

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

June 27, 2014

UNITED STATES OF AMERICA,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324a Proceeding
)	OCAHO Case No. 11A00096
)	
JALISCO’S BAR AND GRILL, INC.,)	
Respondent.)	
_____)	

FINAL DECISION AND ORDER

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 two-count complaint against Jalisco’s Bar and Grill, Inc. (Jalisco’s or the company). Count I alleged that Jalisco’s violated 8 U.S.C. § 1324a(a)(1)(A) by hiring Jose David Guillen Lopez and Marcos Antonio Guillen Lopez knowing them to be unauthorized for employment in the United States. Count II alleged that Jalisco’s violated 8 U.S.C. § 1324a(a)(1)(B) by hiring twenty-four named individuals and failing to prepare and/or present Employment Eligibility Forms I-9 for them. The complaint sought penalties totaling \$26,668.50.

Jalisco’s is not represented by counsel. Francisco J. Gutierrez, the owner and president of the company, filed an answer denying the material allegations of the complaint, and asserting in response to Count I that Jose David Guillen Lopez and Marcos Antonio Guillen Lopez were not employed by Jalisco’s but were actually employees of a previous tenant at the same location.

Jalisco’s subsequently raised an affirmative defense of entrapment with respect to all of Count II, saying that because its original I-9s suffered water damage on September 10, 2010, after the

rupture of a water heater tank, the company recreated its files at that time. The company notes that the *Handbook for Employers*¹ offers no guidance as to what an employer should do in such circumstances and that it expressly says that older versions of the form should not be used. Jalisco's argues that this lack of guidance, coupled with the warning not to use previous versions of the form, results in entrapment because the employer is left with no way to comply with the requirements. Finally, Jalisco's says that it was not required to present an I-9 for Francisco Gutierrez, and that it did present an I-9 for Martha Barrios but ICE must have misplaced it.

Presently pending are the parties' cross motions for summary decision. Neither party responded to the other's motion and both are ready for resolution.

II. BACKGROUND INFORMATION

Jalisco's Bar and Grill, Inc. is a restaurant located at 844 N. Imperial Avenue in El Centro, California that was incorporated in July 2008 by Francisco J. Gutierrez. ICE served a Notice of Inspection (NOI) on Jalisco's on December 13, 2010, and on December 16, 2010, Jalisco's presented thirty I-9 forms for its current and former employees. ICE issued Jalisco's a Notice of Technical or Procedural Failures on February 3, 2011, but there were errors in the notice, including the wrong address for the business, and it appears that Jalisco's never received it. A Notice of Intent to Fine (NIF) was issued to the company on May 12, 2011, and Jalisco's made a timely request for hearing on May 18, 2011. All conditions precedent to the institution of this proceeding have been satisfied.

III. POSITIONS OF THE PARTIES

A. ICE's Motion

ICE's motion contends that there are no genuine issues of material fact and that the government is entitled to summary decision as to liability for both counts, as well as to the requested penalty. The government relies on exhibits it filed with its prehearing statement, consisting of: G-1) Notice of Inspection dated December 13, 2010 (2 pp.); G-2) DHS Receipt for Property dated December 16, 2010; G-3) Notice of Technical or Procedural Failures dated February 3, 2011 (3 pp.); G-4) Business Entity Detail dated April 15, 2011; G-5) Employee Lists (2 pp.); G-6) Articles of Incorporation dated July 31, 2008 (2 pp.); G-7) IRS EIN assignment; G-8) Copy of Business License issued July 1, 2009; G-9) 2010 Fourth Quarter Tax Returns (3 pp.); G-10)

¹ United States Citizenship and Immigration Services (rev. Apr. 3, 2009). Although the Handbook has been subsequently revised, the 2009 edition was the version in effect at all times pertinent to this case.

Payroll Summaries (35 pp.); G-11) Employment Development Department (EDD) Employee Lists (33 pp.); G-12) Civil Money Penalty Memorandum (4 pp.); G-13) Reports of Investigation (4 pp.); and G-14) I-9 Forms (25 pp.).

1. Count I

In support of the allegations in Count I, the government points to two Reports of Investigation. Both reports state that on November 9, 2010, Homeland Security Investigations (HSI) special agents observed Jose David Guillen Lopez (David Guillen) working at Jalisco's Bar and Grill in El Centro, California, and that Guillen is a citizen of Mexico with a non-immigrant visa that allows him to visit the United States, but not to work here. The reports say further that Special Agent Douglas A. Struckmeyer initiated an inspection at Jalisco's on December 13, 2010, and interviewed David Guillen on December 17, 2010 at the Calexico, California East Port of Entry.

