

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

February 6, 2014

UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. § 1324a Proceeding
	)	OCAHO Case No. 13A00001
	)	
SYMMETRIC SOLUTIONS, INCORPORATED	)	
D/B/A MINERVA INDIAN CUISINE,	)	
Respondent.	)	
_____	)	

FINAL DECISION AND ORDER

Appearances:

Joy Lampley Fortson  
For the complainant

Albert Norton  
For the respondent

I. PROCEDURAL HISTORY

This is an action pursuant to the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a (2012), in which the United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a three-count complaint alleging that Symmetric Solutions, Inc. d.b.a. Minerva Indian Cuisine (Symmetric or the company) violated 8 U.S.C. § 1324a(a)(1)(B). Count I alleged that Symmetric failed to prepare and/or present I-9 forms upon request for eighty-two named employees; Count II alleged that the company failed to ensure that Sridhar Posani, Shekar Reddy, Charanjit Singh, and Mahesh Thapa properly completed section 1 of the I-9 form, and/or itself failed to properly complete section 2 or 3 of the form; and Count III alleged that the company hired seventeen named individuals knowing they were unauthorized for employment in the United States.

Symmetric filed an answer denying the government’s material allegations and pleading as affirmative defenses that 1) it was not the employer at the time of the events complained of, 2) it was sued by the acquiring entity, Vensai Foods, and prevailed in the litigation, 3) the claims should be dismissed based on the principles of res judicata and collateral estoppel, 4) the claims

are barred by waiver, and 5) the claims are barred by excessive delay resulting in prejudice to the company's ability to defend itself.

Prehearing procedures have been completed. Presently pending are the parties' cross-motions for summary decision, Symmetric's motion to strike, and the government's second motion to amend the complaint. Each party filed a response in opposition to the other's motion for summary decision, and ICE filed a response in opposition to the company's motion to strike. Symmetric did not respond to the government's second motion to amend the complaint. The amendments proposed are to withdraw the allegations with respect to sixteen employees in Count I, to withdraw Count III in its entirety, and to reduce the penalty commensurately.

Absent any opposition, the government's second motion to amend the complaint is granted. The allegations in Count I that Symmetric failed to present I-9s for Manuel Paddilla Alvarado, Fernando Hernandez Andrade, Fucundo Chavez Antonio, Vutla Balakrishna, Nicholas Gabino De La Cruz, Alfredo Villa Garcia, Jamal Hossain, Srinvasa Reddy Kamireddy, Sarotham Reddy Kalva, Sandeep Raman Kulangara, Jose Santos Pinon Medina, Pavan Kumar Nagarappu, Ruben Caamano Ramos, Kishta Malla Reddy, Juan Bibiano Romero, and Anil Sallawar are dismissed, and Count III is dismissed in its entirety. Sixty-six alleged violations remain in Count I, and four in Count II.

## II. BACKGROUND INFORMATION

The government has proffered a number of exhibits Symmetric contends cannot be considered against it. The documents are described in some detail to facilitate understanding of the issues posed by Symmetric's motion to strike, which is in turn dependent upon and inseparable from Symmetric's motion for summary decision.

Minerva Indian Cuisine is a restaurant located on State Bridge Road in Alpharetta, Georgia. The record reflects that Symmetric Solutions d.b.a. Minerva Indian Cuisine was incorporated as a domestic corporation in New Jersey in 1998, and as a foreign corporation in Georgia in 2003. Symmetric's Georgia registration reflects that the company's corporate officers are identified as Prashanth R. Goguri, Kishore R. Konda Venkata, and Mannem Reddy.

The affidavit of Bruce L. Busby, Special Agent with ICE's Homeland Security Investigations (HSI) unit in Atlanta says that the government was informed in October 2008 that Minerva might be hiring illegal aliens. The government made inquiries to the Georgia Department of Labor, responses to which revealed that Symmetric was reporting wages for only one employee. Subsequent government surveillance revealed, however, that ten to fifteen individuals were actually working there. ICE's Alien Smuggling Unit served Minerva Indian Cuisine with a Notice of Inspection (NOI) on December 11, 2008, at which time Sridhar Posani identified himself as the manager of Minerva and the person responsible for hiring and paying employees. Srinivasa Nimmagadda identified himself as a part-owner who coincidentally happened to be there that day. When asked for the restaurant's I-9s, they told the government's agents that they did not know what an I-9 form was, that "everything" was handled by corporate headquarters, and that Symmetric Solutions, Inc. would have any legal documents regarding the business.

Eighteen employees were present at the restaurant that day. The government, with the consent of Posani and Nimmagadda, interviewed the employees, sixteen of whom, including Posani himself, turned out to be aliens out of status. Of the other two, one was a lawful permanent resident and one a naturalized citizen. The government conducted a search, also with consent, that resulted in the seizure of documents, including the restaurant's payroll ledgers and a computer central processing unit (CPU). ICE also seized a leasing agreement between Symmetric Solutions, Inc. and an apartment complex in Alpharetta, Georgia for a rental unit at 15005 Summerwood Lane, as well as check receipts from a Wachovia bank account in the name Symmetric Solutions, Inc., notated for rent, utility bills, and water bills. Three of Minerva's employees resided in this unit, and seven other employees said Minerva also provided them with housing in Alpharetta.

