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

April 19, 2016

UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 15A00028
	)	
FRIO COUNTY PARTNERS, INC. D/B/A,	)	
JACK'S PRODUCE CO.	)	
Respondent.	)	
	)	

FINAL DECISION AND ORDER

APPEARANCES:

Clay N. Martin
for complainant

Kyle C. Watson
for 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). On January 29, 2015, the United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a single-count complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against Frio County Partners, Inc. d/b/a Jack's Produce Co. (FCP, respondent, or the company). ICE charged FCP with failing to ensure proper completion of section 1 of the Employee Eligibility Verification Form I-9 and/or failing to properly complete section 2 or section 3 of the Form I-9 for eighteen employees. ICE assessed a total penalty of $15,988.50.

FCP filed an answer on March 11, 2015. The government filed its prehearing statement on April 7, 2015, and respondent filed its prehearing statement on May 13, 2015. On November 4, 2015,

ICE filed a Motion for Summary Decision, along with supporting documentation (Exhs. G-1 to G-21). On December 4, 2015, FCP filed a Request for a Formal Evidentiary Hearing. On January 8, 2016, FCP filed a response to ICE's Motion for Summary Decision, along with two supporting documents (Exhs. R-1–R-2). On January 12, 2016, the company filed an Amended Response.[1] The Motion and Response are ready for resolution.

As set forth below, FCP's request for an evidentiary hearing is denied because there is no genuine issue of material fact present in this case that would warrant an evidentiary hearing and because summary decision is appropriate. Also for the reasons detailed below, ICE's Motion for Summary Decision is granted in part. Although ICE has met its burden of proving respondent's liability for the eighteen charged violations, the civil penalty assessed by ICE has been reduced after conducting a *de novo* review of the penalty assessment and considering the totality of evidence and mitigating factors presented in this case.

II. BACKGROUND INFORMATION AND POSITIONS OF THE PARTIES

FCP is a small, domestic wholesaler of fruit and vegetables incorporated in the State of Texas and located in Pearsall, Texas. On August 26, 2013, the government personally served FCP with a Notice of Inspection (NOI). *Complainant's Motion for Summary Decision*, Exh. G-1. The NOI informed FCP that a review of FCP's Forms I-9 was scheduled for August 29, 2013. The letter also indicated that federal regulations provide "three days notice prior to conducting a review of an employer's Forms I-9."

However, on August 26, 2013, FCP's employee Lee Roy Moughon signed the waiver of the "three days notice" period on page two of the NOI, and Mr. Moughon signed the certificate of service as proof of personal service of the NOI on FCP. *Complainant's Motion for Summary Decision*, Exh. G-1 at 2. ICE granted FCP an extension of time within which to produce the documents, and ICE received FCP's documents on September 3, 2013.

According to ICE's Report of Investigation dated October 4, 2013, ICE personally served on FCP a Notice of Technical or Procedural Failures (NOTPF) on October 2, 2013. *Complainant's Motion for Summary Decision*, Exh. G-20 at 3. ICE's report states that FCP Vice President Leesa Barton signed the Certificate of Service acknowledging personal service on the NOTPF. Additionally, the report states that "corrections to the seven Forms I-9 identified on the NOTPF were made by the employer immediately upon receipt," and that ICE "scanned the corrected Forms I-9 for the case file." *Id.*

[1] FCP did not identify how the amended response is distinct from the original response. In addition, the amended response does not conform to 8 C.F.R § 68.9(e) and § 68.11(b).

ICE personally served a Notice of Intent to Fine (NIF) on respondent on March 4, 2014. The NIF identified that respondent failed to ensure that the listed eighteen employees properly completed section 1 of the Form I-9, and/or that respondent failed to properly complete section 2 or section 3 of their Forms I-9. As a result of these violations, ICE assessed a fine of $15,988.50. On January 29, 2015, ICE filed a complaint, which fully incorporated the allegations contained in the NIF, including the proposed civil money penalty, against FCP.