The report dated December 23, 2010 states that Jose David Guillen Lopez is a citizen of Mexico with a visitor's visa, and that Marcos Antonio Guillen Lopez is a citizen of Mexico who lacks documents allowing him to lawfully enter the United States. The report states in addition that when Agent Struckmeyer interviewed David Guillen on December 17, 2010, Guillen told Struckmeyer that he and his brother, Marcos Antonio Guillen Lopez (Marcos Guillen), worked at Jalisco's for approximately three weeks. David Guillen said he stopped working because he started a business in Mexico and was currently trying to immigrate legally. The report states that Marco Antonio Guillen also returned to Mexico and was attempting to immigrate legally. David Guillen told Struckmeyer that "Nellie" referred him to "Francisco," the owner of Jalisco's, at which time Guillen told Francisco he was ineligible to work and Francisco hired him.

The report dated July 5, 2011 says that in November 2010, HSI agents Leon and Niessner witnessed David Guillen working at Jalisco's, and that Agent Struckmeyer saw Guillen's vehicle parked in the lot at least six times in the following two weeks. The report provides additional details, and identifies "Nellie" as Manuela Langworthy, the restaurant manager at Jalisco's and "Francisco" as Francisco Gutierrez, the owner of Jalisco's. David Guillen told Struckmeyer in the interview on December 17, 2010 that Langworthy was aware that he was ineligible to work because she and Guillen had previously worked together for a different employer. David Guillen also told Gutierrez, prior to being hired, that he was ineligible to work.

ICE noted that while the company's answer denied the allegations in Count I, Jalisco's pointed to no evidence to refute or contest the government's factual allegations, and that in addition Jalisco's failed to prepare or present I-9 forms for both of these individuals.

2. Count II

Count II asserts that Jalisco's hired Johenna Alba, Ana Balderas, Rosa I. Balderas, Jose Luis

Barrios, Martha L. Barrios, Keyla M. Cabrales, Janeth Castro, Sergio Celaya, German Cervantes, Daniel Duran, Lucias A. Escobedo, Juan Carlos Flores, Aaron Garcia, Yessenia Garcia, Francisco Gutierrez, Ana Elena Heredia, Manuela Langworthy, Ana L. Lopez, Cristina Lopez, Albert Navarro, Daniel Placeres, Emiliano Ramos, Sergio G. Santiago, and Liz Y. Zaragoza, and failed to prepare and/or present I-9 forms for them.

ICE says that simple visual examination of the company's I-9 forms reflects that, except for Martha L. Barrios and Francisco Gutierrez, for whom no I-9s are included in exhibit G-14, the forms for twenty-two individuals were not timely completed within three days of the individuals' respective dates of hire and are instead backdated. The purported dates of attestation on each of these forms precedes August 7, 2009, the date appearing on the version of the form that was used for all the I-9s. The forms thus could not possibly have been completed on the dates attested to because the version of the form used did not exist until August 7, 2009.

The government contends that, while Jalisco's characterizes these I-9 forms as having been "reconstructed" after a flood, the so-called "reconstructed" forms are fraudulent because they are backdated. There is no objective evidence to show with any degree of certainty when the forms were actually prepared. While it is clear that they could not have been prepared on the dates reflected on the forms, they could have been prepared any time after August 7, 2009, up to and including after the NOI. ICE says that even if the company's I-9s were damaged, this would not excuse Jalisco's for committing perjury on a government form by attesting to facts that are "patently and factually false."

ICE says in addition that Jalisco's claimed defense should be rejected because had Jalisco's I-9s really been destroyed in a flood, some kind of memorandum or documentation should have been created at the time to memorialize such an incident, but no such evidence was offered. The government's prehearing statement also asserts that on July 1, 2011, Agent Struckmeyer interviewed Juan Huerta, the person who fixed the water heater. Huerta said that several boxes were damaged by water, but he did not see any damaged documents.