The payroll ledgers consist of composition books of the kind often used in schools. On the cover of exhibit G-9, under the heading Composition Book, are four lines preceded by the words Name, Subject, School, and Grade. The line for Subject contains the hand-printed word SALARIES, and the line for Grade shows the year, 2006. On exhibits G-10 and G-11 there are three lines preceded by the words Name, School, and Grade. The hand-printed entries on the line for Subject are SALARIES, and the entries on the line for Grade are 2007 and 2008, respectively. The inside pages of each ledger show handwritten entries at the top consisting of a first name with no surname,<sup>1</sup> followed by a series of columns captioned Date, Amount, Date Paid, Amount Paid, and Signature. The ledgers contain the first names of thirty-eight employees paid in 2006, thirty-three in 2007, and forty-six in 2008. Symmetric's wage and hour reports to the State of Georgia, however, reflect no information for any of these employees and it appears that Symmetric reported wages to the state for four employees in the fourth quarter of 2007 through the second quarter of 2008, and five for the third quarter of 2008.

Symmetric presented only four I-9s to ICE for inspection. ICE served Symmetric with a Notice of Intent to Fine on May 11, 2010, and Symmetric Solutions, Inc., by counsel, filed a timely request for hearing on May 28, 2010. ICE filed a complaint with this office on October 1, 2012. All conditions precedent to the institution of this proceeding have been satisfied.

### III. SYMMETRIC'S MOTION FOR SUMMARY DECISION AND MOTION TO STRIKE

#### A. Symmetric's Motion for Summary Decision

Symmetric's motion for summary decision is predicated upon the proposition pleaded as the company's first affirmative defense, that it was not the employer at the time of the inspection. The company asserts that this case is simply "aimed at the wrong entity," because Minerva Indian Cuisine was actually owned and operated by Vensai Foods at the time of inspection, and any records or documents ICE obtained from Minerva are therefore not competent evidence against Symmetric. Pursuant to this theory, Symmetric filed a motion to strike certain exhibits accompanying the government's motion, seeking to exclude from consideration the government's exhibits G-2, G-4, G-5, G-6, G-7 and subparts, G-8 and subparts, G-9, G-10, G-11, G-12, G-13, G-14, G-15, G-16, G-18, G-19, G-20, G-21, which include all of the documents

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<sup>1</sup> The complaint identifies these individuals by their first names, followed by the designation LNU (last name unknown).

obtained from Minerva and the State of Georgia, as well as the Busby affidavit and the declaration of ICE's forensic auditor.<sup>2</sup>

Accompanying Symmetric's motion for summary decision was the affidavit of Mannem Reddy (5 pp.), together with exhibits A) Purchase and Transfer of Assets Agreement (3 pp.); B) Operating Agreement of Vensai Foods, LLC (17 pp.); C) Partnership Agreement (6 pp.); D) Certificate of Organization for Vensai Foods, LLC; and E) Alcohol and Beverage License for Vensai Foods, LLC. The affidavit identifies Mannem Reddy as an officer of Symmetric since 1998. Reddy avers that Symmetric owned Minerva from 2003 until August 14, 2008, when the restaurant was sold to Vensai Foods, LLC, a company organized on July 30, 2008 by Mr. Nimmagadda. Reddy states that Vensai began running the restaurant on August 14, 2008, and that shareholders of Symmetric did not have management authority under Vensai's operating and partnership agreements. The affidavit states further that the accompanying documents show that all of Minerva's assets were transferred to Vensai Foods.

The motion contends further that any records ICE obtained from Minerva are not competent evidence against Symmetric for several reasons: 1) records obtained in December 2008 are not competent evidence of violations that pre-date August 2008, 2) ICE cannot establish that the records are complete, 3) the records cannot be authenticated or presented as admissible business records against Symmetric, 4) ICE cannot establish that the persons listed in Count I were hired by Symmetric, 5) Symmetric is not responsible for Vensai's failure to keep records, and 6) except for Sridhar Posani, Symmetric did not hire the individuals named in Count II. The motion to strike is premised upon these objections.

Symmetric says as to Sridhar Posani that it has a good faith defense because the company had what appeared to be appropriate documentation for him. The Reddy affidavit states that Posani was the general manager of Minerva both before and after the sale, and that when Symmetric hired him he presented both a social security number and an employment authorization card.

#### B. The Government's Response

The government contends that Symmetric's motion for summary decision should be denied because all the violations in Counts I and II occurred prior to any alleged sale of Minerva, and are corroborated by documentary evidence including records obtained from the State of Georgia. ICE contends that the records Symmetric kept of its employees, including payroll ledgers, show that most of the restaurant's employees were unauthorized, that these employees were paid in cash, that the company never reported the wages of the undocumented employees to the State of Georgia or performed the appropriate withholdings required by law, and that the company acted in violation of both tax and labor laws.

ICE states in addition that Symmetric's conclusory claim to a good faith defense to the violation in Count II regarding Sridhar Posani is foreclosed by both longstanding case law and by the facts. Because 8 U.S.C. § 1324a(a)(3) provides a defense only to a knowing hire violation, it has no application to this case because Symmetric is not charged with a knowing hire violation. The defense provided in 8 U.S.C. § 1324a(b)(6) is similarly unavailing because that defense has no

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<sup>2</sup> ICE's exhibit list is more fully set out in section III, *infra*.

application to substantive violations, only to those that are technical or procedural. All the violations charged in this case are substantive.