On March 11, 2015, FCP filed its Answer and Affirmative Defenses (Answer). In its answer, the company admitted that after November 6, 1986, it hired for employment the eighteen individuals listed in Count I of the complaint. However, FCP denied failing to ensure that these eighteen employees properly completed section 1 of their Forms I-9 and/or failing itself to complete section 2 or section 3 of their Forms I-9. FCP also asserted the following affirmative defenses: (1) FCP demonstrated good faith compliance with the requirements of 8 U.S.C. § 1324a(b) with respect to the hiring of the eighteen individuals listed in Count I of the complaint; (2) ICE failed to provide the company with three days' notice of the I-9 inspection pursuant to 8 C.F.R. § 274a.2(b)(2)(ii) and breached its statutory duty to provide such notification; and (3) ICE is "equitably barred from imposing any penalties on respondent on the grounds that any technical violations . . . are de minimus in nature and do not warrant or justify the impositions of any penalties." *See Respondent's Answer* at 2.

On April 7, 2015, the government filed its prehearing statement, in which it proposed nine factual stipulations. On May 13, 2015, FCP filed its prehearing statement, in which it adopted ICE's nine proposed stipulations. However, FCP proposed the following additional tenth stipulated fact:

> On August 26, 2013, [Homeland Security Investigations (HSI)] Auditor Jesse Quilantan along with an additional HSI officer, personally served the NOI on Lee Roy Moughon, Respondent's Operations Supervisor, and immediately demanded to inspect the Form I-9 of Mr. Moughon. Upon reviewing the Form I-9 for Mr. Moughon, Mr. Quilantan claimed there was an error and immediately informed Mr. Moughon and another employee, Jennifer Lafrenz, that they were not to review or change any of Respondent's Form I-9's, thus revoking the mandatory 3-day period for Respondent to review and prepare the record for inspection.

Respondent's Prehearing Statement at 4.

FCP also raised the same legal arguments it had previously set forth in its answer, which included the following: the proposed civil money penalty should be reduced to the minimum fine amount required by law because it is a small business; its workers were authorized for

employment; it acted in good faith; and it has no history of violations. FCP also alleged that imposition of the fine would result in "unjust financial hardship on Respondent." *Respondent's Prehearing Statement* at 8. Finally, FCP continued to argue that the alleged violations constitute "technical errors of a de minimus nature." *Id.*

Complainant filed a Motion for Summary Decision, in which it presented the undisputed nine factual stipulations, but did not admit the additional stipulation that FCP presented in its prehearing statement. *Complainant's Motion for Summary Decision* paras. 6-7. The government argued there is no genuine issue of material fact concerning FCP's liability because a simple visual examination of the eighteen Forms I-9 show that FCP failed to ensure that its employees properly completed section 1 of their Forms I-9 and/or that FCP failed to properly complete section 2 or section 3 of their Forms I-9. *Id.* paras. 17-18.

ICE attached to its motion numerous exhibits. Attached to *Complainant's Motion for Summary Decision* in Exhibit G-19 at page 3 is ICE's "Report of Investigation Continuation," which sets forth problems that ICE identified on FCP's Forms I-9. ICE found "[a] total seven Forms I-9 with technical and procedural failures . . . ." ICE also identified in both Exhibits G-3 and G-19 the following substantive violations found in eighteen of FCP's Forms I-9: (a) two Forms I-9 lacked employee signatures in section 1; (b) five Forms I-9 did not contain "document titles, identification numbers; or expiration dates for the List A, B, or C documents and a legible copy of the documents were not retained with the Forms I-9 and presented" to ICE in the audit; (c) eight Forms I-9 were not signed in a timely manner; and (d) three Forms I-9 failed to contain any employer signature in section 2. *Id.*, Exhs. G-3, G-19 at 3. Regarding the violations for failing to timely complete the Forms I-9, ICE notes that FCP "completed the certification signature area in Section 2 and backdated several Forms I-9 after service of the Notice of Inspection (NOI)-8/26/2013." *Id.*, Exh. G-3. ICE also attached all eighteen Forms I-9 as Exhibit G-4.

In addition, ICE's Report of Investigation submitted as Exhibit G-20 identifies that ICE served a Notice of Technical or Procedural Failures on FCP on October 2, 2013, that the employer immediately made corrections, and that ICE scanned the corrected Forms I-9 into the case file. *Id.*, Exh. G-20, at 3. ICE attached as Exhibit G-9 a letter from FCP dated September 12, 2013, which provides additional clarification regarding the Forms I-9 presented to the government. The Chart included in the letter lists the "Form I-9 areas affected by the 8/29/13 review," identifying that numerous Forms I-9 were changed after the ICE audit by the employer signing the attestation in section 2 of the Forms I-9. *Id.*, Exh. G-9.