3. Penalties

ICE seeks a penalty of \$431.25 for each of the two knowing hire violations in Count I, and a penalty of \$1075.25 for each of the twenty-four paperwork violations in Count II. The total for both counts is \$26,668.50. ICE set the baseline for the paperwork violations at \$935 based on internal agency guidance. The government then considered the statutory penalty factors.² ICE observed that with only seventeen employees there was no issue as to the size of the company,

² These are the size of the business, the good faith of the employer, the seriousness of the violation, whether the individual was an unauthorized alien, and any history of previous violations.

and treated this factor as neutral. Similarly, the absence of any history of previous violations was treated neutrally as well. The government aggravated the penalties by 5% for bad faith based on “evidence of intentional deception in the completion of the Forms” (backdating), by another 5% for the seriousness of the violations, and an additional 5% for the involvement of unauthorized aliens. The 15% fine enhancements were applied across the board to both counts.

B. Jalisco’s Motion

The company’s motion argues generally that the NIF is based only on hearsay and circumstantial evidence, and that ICE failed to conduct a proper investigation. No documents accompanied Jalisco’s motion, but the company’s answer was accompanied by exhibits consisting of a receipt for a water heater installation and flood cleanup dated September 10, 2010, and a photo of a water heater dated May 17, 2011.

1. Count I

Jalisco’s motion contends that Jose David Guillen Lopez and Marcos Antonio Guillen Lopez, named in Count I, were employees of the previous tenant, Miguel Salcedo, who was then doing business as Asadero Jalisco and is now doing business “with a new dba Mexicali Chicken & Salads at a different location.” Jalisco’s asserts that Mexicali Chicken & Salads is also under review by ICE and that the files of the two companies have been commingled.

In support of its claim that ICE commingled Jalisco’s files with those of Mexicali Chicken & Salads, the company points to a Notice of Technical or Procedural Failures issued on February 3, 2011. The body of this notice states that the entity inspected was Mexicali Chicken & Salads located at 2844 N. Imperial Avenue, El Centro, CA 92243. Jalisco’s says that it never actually received this notice, that the address for Jalisco’s is different from the address on the notice, and that the notice is addressed to Mexicali Chicken, a business that is owned by Miguel Salcedo or his wife.

Jalisco’s says further that the government has failed to prove its allegations and that any statement given by David Guillen was made under duress and as part of a “deal” Guillen made with ICE agents to keep his border crossing card and to continue to work for Miguel Salcedo.

2. Count II

In response to the allegations in Count II, Jalisco’s offers a defense of entrapment, stating that the government gives no guidance as to what an employer is to do when its I-9 forms are destroyed, and there is no way to come into compliance. Jalisco’s says that the company did timely prepare I-9s for all the employees, but the forms were damaged when a water heater in the office ruptured, and the company then reproduced them in good faith at the time of the accident and

presented the recreated forms to ICE upon request. Because the employee files were in a cardboard box on the floor when the water heater malfunctioned, the forms absorbed water overnight and were destroyed. Jalisco's said it searched the employer guide for instructions as to what to do, but there were none.

Jalisco's says further that it was not obligated to complete an I-9 form for Francisco Gutierrez because he is the president and a stockholder of Jalisco's, and also owns another business where he is listed as an employee. The company also asserts that, contrary to the government's allegation, the company did provide an I-9 form for Martha Barrios, another stockholder and officer of the company. The company points out that ICE's receipt for documents reflects that nineteen I-9s were presented for active employees, and that the company's list of nineteen active employees includes Martha Barrios. Jalisco's says that ICE probably misplaced her I-9 in another file.

3. Penalties

Jalisco's motion did not specifically address the penalty factors, but the company contends that any monetary sanction should be dismissed in its entirety along with Counts I and II so that Jalisco's can "continue our business with peace & not fear retaliation from ICE."

IV. DISCUSSION AND ANALYSIS

A. Count I

Jalisco's offers no evidence beyond its mere allegation that the Guillen brothers worked for a different employer, but there is probative evidence that both worked for Jalisco's. The company's unsworn factual allegations are not evidence, and absent evidentiary support for Jalisco's allegations, they are not credited. *United States v. Cal. Mantel, Inc.*, 10 OCAHO no. 1168, 9 (2013) (citing *United States v. Ronning Landscaping, Inc.*, 10 OCAHO no. 1149, 14-15 (2012)).³ Such allegations, moreover, cannot operate to create a genuine issue of material fact

³ 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>.

where one does not otherwise exist. *See Goel v. Indotronix Int'l Corp.*, 9 OCAHO no. 1102, 14 (2003).