### C. Discussion and Analysis

While I accept as true the facts asserted in the Reddy affidavit, I must reject his legal conclusion that the accompanying attachments “accomplished the transfer of all of Minerva’s assets to Vensai Foods, LLC.” The documents show nothing of the kind. They show to the contrary, that Symmetric continued to retain a 40% ownership interest in the restaurant at all times relevant to this case.

To begin with, the purchase agreement nowhere even mentions the name Vensai Foods. The agreement recites that Symmetric has a 100% stake in Minerva, and that the purchasers, identified as Kavitha Nimmagadda and Natasha Lavu, want to buy 60%, with the settlement to take place once the sum of \$366,000 is paid to the seller. While Symmetric’s prehearing statement suggests that this \$366,000 payment took place at some unidentified time, there is no evidence as to when or if that final payment was actually made.<sup>3</sup> The agreement is a conditional one, and there is no evidence showing that the condition was satisfied at any time prior to the inspection on December 11, 2008.

Second, assuming *arguendo* for purposes of this motion that the payment was made and the sale consummated prior to the inspection, it is still clear from the purchase agreement itself that Symmetric retained a 40% ownership interest in Minerva after the sale and thus Nimmagadda and Lavu, who together bought 60%, became co-owners of the restaurant with Symmetric. Vensai’s partnership agreement confirms that Lavu and Nimmagadda, the organizers of Vensai, did not buy all of Minerva’s assets as Reddy claims, but actually bought “60% of Minerva restaurant from 100% share owned by ‘Symmetric Solutions’ by which ‘Symmetric Solutions’ was represented by its president, Mannem Reddy.” Vensai’s operating agreement reflects that, although Vensai was formed as a limited liability company, its members intended for it to be classified as a partnership for tax purposes, and that among Vensai’s members are Prashanth Goguri, Kishore Konda, and Mannem Reddy, all officers of Symmetric Solutions. Goguri is Symmetric’s CEO, Konda is its CFO, and Reddy, who once served as the company’s Secretary, is now its president.

Symmetric continued, moreover, to be actively involved with Minerva after the sale. The company’s prehearing statement expressly acknowledged that representatives of Symmetric were involved in Minerva’s business to support the transition of operations. It appears, for example, that Vensai did not obtain a valid alcoholic beverage permit from the city of Alpharetta until November 20, 2008. Symmetric’s Alpharetta alcoholic beverage permit was valid throughout the period from November 2007 to December 31, 2008.

When ICE visited Minerva’s premises on December 11, 2008 and asked Nimmagadda and Posani about the restaurant’s I-9 forms, neither Nimmagadda nor Posani made any reference to Vensai; they told the ICE agents to look to corporate headquarters, and that Symmetric Solutions would have any legal documents. While Nimmagadda identified himself to Busby as a part-

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<sup>3</sup> The agreement reflects that an advance of \$50,000 was paid on July 21, 2008, but establishes no due date for the payment of the remainder.

owner, moreover, when he signed the certificate acknowledging service of the NOI, he referred to himself as “[f]uture owner,” not as a current owner. Symmetric’s name appeared on the lease for at least one rental unit housing employees of Minerva, and the utilities for that unit were paid through a bank account in Symmetric’s name. After Symmetric was served with the NIF, it filed a request for hearing in its own name; the company made no mention of Vensai at that time either.

Symmetric’s motion for summary decision is unencumbered by any reference to case law, federal, state, or administrative, and offers no legal authority to support the proposition that an employer can escape its legal obligations by selling off part of its business. The company thus provides no reason for this forum to depart from traditional general common law principles holding co-owners of an enterprise subject to joint and several liability. *Cf.* Restatement (Second) of Torts § 875 (1979). There is accordingly no need to address the question of whether there was a sufficiently substantial overlap between Symmetric and Vensai for the latter to qualify as a “mere continuation” of the former within the meaning of *Bud Antle, Inc., v. Eastern Foods, Inc.*, 758 F.2d 1451, 1458 (11th Cir. 1985). Symmetric’s motion for summary decision will be denied with respect to its first defense because the documents presented with the Reddy affidavit do not support the affiant’s conclusion that Vensai was the sole owner of Minerva after August 14, 2008.

Symmetric’s motion for summary decision makes no mention of the remaining affirmative defenses raised in its answer, none of which was accompanied by the statement of facts required by 28 C.F.R. § 68.9(c)(2) (2013), and none of which appears to bear any prima facie legal viability. Because Symmetric failed to carry the burden of proof as to any of its affirmative defenses, its motion for summary decision must be denied in its entirety.

#### D. Symmetric’s Motion to Strike

Because Symmetric failed to show that it divested itself of all its ownership interest in Minerva, there is no basis for the company’s motion to strike ICE’s exhibits, and the company’s motion to strike will also be denied. While the company seeks to divide most of the documentary evidence into mutually exclusive categories as either Symmetric’s documents or Vensai’s documents, the fact is that the restaurant’s documents are Minerva’s documents; they were Minerva’s documents before the sale and they continued to be Minerva’s documents after the sale. As such, the documents belong to each of Minerva’s co-owners as well.

