for all forms and was untimely for all forms. For some forms, section 1 was also untimely, but in no case does the difference between the two alter the penalty range.

The record does not contain a listing of dates of hire provided by the company. Most of the Forms I-9 contain the employee's first date of employment.[1] Compl. Mem. Ex. A; Response Ex. C. Also included is an E-Verify receipt for each employee, and all but one includes a handwritten note on the E-Verify receipt that states "Date of Hire" along with a date. Also included is a chart listing each employee, their dates of hire and other information generated by the Complainant – named "Forms I-9 Summary List." Compl. Mem. Ex. B. Complainant did not

[1] The term hire is defined as, "the actual commencement of employment of an employee for wages or other remuneration." 8 C.F.R. § 274a.1. This date usually coincides with the first date of employment, though it has been described as ambiguous and judges have considered other meanings. *United States v. DuBois Farms Inc.*, 2 OCAHO no. 376, 599, 627 (1991), *citing to United States v. ABC Roofing & Waterproofing*, OCAHO Case No. 89100389 at 16 (7/25/91), modified on other grounds by CAHO (8/26/91)("date of hire" could include when an offer of employment is accepted, even if it is days or weeks before starting work; the moment an employee "reports for work"; or a reasonable time after the employee begins work.).

indicate how this list was compiled. The dates of hire provided on the list appear to reflect the dates of hire listed on the E-Verify receipts and/or the first date of employment provided on the Forms I-9.

The Court finds the first date of employment provided by the company on the Forms I-9 to indicate the date of hire. This date was provided by Respondent, and Respondent attested to this date in section 2. This resolves the hiring date for twenty employees.

However, for three employees, the Form I-9 does not contain a first date of employment.[2] *See* Compl, Count I, A6, 8, 9; Compl. Mem. Ex. A. Nevertheless, the E-Verify date of hire matches the date the employee signed the Form I-9 in section 1 for two of the three employees (Count 1, A8 and 9). Given the consistency, the Court does not find a genuine issue of material fact, and finds it reasonable to infer this date as the date of hire. For one employee, the E-verify date is different than the date the employee signed (Count I, A4). The Complainant's Exhibit B matches the E-Verify date. The discrepancy is not material because both dates fall within the same penalty range, and therefore there is no genuine issue of material fact.

Accordingly, fifteen individuals were hired after November 2, 2015, and therefore the penalty range is between $224-2,236. Next, seven individuals were hired between September 30, 1999, and November 2, 2015, and the penalty range is $110-1,100. The remaining one individual was hired in 1992,[3] and accordingly, the penalty range is $100-1,000.[4]

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[2] Complainant did not paginate or bates stamp its exhibits. This memorandum will refer to the names in the counts, and will incorporate the Forms I-9 associated with the names. *See* Compl. Mem. Ex. A.

[3] The Complainant may have assessed a penalty against the owner and President. "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." *United States v. Intelli Transport Servs.*, 13 OCAHO no. 1319, 4 (2018) (quoting *United States v. Alpine Staffing, Inc.*, 12 OCAHO no. 1303, 11 (2017)). Given that Respondent did not raise the issue, and the Court has already made a finding of liability, the Court will not mitigate the penalty amount for this individual.

[4] Respondent did not raise a statute of limitation defense in its answer or in its memorandum. Rule 8(c) of the Federal Rules of Civil Procedure provides, in pertinent part, that a party shall set forth affirmative defenses, including the statute of limitations, *see* Fed. R. Civ. P. 8(c), and the relevant federal case law holds that failure to do so constitutes a waiver of the defense. *United States v. Davila*, 7 OCAHO no. 936, 16 (1997), *citing to United States v. Arky*, 938 F.2d 579 (5th Cir.1991) (holding that failure to raise statute of limitations defense at trial waives affirmative defense). Further, a judge ordinarily should not apply a statute of limitations defense *sua sponte. See Davis v. Bryan*, 810 F.2d 42, 44 (2d Cir. 1987); *Pino v. Ryan*, 49 F.3d 51, 53 (2d Cir. 1995).

While Complainant did not take into consideration the date of occurrence, this Court will adjust the penalty amounts based upon the appropriate range. Furthermore, this Court uses a mid-range penalty as a base penalty and adjusts based upon the factors noted above.

For the majority of violations, using a mid-range penalty as a base penalty, the Court considers the small business mitigating factor is offset by the aggravating factor of the seriousness of the violations. Finally, regarding the violation in Count IIA, the presence of an unauthorized worker is an aggravating factor.

For the one violation that occurred before September 30, 1999, the Court will impose a fine of $500. For the eight violations that occurred between September 30, 1999, and November 2, 2015, the Court will impose a fine of $550 per violation. For twenty-one violations that occurred after November 2, 2015, the Court will impose a fine of $1,230 per violation. The Court will impose a fine of $1,450 for the violation in Count IIA.