ICE's investigatory reports, in contrast, are reports of the findings of an investigative agency made pursuant to the authority granted by law and completed by one of the agents who conducted the investigation. The reports appear to have been prepared in accordance with normal recordkeeping requirements and demonstrate substantial indicia of reliability. While portions of these reports do constitute hearsay, as Jalisco's points out, it is well established, contrary to the company's contention, that hearsay is freely admissible in administrative proceedings so long as it is probative and reliable. *See* Administrative Procedure Act, 5 U.S.C. § 556(d); *United States v. China Wok Rest., Inc.*, 4 OCAHO no. 608, 176, 189 (1994); *see also United States v. Carter*, 7 OCAHO no. 931, 121, 139 n.27 (1997). ICE met the initial burden of proving that Jalisco's hired the Guillen brothers for employment, and also provided substantial evidence that both Guillen brothers were unauthorized for employment in the United States.

Jose David Guillen Lopez said in his interview with Agent Struckmeyer that he told Gutierrez at the time he was hired that he was not eligible to be employed, but ICE points to no evidence that he or anyone else ever told Gutierrez that his brother Marcos Antonio Guillen Lopez was unauthorized as well. There is no suggestion that David Guillen said anything one way or the other to Gutierrez about Marcos Guillen's employment eligibility, and the investigative report does not suggest that ICE agents interviewed Marcos Guillen or asked him what he told Gutierrez. While I credit ICE's conclusion that both brothers were unauthorized for employment in the United States, there is no evidence to support an inference that Gutierrez knew or should have known that Marcos Guillen was not authorized. Jalisco's failure to prepare an I-9 for Marcos Guillen is suggestive, but insufficient in itself to support a finding of constructive knowledge. In the United States today, moreover, mixed-status families are increasingly common, and an employer may not reasonably infer that just because one family member is unauthorized, another must be unauthorized as well.

ICE's motion for summary decision will accordingly be granted as to the allegation in Count I that the company hired Jose David Guillen Lopez knowing him to be unauthorized for employment in the United States, but Jalisco's motion will be granted as to the allegation involving the knowing hire of Marcos Antonio Guillen Lopez. Because the company failed to prepare an I-9 for Marcos Antonio Guillen Lopez, however, his name will be added to the list of employees in Count II.

B. Count II

While both the NIF and the complaint allege twenty-four violations in Count II, only twenty-two I-9s were offered in evidence. Employers are required to prepare I-9 forms for new employees within three business days of their hire, *see* 8 C.F.R. § 274a.2(b)(1)(ii); *Stanford Sign & Awning*,

Inc., 10 OCAHO no. 1145, 4 (2012), and there is no evidence that Jalisco's prepared timely I-9s for any of the employees named in Count II. Backdating is facially apparent on the twenty-two I-9s offered in evidence because the date reflecting the revision of the forms indicates that it is impossible for Jalisco's to have completed the I-9s when it claims to have done so. Jalisco's admits entering incorrect information on the backdated I-9s to make them appear as if they were created within three days' of the employees' original hire dates, but argues that the only reason it did so was that the original forms were destroyed after a water heater malfunctioned. Jalisco's submitted invoices from September 2010 indicating that it required flood cleanup, and says that having been left without any specific instructions in the *Handbook for Employers*, the company was attempting in good faith to comply with IRCA.

Jalisco's argues that it was entrapped, but as pointed out in *United States v. McDougal*, 4 OCAHO no. 687, 862, 874 (1994), entrapment is a defense in a criminal proceeding and is not available in civil cases (citing *United States v. Irvin Indus., Inc.*, 1 OCAHO no. 139, 937, 945-46 (1990) and *United States v. Multimatic Prods., Inc.*, 1 OCAHO no. 221, 1483, 1485-1486 (1990) (striking the defense)). The notion that the government should have made previous versions of the I-9 forms available to employers so that the employers could more readily conceal the backdating of the forms is not, moreover, a proposition that commands instant support. ICE's failure to facilitate concealment of the date of completion of an I-9 form does not constitute entrapment.