### III. ICE’S MOTION FOR SUMMARY DECISION

#### A. ICE’s Motion

The government’s motion contends that it is entitled to summary decision as to both counts, as well as to penalties totaling \$77,000. Exhibits accompanying the motion include G-1) Notice of Inspection dated December 11, 2008 (4 pp.); G-2) Articles of Incorporation of Symmetric Solutions, Inc. (6 pp.); G-3) Georgia Secretary of State documents for Symmetric Solutions, Inc. (New Jersey) (5 pp.); G-4) business licenses and permits for Minerva Indian Cuisine and/or Symmetric Solutions, Inc. (6 pp.); G-5) affidavit of HSI Special Agent Bruce Busby (5 pp.); G-6) declaration of ICE Auditor Melinda Stephens (5 pp.); G-7A) ICE inquiry to the Georgia

Department of Labor (GDOL) for wage and quarterly reports for Symmetric Solutions, Inc., d.b.a Minerva Indian Cuisine and response for 2007 (3 pp.); G-7B) ICE inquiry to GDOL for wage and quarterly reports for Symmetric Solutions, Inc., d.b.a Minerva Indian Cuisine and response for 2006 (3 pp.); G-7C) ICE inquiry to GDOL for wage and quarterly reports and response for 2005 (6 pp.); G-8) GDOL facsimile to ICE; G-8A) ICE inquiry to GDOL for Symmetric's wage report and response for 4th quarter 2007; G-8B) ICE inquiry to GDOL for Symmetric's wage report and response for 1st quarter 2008; G-8C) ICE inquiry to GDOL for Symmetric's wage report and response for 2nd quarter 2008; G-8D) ICE inquiry to GDOL for Symmetric's wage report and response for 3rd quarter 2008; G-9) composition book labeled "Salaries 2006" (41 pp.); G-10) composition book labeled "Salaries 2007" (46 pp.); G-11) composition book labeled "Salaries 2008" (56 pp.); G-12) employee list for Symmetric Solutions, Inc.; G-13) Symmetric Solutions, Inc. payroll summary, December 2007 to November 2008 (3 pp.); G-14) Employer's Quarterly Tax and Wage Report for Symmetric Solutions, Inc. for the quarter ending December 31, 2007 (3 pp.); G-15) Employer's Quarterly Tax and Wage Report for Symmetric Solutions, Inc. for the quarter ending March 31, 2008 (3 pp.); G-15) (sic)<sup>4</sup> Employer's Quarterly Tax and Wage Report for Symmetric Solutions, Inc. for the quarter ending June 30, 2008 (2 pp.); G-16) Employer's Quarterly Tax and Wage Report for Symmetric Solutions, Inc. for the quarter ending September 30, 2008 (4 pp.); G-17) Memorandum to INS from Paul W. Virtue, INS Acting Executive Commissioner for Programs, *Interim Guidelines: Section 274A(b)(6) of the Immigration & Nationality Act Added by Section 411 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (Mar. 6, 1997) (the Virtue Memorandum or Interim Guidelines) (11 pp.); G-18) Form I-9 for Sridhar Posani with attachments (3 pp.); G-19) Form I-9 for Shekar Reddy Patlolla with attachments (2 pp.); G-20) Form I-9 for Charanjit Singh with attachment (2 pp.); G-21) Form I-9 for Mahesh Thapa with attachments (3 pp.); and G-22) ICE Fact Sheet: Form I-9 Inspection Overview (2 pp.).

First, ICE says as to Count II that Symmetric is liable for failing to prepare or present I-9 forms for the sixty-six employees<sup>5</sup> named in Count I as amended. Symmetric's records, including its payroll ledgers, reflect that each of these employees worked for Symmetric in 2006, 2007, and/or 2008, so Symmetric was required to prepare an I-9 for each of them and failed to do so. ICE points out that the ledgers were obviously created prior to August 14, 2008 when the sale occurred; they were seized on December 11, 2008 during the search of Minerva's premises, where they were apparently still in use.

<sup>4</sup> Two exhibits are identified as G-15.

<sup>5</sup> Ajay Last Name Unknown (LNU), Alberto LNU, Alexandro LNU, Alfredo LNU, Anthony LNU, Antonio LNU, Aravind LNU, Balu LNU, Cecelia LNU, Chavez LNU, Cicilia LNU, Dio LNU, Feroz LNU, Gregory LNU, Hector LNU, Ijabel LNU, Isabel LNU, Jai Raj LNU, Jesus LNU, Jose LNU, Jose LNU2, Jovani LNU, Juan LNU, Jude LNU, Kishan LNU, Lily LNU, Lokesh LNU, Lorenzo LNU, Marcial LNU, Marco O. LNU, Marcos LNU, Maria LNU, Mario LNU, Mario LNU2, Markos LNU, Montana LNU, Moraci LNU Nitesh LNU, Pawan LNU, Philip LNU, Pradeep LNU, Pradeep LNU2, Raj LNU, Ravi LNU, Ricardo LNU, Santosh LNU, Satyanarayana LNU, Selvergo LNU, Shiva LNU, Sulma LNU, Swaraj LNU, Vamshi LNU, Vasu LNU, Victorino LNU, Wilfredo LNU, Zakhir LNU, Bala Krishna Reddy, Konda Reddy, Krishna Reddy, Niranjan Reddy, Prakash Reddy, Ravinder Reddy, Sanjeeva Reddy, Alfredo Sanchez, Kumara Swamy, T. Yadagiri.