In its motion, the government asserted that the affirmative defense of "good faith" under 8 U.S.C. § 1324a(a)(3) is not applicable to respondent. The government explained that "good faith" is a defense to violating 8 U.S.C. § 1324a(a)(1)(A), for hiring an alien knowing the alien is unauthorized to work in the United States, with which FCP was not charged. *Complainant's Motion for Summary Decision* para. 19. The government also argued that respondent is not entitled to the defense of "good faith compliance" under 8 U.S.C. § 1324a(b)(6) because this

defense applies to technical or procedural violations, not substantive violations as charged against respondent. *Id.* para. 20. Also, because the violations are substantive, ICE argued that FCP cannot raise "equitable barring" as a defense because the violations are not "de minimus in nature." *Id.* para. 22. Moreover, ICE contends that respondent received proper notice of the Form I-9 inspection, and that the evidence of record supports proper notice. *Id.* para. 21.

In addition, the government argued that there is no genuine issue of material fact with respect to the proposed civil money penalty, which it calculated based on the five statutory factors set forth at 8 U.S.C. § 1324a(e)(5) and its agency's internal guidelines.[2] *Id.* paras. 23-27. ICE explained that at the time of its audit, respondent had twenty-five employees. Because the Forms I-9 for eighteen of the twenty-five employees contained substantive violations, which is a violation rate of seventy-two-percent, ICE assessed a baseline fine at the maximum amount of $935 per violation. *Id.* para. 25 (citing Exh. G-15).

ICE aggravated the baseline fine of $935 for each violation by five percent, adding $46.75 per violation, due to the seriousness of the violations. *Id.* para. 26 (citing Exh.G-15). However, ICE mitigated the fine by five percent because of the company's small size by subtracting $46.75 per violation and mitigated the fine by another five percent due to the lack of involvement of unauthorized workers by subtracting an additional $46.75 per violation. *Id.* para. 26 (citing Exh. G-15). ICE considered "neutral" the factors of good faith and a lack of history of violations. *Id.* (citing Exh. G-15). Therefore, ICE ultimately assessed a fine of $888.25 per violation, for a total fine amount of $15,988.50 for the eighteen Forms I-9 containing violations. *Id.*

In its Response to Complainant's Motion for Summary Decision, FCP reiterated the same arguments it made in its prehearing statement, including good faith compliance with 8 U.S.C. § 1324a(b). *Respondent's Response* para. 4.1. FCP further alleged that ICE did not provide it with "three days notice prior to inspecting the Forms I-9" and that "[s]uch failure should be fatal to the prosecution of the complaint against Frio in balancing the interests of the parties in seeking justice and in view of the innocent nature of Respondent's alleged violations." *Id.* para. 4.2.

FCP also claimed that ICE is "equitably barred from imposing any penalties" on the company because the violations are technical and "de minimus in nature." *Respondent's Response* para. 4.3. Moreover, FCP argued that ICE's alleged failure to issue a "Notice of Technical or Procedural Failures" violated FCP's due process rights because it was not provided "notice of and an opportunity to correct the alleged paperwork violations," and because ICE instructed it "not to make any changes whatsoever to the existing I-9 forms" when serving the NOI. *Id.* paras. 4.13, 4.14.

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[2] ICE did not specify the internal guidance on which it relied. However, based on its "Memorandum to Case File, Determination of Civil Money Penalty" at Exhibit G-15, it appears that ICE used its *Fact Sheet: Form I-9 Inspection Overview* (Jun. 26, 2013), http://www.ice.gov/news/library/factsheets/i9-inspection.htm.

In addition, FCP contended that ICE's penalty assessment is "unconscionable, overreaching and excessive" because FCP cooperated during the investigation and because the violations are "minor errors." *Id.* paras. 4.5, 4.8, 4.11. FCP states,

> The innocent, unintended overlooking by Frio and neglecting to comply with certain technical formalities does not change the fact that Frio hired no illegal immigrants and that the mistakes that might have gone unnoticed, were done so in good faith. Therefore, the spirit of the law that is designed to be followed with respect and adherence in not hiring and retaining illegal and unauthorized immigrants was unharmed. Frio respectfully asserts that this should be a mitigating factor in consideration of the fine imposed.

Id. para. 4.8.