A more appropriate defense of impossibility might be established in some circumstances where an employer, through no fault of its own, is unable to produce its original forms. Such a defense to the production of the original forms is recognized in OCAHO case law, but is not applicable in this case because, like the employer in *United States v. Alvand, Inc.*, 2 OCAHO no. 352, 378, 383-85 (1991) (modification by the Chief Administrative Hearing Officer), Jalisco's failed to present any evidence whatsoever to show that the original forms were timely prepared in the first instance.⁴ Unlike the circumstances in *United States v. Metropolitan Warehouse, Inc.*, 10 OCAHO no. 1207, 3 (2013), where affidavit testimony by the warehouse manager who actually prepared the I-9s established that the form had been completed for the individual in question, Jalisco's provides no evidence beyond the mere unsupported allegation that its original I-9s had been prepared within three days of each individual's date of hire. *See also United States v. Kurzon*, 3 OCAHO no. 583, 1829, 1843 (1993) (finding that absent credible evidence that the I-9s were actually created in the first place, the respondent did not establish a defense).

Similarly, the bald allegation that ICE lost Barrios' I-9 does not establish a valid defense either. Assuming *arguendo* that an I-9 form was presented for Barrios, Jalisco's does not suggest that the

⁴ In *Alvand*, moreover, the respondent presented virtually no evidence to establish a nexus between the burglary of its premises and the failure of the employer to present the I-9s. 2 OCAHO no. 352 at 382. The same is true here.

form it would have presented was actually prepared within three days of her hire and was not, like Jalisco's other I-9s, backdated. ICE is entitled to summary decision that Jalisco's failed to prepare and/or present I-9s for Barrios as well as for the other employees named in Count II.

The restaurant was not, on the other hand, obligated to prepare an I-9 for Francisco Gutierrez. The question of an individual's employment status is a mixed question of law and fact and, in the absence of a factual issue, can be resolved as a matter of law. *Bryson v. Middlefield Volunteer Fire Dep't, Inc.*, 656 F.3d 348, 352 (6th Cir. 2011). The Restatement (Third) of Employment § 1.03 (Tentative Draft no. 2, revised, 2009) (emphasis added) provides that, "Unless otherwise provided by law, an individual is not an employee of an enterprise if the individual through an ownership interest controls *all or a part of* the enterprise." Common law agency principles, in particular those for assessing the level of control a person has within a business entity, inform the analysis used for determining when a major shareholder of a corporation is an employee. *Cf. Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 445 (2003). Neither the form of the business entity nor the individual's title is determinative. *Id.* at 449-50. It is the function of the individual within the enterprise that governs, and all the incidents of the relationship must be considered. *Id.* at 451.

Gutierrez is representing the restaurant in this proceeding in his capacity as the company's owner and president. The record does not reflect that any other person has had a significant economic role in managing the company since its inception in 2008. The company's business license was issued in the name of Gutierrez, d.b.a. Jalisco's Grill, and the record reflects that Gutierrez is the person who does the hiring and firing, and otherwise exercises control over the company's business decisions and daily activity. As such, he will not be considered an employee for purposes of this inquiry. *Cf. United States v. Santiago's Repacking, Inc.*,⁵ 10 OCAHO no. 1153, 4-6 (2012) (working partner not treated as an employee). Jalisco's failed to complete timely I-9s for the employees named in Count II, with the exception of Francisco Gutierrez, for whom no I-9 was required. But the company is still liable for twenty-four Count II violations because it failed as well to prepare an I-9 form for Marcos Antonio Guillen Lopez.

C. Penalties

The government seeks penalties in the amount of \$431.25 for each knowing hire violation in Count I, and \$1075.25 for each paperwork violation in Count II. The total penalty sought for both counts is \$26,668.50. ICE offered no rationale as to why it set the penalty for a knowing hire violation at less than half the penalty it assessed for a paperwork violation, and such a proposal confounds the statutory purpose. The knowing hire of an unauthorized alien is a far more serious violation of law than is a paperwork violation of any character.

⁵ The caption in the cited case contains a misnomer in that Santiago's actually was a partnership, not a corporation.