Second, ICE points out with respect to Count II that, notwithstanding Symmetric's denial that it hired most of the individuals named in Count II, Georgia wage and hour records reflect that Symmetric paid Sridhar Posani (the only individual the company did admit hiring) \$50,120 in wages in 2005, \$60,000 in 2006, \$55,000 in 2007, and \$30,000 for the first two quarters of 2008. Shekar Reddy Patlolla (named in the complaint as Shekar Reddy) was paid \$5400 in wages in 2005, \$6000 in 2006, \$24,000 in 2007, and \$12,000 in the first two quarters of 2008. Mahesh Thapa was paid wages of \$23,200 in 2005, \$24,000 in 2006, \$25,500 in 2007, and \$12,500 through the first two quarters of 2008. Internal payroll records reflect that Charanjit Singh was paid wages of at least \$10,000 before his release in November 2008. All were hired well before the sale, Posani in 2000, Reddy Patlolla in 2005, Singh in July 2008, and Thapa in 2004. Visual inspection of the I-9s for these employees reflects that the section 2 certification was not completed for any of them and that section 2 is entirely blank on the forms for Reddy Patlolla, Singh, and Thapa.

### B. Symmetric's Response

Symmetric's response reiterates its view that, because it is a distinct entity from Vensai Foods, LLC, which it says owned Minerva at the time of ICE's inspection, Symmetric is not liable for Vensai's failure to keep adequate records. Symmetric again sets out its arguments as to why it cannot be assumed that the records ICE obtained in December 2008 are complete.

### C. Discussion and Analysis

The government demonstrated that Symmetric failed to prepare and/or present I-9s for the sixty-six employees named in amended Count I, all of whom worked at Minerva and were paid in cash. Law and regulations impose an affirmative duty upon employers to prepare an Employment Eligibility Verification Form I-9 for each employee they hire and to make the form available for inspection on three days' notice. 8 U.S.C. § 1324a(b); 8 C.F.R. § 274a.2(b)(2)(ii). Symmetric will be held liable for the violations in Count I notwithstanding the fact that only the first names of individuals are reflected on the ledgers. The names of these employees do not appear on the company's employee list and are nowhere identified on the company's quarterly wage and tax reports, but it is evident that the company was paying them in cash under the table as well as housing at least some of them. Most were unauthorized for employment. *Cf. United States v. Hudson Delivery Serv., Inc.*, 7 OCAHO no. 945, 368, 393 n.25 (1997) (noting that cash payments to unauthorized aliens suggest the company was attempting to leave no paper trail).<sup>6</sup>

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<sup>6</sup> 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 been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at <http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm# PubDecOrders>.

Symmetric elected to keep its payroll ledgers in a manner that failed to identify the surnames of these employees. The company will not be permitted to avoid liability by concealing its employees' identities. The payroll ledgers from 2006 through 2008 show that thirty-eight employees were paid wages in 2006, thirty-three were paid wages in 2007, and forty-six were paid wages in 2008.<sup>7</sup>

The government also demonstrated that Symmetric failed to properly complete section 2 of form I-9 for Sridhar Posani, Shekar Reddy (Patlolla), Charanjit Singh, and Mahesh Thapa as charged in Count II. Visual inspection of the Forms I-9 reflects that Symmetric failed to complete the section 2 certification on all of the forms. ICE is thus entitled to summary decision as to liability for sixty-six violations alleged in Count I and four violations alleged in Count II.

#### IV. PENALTY ASSESSMENT

Civil money penalties are assessed for paperwork violations according to the parameters set forth at 8 C.F.R. § 274a.10(b)(2) (2013): the minimum penalty for each individual with respect to whom a violation occurred after September 29, 1999, is \$110, and the maximum is \$1100. The government has the burden of proof with respect to the penalty, *United States v. March Construction, Inc.*, 10 OCAHO no. 1158, 6 (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).

In assessing an appropriate penalty, the following factors must be considered: 1) the size of the employer's business, 2) the employer's good faith, 3) the seriousness of the violations, 4) whether or not the individual was an unauthorized alien, and 5) the employer's history of previous violations. 8 U.S.C. § 1324a(e)(5). The statute neither requires that equal weight be given to each factor, nor rules out consideration of additional factors. *See United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000).

##### A. The Government's Assessment

ICE calculated a baseline penalty in accordance with internal agency guidance that sets a penalty of \$935 for each violation when the employer's error rate exceeds 50%. ICE then aggravated the fine by 20%, 5% for each of four statutory factors. The declaration of Melinda Stephens, DHS auditor, states that Minerva employed seventy-four individuals between January 2006 and

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<sup>7</sup> *See* Appendix A. The number of employees in a given year was determined by counting the number of different names at the top of each payroll sheet showing the employee's wages. Where there were multiple copies of the same payroll sheet, the name of that employee was only counted once. When the complaint listed the same first name more than once as "Jose LNU, Jose LNU 2," and there were two different payroll sheets having the same name but different wages clearly relating to distinct employees, the name was counted twice. The name Marcos LNU appears in the complaint, but not on Symmetric's payroll ledgers. The 2008 ledger does, however, have a page captioned "Jr. Marcos-Soliz (chicito)," and this individual is assumed to be Marcos LNU.