FCP cited *United States v. Keegan Variety, LLC*, 11 OCAHO no. 1238, 6-7 (2014),[3] for the proposition that factors other than the five listed at 8 U.S.C. § 1324a(e)(5), such as a company's ability to pay the penalty and policies of leniency, should be considered when determining the appropriate fine. *Respondent's Response* para. 4.9. FCP also claimed that it should be treated with leniency, and that its errors were only minor infractions related to how it "filled out" the Forms I-9, noting that it prepared and presented Forms I-9 for all employees. *Id.* paras. 4.6, 4.11. FCP also alleged that ICE had informed FCP that FCP's "good faith and cooperative spirit would be taken into account to mitigate a fine, if any." *Id.* at 1.6.

Additionally, FCP challenged ICE's assessment of $888.25 per violation, arguing that this fine represents the "upper-range of assessments for first-time offenses." *Id.* para. 4.12. Citing *United States v. Niche, Inc.*, 11 OCAHO no. 1250, 12 (2015), FCP argued that an OCAHO Administrative Law Judge (ALJ) can conduct a *de novo* review of ICE's penalty assessment, and that penalties assessed in the upper-range should be for "only the most serious violations." *Respondent's Response* para. 4.12. Relying on *United States v. Buffalo Transp., Inc.*, 11

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[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.

OCAHO no. 1263, 11-12 (2015), FCP argued that the "minor errors" found in eighteen of its Forms I-9 are less egregious violations than those found in *Buffalo Transportation*, and that the ALJ in *Buffalo Transportation* reduced the fine assessment to $500 per violation for failure to correctly complete Forms I-9. *Respondent's Response* para. 4.12.

Finally, FCP alleged that "material disputes exist" as to the validity of the I-9 inspection notice, FCP's liability, and the facts surrounding mitigation of the penalty. Therefore, FCP argued that ICE's summary decision motion should be denied. *Id.* para. 4.15. On January 12, 2016, FCP filed an Amended Response to Complainant's Motion for Summary Decision. It appears that only a few minor changes exist between the two documents.[4]

As set forth below, ICE's Motion for Summary Decision is granted in-part because the government established that there is no genuine issue of material fact with respect to FCP's liability for the eighteen charged violations. Accordingly, FCP's request for a formal evidentiary hearing is denied because there is no genuine issue of material fact in dispute. The fine initially assessed by ICE is reduced pursuant to a *de novo* review of the totality of evidence.

III. DISCUSSION

A. Legal Standards and Analysis

The government bears the burden of proving both liability and penalty by a preponderance of the evidence. The government must also prove the existence of aggravating factors in the penalty assessment by a preponderance of the evidence. *Buffalo Transp.,* 11 OCAHO no. 1263 at 6 (citing *United States v. Nebeker, Inc.*, 10 OCAHO no. 1165, 4 (2013)).

1. Liability for Substantive Violations

Employers must complete Forms I-9 for each new employee hired after November 6, 1986, to document that the employer verified the employee's identity and employment authorization status. *Id.* at 5 (citing *Keegan Variety*, 11 OCAHO no. 1238 at 2). An employer "must ensure"

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[4] Although FCP did not identify the differences or changes made in the Amended Response to Complainant's Motion for Summary Decision, it appears that the following immaterial changes noted in italics have been made. In paragraph 1.3, a change was made from the allegation that the three-days' notice was revoked within "*thirty (30) minutes of its issuance*" instead of within ten minutes as alleged in the initial *Response*. It is also noted that ICE told FCP that documents could be submitted via *overnight mail*. In paragraph 1.6, FCP added that an exchange occurred "*at a meeting*" during which ICE told it that it would take into consideration FCP's "good faith and cooperative spirit" to mitigate any fine.

that an employee completes section 1 of a Form I-9 no later than the first day of employment, and the employer must complete section 2 by physically examining the individual's documents and attesting to their appearance as genuine within three business days of the employee's first day of employment for those employees who are employed for three business days or more. 8 C.F.R. § 274a.2(b)(1)(i)-(ii).