IV. CONCLUSION

Respondent is liable for twenty-three violations in Count I, and eight violations in Count II. After considering the statutory factors and the totality of the evidence, the undersigned finds that Complainant's proposed penalty should be adjusted. The penalty amount for thirty-one violations of 8 U.S.C. § 1324a is $32,130.

V. FINDINGS OF FACT

1. On February 12, 2020, the Department of Homeland Security, Immigration and Customs Enforcement, served Cityproof Corporation with a Notice of Intent to Fine.

2. On September 25, 2020, the Department of Homeland Security, Immigration and Customs Enforcement, filed a Complaint with the Office of the Chief Administrative Hearing Officer.

3. Cityproof Corporation failed to timely prepare and/or present I-9s for twenty-three employees.

4. Cityproof failed to ensure proper completion of section 1 and/or failed to properly complete sections 2 or 3 for eight employees.

5. One employee did not have authorization to work in the United States.

6. Cityproof employed 18 individuals at the time of the inspection.

7. Fifteen individuals were hired after November 2, 2015, and the assessment date was February 12, 2020.

8. Seven individuals were hired between September 30, 1999, and November 2, 2015, and the violation occurred on the first or fourth day after hiring.

9. One individual was hired in 1992, and the violation occurred on the first day after hiring.

VI. CONCLUSIONS OF LAW

1. Cityproof Corporation is an entity within the meaning of 8 U.S.C. § 1324a(a)(1).

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

3. Cityproof Corporation is liable for thirty-one violations of § 1324a(a)(1)(b).

4. The government met its burden of proof with respect to penalties and proved the existence of aggravating factors by a preponderance of the evidence. *United States v. 3679 Commerce Place, Inc.*, 12 OCAHO no. 1296, 4 (2017).

5. Cityproof Corporation's failure to timely complete the Form I-9 is serious, though marginally less serious than failure to have the employer or employee sign the form. *United States v. Metro. Warehouse, Inc.*, 10 OCAHO no. 1207, 7 (2013).

6. Under the circumstances of this case, it was appropriate to treat the history of violations factor as neutral. *United States v. New China Buffet Rest.,* 10 OCAHO no. 1133, 6 (2010).

7. The violations in Count II are continuing violations, and were not corrected. *See* § 274a.2(b)(2)(i)(A); *United States v. Curran Eng'g Co., Inc*., 7 OCAHO 975, 895 (1997).

8. The five-year statute of limitations codified at 28 U.S.C. § 2462 is applicable to proceedings under § 1324a, but must be raised as an affirmative defense. *United States v. St. Croix Personnel Servs., Inc.*, 12 OCAHO no. 1289, 10–11 (2016). Failure to raise the statute of limitations results in its waiver, and a judge may not raise it sua sponte. *United States v. Davila*, 7 OCAHO no. 936, 16 (1997), *citing to United States v. Arky*, 938 F.2d 579 (5th Cir.1991), *cert*. *denied*, 503 U.S. 908 (1992); *Davis v. Bryan*, 810 F.2d 42, 44 (2d Cir. 1987); *Pino v. Ryan*, 49 F.3d 51, 53 (2d Cir. 1995).

9. Violations in Count I are paperwork violation that allege a timeliness failure and are "frozen in time" at the point when the employer "'fail[s] to complete, or to ensure completion, of an I-9 form by the date that the completion is required" which is either the first or fourth business day after hiring."' *United States v. WSC Plumbing, Inc.,* 9 OCAHO no. 1061, 11–12 (2000) (quoting *United States v. Curran Eng'g*, 7 OCAHO no. 975, 895, 897 (1997)).

10. If the violation occurred before November 2, 2015, the minimum penalty amount is $110 and the maximum is $1,100. 8 C.F.R. § 274a.10(b)(2). For violations that occur after November 2, 2015, the adjusted penalty range as set forth in 28 C.F.R. § 85.5 applies. If the penalty is assessed after January 29, 2018, the minimum penalty is $224 and the maximum is $2,236. 28 C.F.R. § 85.5. Civil Monetary Penalties Inflation Adjustment, 83 Fed. Reg. 3944, 3947 (Jan. 29, 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.

VII. ORDER

Respondent is liable for thirty-one violations of § 1324a(a)(1)(B) and is directed to pay civil penalties in the total amount of $32,130. Respondent shall cease and desist from violating § 1324a. The parties are free to establish a payment schedule to minimize the impact of the penalty on Respondent's operations.

SO ORDERED.

Dated and entered on September 15, 2022.

_____

Jean C. King
Chief 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.