July 2008, and had an approximate annual payroll amount of \$300,000. While the government was unable to determine the amount of the company's business revenue, Stephens concluded based on the payroll that Minerva appeared profitable and should have had an employee dedicated to ensuring that all I-9 paperwork was properly prepared. The penalty was therefore aggravated based on the size of the employer.

The declaration says further that Minerva lacked good faith because it presented I-9 forms for only four employees and failed to prepare I-9s for most of its workforce. The company's managers and owners profited by disregarding the INA and also broke tax and labor laws as standard operating procedure, justifying an enhancement based on this factor as well. ICE also aggravated the fine based on the seriousness of the violations. The government characterized the violations as serious by referring again to the company's 100% error rate and observing that the four I-9s Minerva presented all contained substantive violations. ICE also notes that a large number of current and former employees were permitted to work without completing a Form I-9. Seventeen out of nineteen employees were identified as unauthorized, constituting eighty-nine percent of the workforce. Minerva in addition had fifty-five former employees without I-9s who were not reported to the State of Georgia or on the Federal Quarterly Tax Returns.

Finally, ICE aggravated the fine based on the presence of unauthorized workers. The government acknowledged that the company did not provide sufficient information for ICE to determine conclusively the work authorization status of all the employees and former employees, but said the surrounding circumstances, including the company's recordkeeping practices, supported the inference that these workers were unauthorized. The Busby declaration says that sixteen aliens at Minerva, in addition to one employee located off the restaurant's premises, were administratively processed for removal, and two of the employees named in Count II, Mahesh Thapa and Sridhar Posani, were also unauthorized for employment.

The government's assessment resulted in a total of \$1122 for each violation, but that had to be adjusted to \$1100 because the regulations do not permit fines exceeding \$1100 per violation. The total penalty based on the amended complaint is \$77,000.

#### B. Symmetric's Response

Symmetric's response presented neither legal argument nor evidence respecting the proposed penalty. The company's prehearing statement and answer do not address the issue either.

#### C. Discussion and Analysis

The government assessed the size of the employer in part by finding that Minerva had at least seventy employees. As observed in *United States v. MEMF LLC*, 10 OCAHO no. 1170, 4-5 (2013), however, the restaurant industry is notoriously subject to a high employee turnover rate and a more accurate assessment can be made by looking at how many employees the company had at any one time. Agent Busby's declaration says that ten to fifteen individuals were identified as employees of Minerva during the government's surveillance of the restaurant, and eighteen were present on December 11, 2008, when the NOI was served. ICE also relied in part on Symmetric's payroll of \$300,000 in concluding that the company was profitable, but profit is not a proxy for size. A large business is not necessarily profitable and a small business is not necessarily unprofitable. See *United States v. Alyn Indus., Inc.*, 10 OCAHO no. 1141, 5 (2011).

I conclude based on the record as a whole that, regardless of its profitability, the company was a small employer.

ICE did show, on the other hand, that Symmetric lacked good faith, notwithstanding the government's use of the company's error rate in evaluating this factor.<sup>8</sup> The company's lack of good faith is clearly established without reference to the rate of violations because the record is replete with evidence that Symmetric engaged in widespread deception over the course of at least three years. Paying unauthorized workers in cash under the table while failing to report their wages to taxing authorities are not the actions of an employer making an honest effort to ascertain what its legal obligations are and to conform its conduct to them. *See United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 10 (2010) (citing *United States v. Felipe, Inc.*, 1 OCAHO no. 93, 526, 634 (1989)).

The government also assessed the seriousness of the violations appropriately. Failure to prepare and/or present an I-9 is one of the most serious paperwork violations. *See United States v. Platinum Builders of Cent. Fla., Inc.*, 10 OCAHO no. 1199, 8 (2013) (citing *United States v. Reyes*, 4 OCAHO no. 592, 1, 10 (1994)). Failure to complete the certification in section 2 is also a very serious violation. *See United States v. Metro. Warehouse, Inc.*, 10 OCAHO no. 1207, 11 (2013) (citing *United States v. J.J.L.C., Inc.*, 1 OCAHO no. 154, 1089, 1098 (1990)). While ICE may well be correct in concluding that most of Symmetric's workforce was unauthorized, the question posed by the statute is "whether or not the *individual* was an unauthorized alien," not what percentage of the workforce is unauthorized. 8 U.S.C. § 1324a(e)(5) (emphasis added); *see United States v. Nebeker, Inc.*, 10 OCAHO no. 1165, 5 (2013) (citing *Hernandez*, 8 OCAHO no. 1043 at 669). Ordinarily this means that penalties are not enhanced across the board for all the violations based on the presence of some unauthorized workers. *See March Construction*, 10 OCAHO no. 1158 at 5.

Nevertheless, while I do not necessarily concur with all aspects of the government's rationale, Symmetric has pointed to no reason for reducing the penalties and the government reached an appropriate result by imposing penalties at or near the maximum. *See United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013) (observing that penalties close to the maximum permissible are reserved for the most egregious violations). Apart from the fact that Minerva is a small employer, there are no equities favoring the company, and the function of a maximum penalty here is not punitive, but prophylactic and corrective. While Symmetric represented in an earlier pleading that Minerva is now closed, no evidence confirms this assertion. Although OCAHO case law has long affirmed that penalties are not intended to put employers out of business, *see, e.g., Felipe*, 1 OCAHO no. 93 at 631, that precept has no application to this case. The presence in this country of employers who deliberately and cynically profit from defying multiple laws and standards governing employer conduct corrupts our economy and undermines the rule of law; such conduct needs to be deterred.