The distinctions between Form I-9 substantive violations and Form I-9 technical and procedural failures are set forth in a memorandum authored by Paul W. Virtue, who served as Acting Executive Commissioner for Programs of the former Immigration and Naturalization Service (INS).[5] *See* Paul W. Virtue, INS Acting Exec. Comm. of 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), *available at* 74 Interpreter Releases 706 (Apr. 28, 1997) [hereinafter the *Virtue Memorandum*]. Relevant to the instant case, the *Virtue Memorandum* characterizes the following errors as Form I-9 substantive violations: (a) failure to ensure that the employee signs the attestation in section 1; (b) failure of the employer to sign the attestation in section 2; (c) failure to date section 2 within three business days of the employee's first day of employment; and (d) failure of the employer to provide in section 2 a proper List A, B, or C document title, "unless a legible copy of the document(s) is retained with the Form I-9 and presented at the I-9 inspection." *Virtue Memorandum* at 3-4. The *Virtue Memorandum* also states that the "notification and correction period requirements . . . do not apply to these failures." *Id* at 4.

a. Two Forms I-9 Do Not Contain an Employee Attestation in Section 1

The Forms I-9 for employees Michael J. Saathoff and Hector Villareal do not contain an employee signature. *See Complainant's Motion for Summary Decision*, Exh. G-4 at 17, 18. Failure to ensure that an employee signed section 1 is a substantive failure. Therefore, FCP is liable for these two violations. *See United States v. Hartmann Studios, Inc.*, 11 OCAHO no. 1255, 9 (2015); *Virtue Memorandum* at 3.

b. Five Forms I-9 Do Not Identify the Issuing Authority of the List B Document in Section 2

The Forms I-9 for employees Carlos Cardona and David Jones list driver's licenses as a List B document in section 2 but omit the State that issued the licenses. *See Complainant's Motion for Summary Decision*, Exh. G-4 at 2, 11. Similarly, the issuing authority is not identified for the Forms I-9 for Isidoro Camacho III, whose List B document is "ID Card," and for Miguel Nino, whose List B document is "Southern Correction Sys." *Id.* at 1, 15. The Form I-9 for Carlos

[5] As of March 1, 2003, the functions of INS were transferred to the Department of Homeland Security. *See* Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135 (Nov. 25, 2002).

Cardona Jr., whose List B document is "Student Id," also fails to name the issuing authority. *Id.* at 3. FCP did not retain legible copies of the supporting List A or List B and List C documents for any of its Forms I-9.[6]

OCAHO case law has held that failing to identify the issuing authority of a List B document constitutes a substantive violation. *United States v. PM Packaging, Inc.*, 11 OCAHO no. 1253, 9 (2015) (citing *United States v. Ketchikan Drywall Servs., Inc.*, 10 OCAHO no. 1139, 19 (2011), *aff'd sub nom Ketchikan Drywall Servs., Inc. v. ICE*, 725 F.3d 1103, 1114 (9th Cir. 2013); *United States v. M&D Masonry, Inc.*, 10 OCAHO no. 1211, 9 (2014)); *see e.g., Virtue Memorandum* at 5 (characterizing failure to list a document title of a List A document or List B and List C documents as a technical or procedural failure "only if a legible copy of the document(s) is retained with the Form I-9 and presented at the I-9 inspection").[7] Accordingly, FCP is liable for these five substantive violations.

c. Three Forms I-9 Do Not Contain a Signed Employer Attestation in Section 2

The Forms I-9 for Johnny Garcia, Joshua Garcia, and Mateo Gonzalez do not contain a signature in the employer attestation of section 2. *Complainant's Motion for Summary Decision*, Exh. G-4 at 7, 8, 10. The employer attestation sections of these I-9s only identify the hire date of these three employees. Failure to sign the employer attestation in section 2 is a substantive violation. *See United States v. Durable, Inc.*, 11 OCAHO no. 1229, 13 (2014); *Virtue Memorandum* at 3-4. Therefore, FCP is liable for these three violations.

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[6] According to Lessa L. Barton, FCP's Secretary and Vice President, the company's policy is not to copy the employee's documents. *See Complainant's Motion*, Exh. G-9 at 2. Employers are permitted, but not required, to copy the documents that they examine. 8 C.F.R. § 274a.2(b)(3). If they choose to do so, employers must retain the documents with the Forms I-9 and this practice must apply to all employees. *Id.*

[7] According to Ms. Barton, Texas is the issuing State of the driver's licenses on the Forms I-9 that do not identify the issuing authority. *See Complainant's Motion*, Exh. G-9 at 2. This explanation does not absolve FCP of its obligation to have listed this information on the Form I-9. Moreover, FCP's situation is not one in which the company failed to provide complete information about the employee's documents but retained legible copies of the documents. *Virtue Memorandum* at 5; *see also Ketchikan Drywall Servs.*, 10 OCAHO no. 1139 at 22-23 ("Because the document copies were evidently retained with the I-9 form and presented at the time of inspection, the omission [of the issuing authority] must be regarded as technical or procedural in nature pursuant to the *Virtue Memorandum* and accordingly does not provide a basis for a substantive violation.").