Both the statute itself and the regulations setting out the permissible penalties for each type of violation reflect this distinction in the levels of gravity of the respective violations. Penalties for a first offense involving the knowing hire or continued employment of an unauthorized alien after March 27, 2008 range from a minimum of \$375 to a maximum of \$3200, while the range of penalties for a first offense involving a violation of the paperwork requirements is substantially lower, ranging from \$110 to \$1100. 8 C.F.R. § 274a.10(b). The statute mandates, moreover, that in addition to substantially higher penalties, a cease and desist order is required when a violation involving the knowing hire or continued employment of an unauthorized alien is detected, 8 U.S.C. § 1324a(e)(4), while monetary penalties alone are a sufficient deterrent for paperwork violations, 8 U.S.C. § 1324a(e)(5). *See also United States v. Gutierrez*, 3 OCAHO no. 554, 1513, 1515-16 (1993) (modification by the CAHO) (noting that statute does not authorize a cease and desist order where the only violations are paperwork errors) (internal citations omitted). Unlike many statutes that make injunctive relief optional, *see, e.g.*, Commodity Exchange Act, 7 U.S.C. § 13a-1, every violation of subsection (a)(2), in contrast, requires the issuance of a cease and desist order. These provisions reflect a Congressional judgment about the relative levels of gravity of the respective violations, and that judgment is entitled to deference. The penalty for the knowing hire of Jose David Guillen Lopez will therefore be increased substantially to reflect these considerations.

In considering the statutory factors for assessing the penalties for paperwork violations, ICE acknowledged that Jalisco's is a small employer and does not have any history of previous violations. These two factors are favorable to the employer. Aggravating the penalties across the board, however, for all the paperwork violations in Count II based on the unauthorized status of the employees named in Count I was inappropriate. The statute instructs that the factor to be considered in assessing a civil money penalty is whether or not *the individual* was unauthorized, not whether some other person was. 8 U.S.C. § 1324a(e)(5). The penalty for failure to prepare an I-9 for Marcos Antonio Guillen Lopez may be enhanced in light of his unauthorized status, but the penalties for the remaining individuals named in Count II may not.

Neither may the penalty for the knowing hire of Jose David Guillen Lopez be enhanced based on the statutory factors of 8 U.S.C. § 1324a(e)(5). Had Congress intended that these factors be considered in setting penalties for violations involving the knowing hire or continued employment of unauthorized aliens, it would have said so. Section 1324a(a)(e)(5) expressly states that the mandated factors are to be considered "[w]ith respect to a violation of subsection (a)(1)(B) of this section," that is, with respect to violations involving failure to comply with the requirements of the employment eligibility verification system, commonly known as paperwork violations. Section 1324a(e)(5) does not apply to violations of subsections (a)(1)(A) or (a)(2) involving the knowing hire or continued employment of unauthorized aliens. The § 1324a(e)(5) factors appear nowhere in 8 U.S.C. § 1324a(e)(4), which does not prescribe any specific factors to be considered in setting penalties for the knowing hire or continued employment of

unauthorized aliens. *Cf. United States v. Occupational Res. Mgmt., Inc.*, 10 OCAHO no. 1166, 28 (2013).

For the reasons more fully explained in *United States v. Sunshine Building Maintenance, Inc.*, 7 OCAHO no. 997, 1122, 1187 (1998), the factors set out in § 1324a(e)(5) should not be extrapolated to § 1324a(e)(4). Notwithstanding the suggestion in *United States v. Ulysses, Inc.*, 3 OCAHO no. 449, 544, 550 (1992) that the paperwork violation factors may be “of assistance” in setting penalties for knowing hire violations, the better view is that those factors are simply not relevant to that inquiry. *See United States v. Busy Corner Sportswear*, 3 OCAHO no. 511, 1086, 1088 (1993). To begin with, the knowing hire or continued employment of an unauthorized alien is virtually never done in good faith, is always extremely serious, and by definition always involves an unauthorized alien. Neither the size of the employer nor the absence of previous violations provides a reason to reduce or enhance the penalty for such conduct. To the extent that a rare knowing hire case might present some ground for mitigation, the range of permissible penalties is already sufficiently broad to provide plenty of room for the exercise of discretion.

While the penalty proposed for the knowing hire of David Guillen was insufficient, penalties of \$1075.25 for each of the paperwork violations appear disproportionate both to the gravity of those violations and to the size of the business. Our case law, moreover, reserves penalties so close to the maximum for more egregious violations than these. *United States v. New Outlook Homecare, LLC*, 10 OCAHO no. 1210, 4 (2014). Giving due consideration to both the statutory factors as well as the record as a whole, the penalty for the knowing hire of Jose David Guillen Lopez will be assessed at \$1900; the penalty for failure to prepare an I-9 form for Marcos Antonio Guillen Lopez will be assessed at \$750; and the penalties for the remaining twenty-three violations in Count II will be reduced to \$450 each. The total penalty for both counts is \$13,000.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Jalisco’s Bar and Grill, Inc. is a restaurant located at 844 N. Imperial Avenue in El Centro, California.
2. The president and owner of Jalisco’s Bar and Grill, Inc. is Francisco Gutierrez, who represents the company in this matter.
3. The United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) ICE served a Notice of Inspection (NOI) on Jalisco’s Bar and Grill, Inc. on December 13, 2010.