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<sup>8</sup> Because the employer's rate of compliance is already used to determine the baseline penalty, it should not be used again to aggravate a penalty based on a statutory factor. *See United States v. Stanford Sign and Awning, Inc.*, 10 OCAHO no. 1152, 6 (2012).

## V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. Findings of Fact

1. Symmetric Solutions d.b.a. Minerva Indian Cuisine was incorporated as a domestic corporation in New Jersey in 1998 and as a foreign corporation in Georgia in 2003.
2. The Department of Homeland Security, Immigration and Customs Enforcement served Symmetric Solutions, Inc. d.b.a. Minerva Indian Cuisine with a Notice of Inspection (NOI) on December 11, 2008.
3. Symmetric Solutions, Inc. d.b.a. Minerva Indian Cuisine provided four I-9s for inspection on December 15, 2008.
4. The Department of Homeland Security, Immigration and Customs Enforcement served Symmetric Solutions, Inc. d.b.a. Minerva Indian Cuisine with a Notice of Intent to Fine on May 11, 2010.
5. Symmetric Solutions, Inc. d.b.a. Minerva Indian Cuisine filed a timely request for hearing on May 28, 2010.
6. The Department of Homeland Security, Immigration and Customs Enforcement filed a complaint against Symmetric Solutions, Inc. d.b.a. Minerva Indian Cuisine with the Office of the Chief Administrative Hearing Officer on October 1, 2012.
7. Symmetric Solutions, Inc. d.b.a. Minerva Indian Cuisine failed to prepare and/or present Forms I-9 for Ajay Last Name Unknown (LNU), Alberto LNU, Alexandro LNU, Alfredo LNU, Anthony LNU, Antonio LNU, Aravind LNU, Balu LNU, Cecelia LNU, Chavez LNU, Cicilia LNU, Dio LNU, Feroz LNU, Gregory LNU, Hector LNU, Ijabel LNU, Isabel LNU, Jai Raj LNU, Jesus LNU, Jose LNU, Jose LNU2, Jovani LNU, Juan LNU, Jude LNU, Kishan LNU, Lily LNU, Lokesh LNU, Lorenzo LNU, Marcial LNU, Marco O. LNU, Marcos LNU, Maria LNU, Mario LNU, Mario LNU2, Markos LNU, Montana LNU, Moraci LNU Nitesh LNU, Pawan LNU, Philip LNU, Pradeep LNU, Pradeep LNU2, Raj LNU, Ravi LNU, Ricardo LNU, Santosh LNU, Satyanarayana LNU, Selvergo LNU, Shiva LNU, Sulma LNU, Swaraj LNU, Vamshi LNU, Vasu LNU, Victorino LNU, Wilfredo LNU, Zakhir LNU, Bala Krishna Reddy, Konda Reddy, Krishna Reddy, Niranjana Reddy, Prakash Reddy, Ravinder Reddy, Sanjeeva Reddy, Alfredo Sanchez, Kumara Swamy, and T. Yadagiri, upon request.
8. Symmetric Solutions, Inc. d.b.a. Minerva Indian Cuisine failed to complete the section 2 certification of the Forms I-9 for Sridhar Posani, Shekar Reddy Patlolla, Charanjit Singh, and Mahesh Thapa.
9. Symmetric Solutions, Inc. d.b.a. Minerva Indian Cuisine attempted to conceal its hiring and payment practices by paying workers in cash, failing to show the total number of its employees in its own employee list, and repeatedly failing to report its employees' wages to the State of Georgia or other taxing authorities.
10. The Department of Homeland Security, Immigration and Customs Enforcement amended its complaint to dismiss the allegations in Count I that Symmetric Solutions, Inc. d.b.a. Minerva

Indian Cuisine failed to present I-9s for Manuel Paddilla Alvarado, Fernando Hernandez Andrade, Fucundo Chavez Antonio, Vutla Balakrishna, Nicholas Gabino De La Cruz, Alfredo Villa Garcia, Jamal Hossain, Srinvasa Reddy Kamireddy, Sarotham Reddy Kalva, Sandeep Raman Kulangara, Jose Santos Pinon Medina, Pavan Kumar Nagarappu, Ruben Caamano Ramos, Kishta Malla Reddy, Juan Bibiano Romero, and Anil Sallawar.

11. The Department of Homeland Security, Immigration and Customs Enforcement amended its complaint to dismiss the allegations in Count III that Symmetric Solutions, Inc. d.b.a. Minerva Indian Cuisine hired seventeen named individuals knowing they were unauthorized for employment in the United States.

#### B. Conclusions of Law

1. Symmetric Solutions, Inc. d.b.a. Minerva Indian Cuisine is an entity within the meaning of 8 U.S.C. § 1324a(a)(1) (2012).

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

3. The Department of Homeland Security, Immigration and Customs Enforcement filed an amended complaint dismissing the allegations in Count I with respect to sixteen named individuals.

4. The Department of Homeland Security, Immigration and Customs Enforcement filed an amended complaint dismissing Count III of its original complaint in its entirety.

5. Symmetric Solutions, Inc. d.b.a. Minerva Indian Cuisine is liable for seventy violations of 8 U.S.C. § 1324a(a)(1)(B).