d. Eight Forms I-9 Were Not Timely Prepared

The government has also established by a preponderance of the evidence that FCP failed to prepare the remaining eight Forms I-9 in a timely manner because the company did not complete section 2 within three days of the employees' first day of employment.[8] Although the Forms I-9 for Juan Delgado, Jorge Esquivel, Christopher Flores, Jesus Gonzalez-Herrada, Ezequiel Melchor, Jesus Melchor, Lee Moughon, and Jesus Puente contain completed employer attestations in section 2 and are dated the same date as the respective employee's start date, the government contends that FCP completed these Forms I-9 after service of the NOI on August 26, 2013, which is more than three days after each employee's start date. *See Complainant's Motion for Summary Decision*, Exhs. G-1; G-3; G-4 at 4-6, 9, 12-14, 16; *see generally United States v. Two For Seven, LLC*, 10 OCAHO no. 1208, 4 (2014) (discussing proof of timely completion of Forms I-9 section 2 attestation).

The evidence supports the government's claim because the record contains an admission by FCP that it completed section 2 for these Forms I-9 after it was served with the NOI. In a letter dated September 12, 2013, Lessa L. Barton, FCP's Secretary and Vice President, provided additional information that was requested by HSI Auditor Jesse Quilantan regarding the Forms I-9. *See Complainant's Motion for Summary Decision*, Exh. G-9. The letter includes a two-column chart that lists in the left-hand column the names of the twenty-five employees whose Forms I-9 the company provided to ICE and that describes in the right-hand column, "FORM I-9 AREAS AFFECTED BY 8/29/13 REVIEW." *Id.* at 1. Ms. Barton writes, "Beside each name is listed the area(s) *filled-in after* August 26, 2013 using information that was verified at the time each employee was hired but was noticed to not be entered on the respective I-9 upon review on August 29, 2013." *Id.* (emphasis added). According to the chart, the employer attestation of the Forms I-9 for Juan Delgado, Jorge Esquivel, Christopher Flores, Jesus Gonzalez-Herrada, Ezequiel Melchor, Jesus Melchor, and Jesus Puente was completed after August 26, 2013. *Id.* at 1-2.[9] In addition, the chart indicates that "All of Section 2" of Lee Moughon's Form I-9 was completed after service of the NOI. *Id.* at 2.

The government does not question FCP's assertion that it relied on accurate information when it completed and signed the employer attestation of these Forms I-9. Nevertheless, based on the information contained in the Forms I-9, completion of the Forms I-9 on or after August 26, 2013,

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[8] According to the documents that FCP submitted, these eight individuals were employed for more than three days. *See* Exhs. G-3–G-4, G-12; 8 C.F.R. § 274a.2(b)(1)(ii)(B).

[9] According to Ms. Barton's letter, the employer attestation in section 2 of the Forms I-9 for Johnny Garcia and Mateo Gonzalez was also completed after August 26, 2013. *See Complainant's Motion for Summary Decision*, Exh. G-9 at 2. However, a visual examination of these two Forms I-9 shows that the employer attestation was not signed. *See id.*, Exh. G-4 at 7, 10. The Forms I-9 of Mr. Garcia and Mr. Gonzalez only identify their start dates in the section 2 employer attestation.

is significantly more than three days beyond the start dates of the eight employees at issue. *See Complainant's Motion for Summary Decision*, Exh. G-4. FCP's conduct, which is undisputed, expressly violated 8 C.F.R. § 274a.2(b)(1)(ii), which requires that an employer complete section 2 of the Form I-9 within three days of the employee's first day of employment. Failure to timely prepare a Form I-9 is a substantive violation. *See United States v. Dr. Robert Schaus, D.D.S.*, 11 OCAHO no. 1239, 8 (2014) ("Failure to timely prepare an I-9 form for a new employee accordingly cannot be characterized as a technical or procedural violation, and such a failure is not cured or 'corrected' by a subsequent belated or partial completion of the form.") (citing *United States v. New China Buffet Rest.*, 10 OCAHO no. 1132, 4-5 (2010)). Accordingly, FCP is liable for these eight substantive violations for failing to timely complete Forms I-9.

