

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

February 16, 2023

UNITED STATES OF AMERICA,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324a Proceeding
)	OCAHO Case No. 2022A00015
)	
KOY CHINESE & SUSHI RESTAURANT,)	
)	
Respondent.)	
_____)	

Appearances: John C. Wigglesworth, Esq., for Complainant
Kevin Lashus, Esq., for Respondent

NOTICE & OPPORTUNITY TO BE HEARD ON NON-STATUTORY PENALTY FACTOR
(LACK OF PROSECUTORIAL INTEREST & INSUFFICIENTLY DEVELOPED RECORD)

I. BACKGROUND

This case arises under the employer sanctions provisions of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324a.

On January 10, 2022, Complainant, the U.S. Department of Homeland Security, Immigration and Customs Enforcement (DHS, ICE, or the Government), filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO), alleging violations of § 1324a(a)(1)(B).

On March 22, 2022, the Court issued an Order to Show Cause. *United States v. Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416, 1 (2022).¹ The Court ordered Respondent to show cause for its

¹ 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

failure to timely file an answer pursuant to the OCAHO Rules,² and to file an answer pursuant to 28 C.F.R. § 68.9(c). *Id.* at 2–3. To date, Respondent has not filed an answer or a response to the Order to Show Cause.

On June 8, 2022, the Court issued an Amended Order Entering Default Judgment on Liability (Default Judgment Order). *United States v. Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416a, 1 (2022).³ With liability established, the Court bifurcated the issues of liability and penalty because the record was insufficiently developed as to penalty. *See id.* at 5 (citations omitted). The Court provided the parties “an opportunity to develop the record on penalties by way of supplemental filings.” *Id.* (citing *United States v. Sanjay Jeram Corp.*, 15 OCAHO no. 1412, 2 (2022) (reminding the parties of their respective burdens on statutory and nonstatutory penalty factors)).⁴ The administrative law judge (ALJ) cautioned that “[f]ailure to timely provide a submission constitutes a waiver of the parties’ right to be heard on penalties.” *Id.* at 6.

The parties did not submit supplemental filings on penalties by the Court’s July 1, 2022 deadline. In fact, the only filing ever received in this case is the Complaint. At this juncture, the only entity actively participating in this case is the Court.

II. LAW & ANALYSIS

After finding liability, the Court has discretion to adopt the penalty proposed by the complainant or assess penalties de novo.⁵ *See United States v. Zuniga Torentino*, 15 OCAHO no. 1397, 4

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>.

² OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2022).

³ In the Default Judgment Order, the Court made factual findings based on the Complaint alone. Default J. Order ¶¶ 2–3. The Court then entered findings of liability for the alleged § 1324a(a)(1)(B) violations as a matter of default. *See id.* at 3–6.

⁴ The Court specifically identified the lack of evidence in the record as to when the failure to timely prepare violations occurred. *See* Default J. Order ¶ 6 (citing 28 C.F.R. § 85.5, and then citing *United States v. Visiontron Corp.*, 13 OCAHO no. 1348, 9 (2020)).

⁵ The applicable penalty range for paperwork violations depends on the date of the violations and the date of assessment. *See* 8 U.S.C. § 1324a; 8 C.F.R. § 274a.10(b)(2); 28 C.F.R. § 85.5.

(2021) (citing *United States v. Yi*, 8 OCAHO no. 1011, 218, 223 (1998) (internal citations omitted)); *United States v. Alpine Staffing, LLC*, 12 OCAHO no. 1303, 10 (2017) (citing *United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6 (2011)).

There are five factors⁶ in the statute which the Court must consider in making a penalty determination. 8 U.S.C. § 1324a(e)(5). The Court may also consider other factors or considerations not expressly enumerated in the statute, as “[t]here is no reason that additional considerations cannot be weighed separately.” *United States v. Integrity Concrete, Inc.*, 13 OCAHO no. 1307, 18 (2017) (quoting *United States v. M.T.S. Service Corp.*, 3 OCAHO no. 448, 527, 531 (1992)).

The complainant has the burden of proof with respect to penalties, and if attempting to show aggravation, “must prove the existence of any aggravating factors by a preponderance of the evidence.” *United States v. 3679 Commerce Pl., Inc.*, 12 OCAHO no. 1296, 4 (2017) (citations omitted). Where a complainant fails to develop the record on a particular statutory factor, the Court may ultimately elect to treat that factor as neutral or mitigated, bearing in mind the complainant’s burden generally,⁷ and its burden when it seeks to aggravate a penalty based on a statutory factor.

The record in this case presents issues of concern. Complainant, the “proponent” in this case, has declined to build a sufficient record despite its obligation to do so under the Administrative Procedure Act. *See* 5 U.S.C. 556(d). Other than initiating the case by filing the Complaint over a year ago, Complainant has not participated in this matter. Troublingly, Complainant has provided neither evidence nor argument as to when the Count II violations occurred.⁸ The record remains silent *even after* the Court identified this deficiency. Default J. Order ¶ 3.

⁶ The Court must consider the following statutory factors during the penalty assessment stage: “(1) the size of the employer’s business; 2) the employer’s good faith; 3) the seriousness of the violations; 4) whether or not the individual was an unauthorized alien; and 5) the employer’s history of previous violations.” 8 U.S.C. § 1324a(e)(5). Neither the statute nor OCAHO regulations require a particular weight or outcome be given to each factor. *See Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, at 6–7.

⁷ This burden, at its most fundamental level, flows from the requirements set forth in the Administrative Procedure Act. “Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof.” 5 U.S.C. 556(d).

⁸ Timeliness verification failures, such as those alleged at Count II, are “frozen in time.” *See United States v. T-Ray Constr. Co.*, 13 OCAHO no. 1346, 7 (2020) (citations omitted). The date of hire is therefore critical to assessing penalties in timeliness violations.

This lack of participation causes the Court to conclude that this case is of little prosecutorial interest to Complainant, and thus causes the Court to consider the propriety of how such a lack of interest by the proponent, along with the insufficiently developed record, should factor into the penalty assessment as a matter of equity. Such a consideration would be one of discretion (as a nonstatutory penalty factor).

Because such a consideration (lack of prosecutorial interest and insufficiently developed record) had previously not been identified to the parties as a potential consideration by the Court in its penalty analysis, the Court now provides this Notice. This Notice informs the parties of this prospect and permits them an opportunity to be heard on such a consideration before issuance of a decision on penalties. If the parties desire an opportunity to be heard on only this issue, they must submit filings within 14 days from the date of this Notice. Failure to do so will constitute a waiver of their opportunity to be heard on the non-statutory penalty factor.

SO ORDERED.

Dated and entered on February 16, 2023.

Honorable Andrea R. Carroll-Tipton
Administrative Law Judge