6. Symmetric Solutions, Inc. d.b.a. Minerva Indian Cuisine failed to prepare or present I-9s for sixty-six individuals named in Count I of the amended complaint.

7. Symmetric Solutions, Inc. d.b.a. Minerva Indian Cuisine failed to properly complete section 2 of Form I-9 for the four individuals named in Count II.

8. In assessing an appropriate penalty, the following factors must be considered: 1) the size of the employer's business, 2) the employer's good faith, 3) the seriousness of the violations, 4) whether or not the individual was an unauthorized alien, and 5) the employer's history of previous violations. 8 U.S.C. § 1324a(e)(5). The statute neither requires that equal weight be given to each factor, nor rules out consideration of additional factors. *See United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000).

9. An employer's percentage of violations is used to determine the baseline penalty under ICE guidelines and should not be used again as an aggravating factor. *See United States v. Stanford Sign and Awning, Inc.*, 10 OCAHO no. 1152, 6 (2012).

10. Good faith is shown when an employer makes an honest effort to ascertain what its legal obligations are and to conform its conduct to them. *See United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 8 (2010) (citing *United States v. Felipe, Inc.*, 1 OCAHO no. 93, 526, 634 (1989)).

11. Failure to prepare and/or present an I-9 is one of the most serious paperwork violations. *See United States v. Platinum Builders of Cent. Fla., Inc.*, 10 OCAHO no. 1199, 8 (2013) (citing *United States v. Reyes*, 4 OCAHO no. 592, 1, 10 (1994)).

12. An employer's failure to complete the section 2 certification in Form I-9 is very serious violation. *See Metro. Warehouse, Inc.*, 10 OCAHO no. 1207, 11 (2013) (citing *United States v. J.J.L.C., Inc.*, 1 OCAHO no. 154, 1089, 1098 (1990)).

13. Penalties generally should not be enhanced across the board for all the violations based on the presence of some unauthorized workers. *See United States v. March Construction, Inc.*, 10 OCAHO no. 1158, 5 (2012).

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

To the extent that any statement of fact is deemed to be a conclusion of law or any conclusion of law is deemed to be a statement of fact, the same is so denominated as if set forth as such.

#### ORDER

The government's second motion to amend the complaint is granted. Symmetric Solutions, Inc.'s motions for summary decision and to strike exhibits are denied. The government's motion for summary decision is granted. Symmetric Solutions, Inc. is liable for seventy violations of 8 U.S.C. § 1324a(a)(1)(B) and is ordered to pay a civil money penalty of \$77,000. All other pending motions are denied.

SO ORDERED.

Dated this 6th day of February, 2014.

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Ellen K. Thomas  
Administrative Law Judge

### Appeal Information

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

Provisions governing administrative reviews by the CAHO are set forth at 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. pt. 68. Note in particular that a request for administrative review must be filed with the CAHO within ten (10) days of the date of this order, pursuant to 28 C.F.R. § 68.54(a)(1) (2012).

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

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

## Appendix A

<b>Name of Employee</b>	<b>Year (s) of Payroll Ledger(s) that List(s) Employee's Name</b>
Ajay Last Name Unknown (LNU)	2007, 2008
Alberto LNU	2008
Alexandro LNU	2006, 2007, 2008
Alfredo LNU	2006, 2007, 2008
Anthony LNU	2008
Antonio LNU	2006
Aravind LNU	2006
Balu LNU	2007, 2008
Cecelia LNU	2006
Chavez LNU	2008
Cicilia LNU	2007, 2008
Dio LNU	2006, 2007, 2008
Feroz LNU	2007
Gregory LNU	2006, 2007
Hector LNU	2006
Ijabel LNU	2006
Isabel LNU	2007
Jai Raj LNU	2006, 2007
Jesus LNU	2006
Jose LNU	2006, 2007, 2008
Jose LNU2	2006
Jovani LNU	2008
Juan LNU	2006, 2007, 2008
Jude LNU	2006
Kishan LNU	2008
Lily LNU	2008
Lokesh LNU	2006
Lorenzo LNU	2008
Marcial LNU	2006
Marco O. LNU	2006
Marcos LNU	2008
Maria LNU	2006
Mario LNU	2006, 2008
Mario LNU 2	2007
Markos LNU	2008
Montana LNU	2008
Moraci LNU	2006
Nitesh LNU	2008
Pawan LNU	2006, 2007, 2008
Philip LNU	2006
Pradeep LNU	2006

Pradeep LNU 2	2006, 2007, 2008
Raj LNU	2008
Ravi LNU	2006
Ricardo LNU	2006
Santosh LNU	2008
Satyanarayana LNU	2007
Selvergo LNU	2007
Shiva LNU	2008
Sulma LNU	2006
Swaraj LNU	2007
Vamshi LNU	2007
Vasu LNU	2008
Victorino LNU	2006
Wilfredo LNU	2007
Zakhir LNU	2006
Bala Krishna Reddy	2008
Konda Reddy	2007, 2008
Krishna Reddy	2008
Niranjan Reddy	2007
Prakash Reddy	2008
Ravinder Reddy	2006, 2007
Sanjeeva Reddy	2006, 2007, 2008
Alfredo Sanchez	2008
Kumara Swamy	2007
T. Yadagiri	2007, 2008