4. On December 16, 2010, Jalisco's Bar and Grill, Inc. presented the United States Department of Homeland Security, Immigration and Customs Enforcement with thirty I-9 forms for current and former employees.
5. The United States Department of Homeland Security, Immigration and Customs Enforcement issued Jalisco's Bar and Grill, Inc. a Notice of Technical or Procedural Failures on February 3, 2011 that was evidently mailed to the wrong address and not received by the company.
6. The United States Department of Homeland Security, Immigration and Customs Enforcement issued a Notice of Intent to Fine (NIF) to Jalisco's Bar and Grill, Inc. on May 12, 2011.
7. Jalisco's Bar and Grill, Inc. made a request for a hearing on May 18, 2011.
8. Jose David Guillen Lopez and Marcos Antonio Guillen Lopez were unauthorized for employment in the United States at all times relevant to this proceeding.
9. Jalisco's Bar and Grill, Inc. hired Jose David Guillen Lopez knowing him to be unauthorized for employment in the United States.
10. Jalisco's Bar and Grill, Inc. hired Johenna Alba, Ana Balderas, Rosa I. Balderas, Jose Luis Barrios, Martha L. Barrios, Keyla M. Cabrales, Janeth Castro, Sergio Celaya, German Cervantes, Daniel Duran, Lucias A. Escobedo, Juan Carlos Flores, Aaron Garcia, Yessenia Garcia, Ana Elena Heredia, Manuela Langworthy, Ana L. Lopez, Cristina Lopez, Albert Navarro, Daniel Placeres, Emiliano Ramos, Sergio G. Santiago, Liz Y. Zaragoza, and Marcos Antonio Guillen Lopez and failed to prepare and/or present I-9 forms for them.
11. Jalisco's Bar and Grill, Inc. is a small employer with no history of previous violations.

B. Conclusions of Law

1. Jalisco's Bar and Grill, Inc. 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. Jalisco's Bar and Grill, Inc. engaged in one violation of 8 U.S.C. § 1324a(a)(1)(A) and twenty-four violations of 8 U.S.C. § 1324a(b).
4. When an employer has violated 8 U.S.C. § 1324a(a)(1)(A) or (a)(2), a cease and desist order is mandatory. 8 U.S.C. § 1324a(e)(4); 8 C.F.R. § 274a.10(b)(1)(i).

5. An employer must comply with the verification requirements by ensuring that an employee completes section 1 of the Form I-9, and by itself completing section 2. 8 C.F.R § 274a.2(b)(1)(i)(A), (ii)(B).
6. Failure to prepare and/or present I-9s completely subverts the purpose of the employment eligibility verification process. *See United States v. M&D Masonry, Inc.*, 10 OCAHO no. 1211, 11 (2014).
7. Penalties close to the maximum permissible should be reserved for the most egregious violations. *United States v. New Outlook Homecare, LLC*, 10 OCAHO no. 1210, 4 (2014).

ORDER

Jalisco's motion for summary decision is granted in part and denied in part. The allegation in Count I as to the knowing hire violation involving Marcos Antonio Guillen Lopez is dismissed. The allegation in Count II of failure to prepare an I-9 form for Francisco Gutierrez is also dismissed.

The government's motion for summary decision is granted in part and denied in part. Jalisco's is liable for one violation in Count I as to the knowing hire of Jose David Guillen Lopez, and for twenty-four paperwork violations in Count II as amended nunc pro tunc to omit the name Francisco Gutierrez, for whom no I-9 was required, but to add the name of Marcos Antonio Guillen Lopez, for whom no I-9 was prepared.

Jalisco's is directed to henceforth cease and desist from further violating the provisions of 8 U.S.C. § 1324a(a)(1)(A) and to pay civil money penalties in the total amount of \$13,000.

SO ORDERED.

Dated and entered this 27th day of June, 2014.

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).

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.