The government has met its burden of establishing that there is no genuine issue of material fact with respect to FCP's liability. The documentary evidence, as detailed above, establishes that FCP engaged in eighteen substantive violations of 8 U.S.C. § 1324a(a)(1)(B) by failing to ensure that two of its employees signed section 1 of their Forms I-9 and by failing to properly or timely complete section 2 for sixteen Forms I-9.

2. Summary Decision is Appropriate, Instead of an Evidentiary Hearing

Summary decision is appropriate where the pleadings and other materials show that there is no genuine issue as to any material fact, and that a party is entitled to summary decision. 28 C.F.R. § 68.38(c). An evidentiary hearing is necessary when genuine issues of material fact are in dispute. *Id.* § 68.38(e). Parties should not be imposed with the "'burden and expense of a hearing in the absence of any genuine issue of material fact.'" *See Keegan Variety*, 11 OCAHO no. 1238 at 3 (quoting *Nebeker,* 10 OCAHO no. 1165 at 2). This rule is similar to and modeled after Rule 56(c) of the Federal Rules of Civil Procedure, which provides for summary judgment in federal cases. *See New China Buffet Rest.*, 10 OCAHO no. 1132 at 2. OCAHO jurisprudence looks to federal case law for guidance in determining when summary decision is appropriate. *Id.*[10]

The moving party for summary decision bears the initial burden of demonstrating that the record does not contain any genuine issues of material fact. *Buffalo Transp.,* 11 OCAHO no. 1263 at 5. *See Davis v. Fort Bend Cnty.*, 765 F.3d 480, 484 (5th Cir. 2014) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). An issue of material fact is genuine only if it has a real basis in the record and is material only if it might affect the outcome of the case. *See Santos v. United States Postal Service*, 9 OCAHO no. 1105, 4 (2004) (referencing *Aguirre v. KDI Am. Products, Inc.*, 6 OCAHO no. 882, 632, 640 (1996); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

[10] The cause of action in this case occurred in the State of Texas and therefore legal precedent from the United States Court of Appeals for the Fifth Circuit (Fifth Circuit) will serve as persuasive authority.

Once the moving party has made this showing, the burden shifts to "'the nonmoving party to go beyond the pleadings and by [its] own affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Davis*, 765 F.3d at 484 (quoting *Celotex*, 477 U.S. at 324); *see also* 28 C.F.R. § 68.38(b). All facts and reasonable inferences therefrom are viewed in the light most favorable to the nonmoving party. *United States v. Primera Enters.*, 4 OCAHO no. 615, 259, 261 (1994).

Rule 56(c) of the Federal Rules of Civil Procedure allows consideration of any "admissions on file" for the basis of summary decision. *See United States v. Dittman*, 1 OCAHO no 195, 1289, 1290 (1990) (citing *Home Indem. Co. v. Famularo*, 530 F. Supp. 797, 799 (D.Colo. 1982)). "Any allegations of fact set forth in the Complaint which the Respondent does not expressly deny shall be deemed to be admitted." *Id.* at 1290 (citing 28 C.F.R. § 68.8(c)(1) (1988)).

In the instant case, ICE has met its burden of demonstrating that summary decision is appropriate because there is no genuine issue of material fact with respect to FCP's liability for the violations listed in the complaint. Moreover, the evidence of record submitted by ICE in support of its Motion for Summary Decision contains admissions by FCP that clarify and resolve allegedly disputed issues. First, ICE submitted a copy of the signed Notice of Inspection, which contains FCP employee Lee Roy Moughon's signature waiving the three-day notice period, and thus undermines all of FCP's arguments alleging the government breached the three-day notice period. *Complainant's Motion for Summary Decision*, Exh. G-1.

Second, FCP's email dated September 7, 2013, and letter dated September 12, 2013, provide FCP's explanation and clarification regarding numerous Form I-9 violations, with many statements constituting admissions to the violations. *Complainant's Motion for Summary Decision*, Exhs. G-9, G-10. For example, FCP's Leesa Barton admits that FCP completed Mr. Moughon's Form I-9 after the Notice of Inspection was served, but Ms. Barton explained that FCP was "only attempting to be forthcoming, responsive, and truthful with accurate information." *Id.*, Exh. G-10. The email also admits that a FCP employee compiled and verified information on Forms I-9 after service of the NOI but prior to production of documents to ICE.

Third, regarding the errors on the Forms I-9 constituting violations, a visual examination of the eighteen Forms I-9 at issue reveals the following deficiencies: (a) FCP failed to ensure that two of its employees signed section 1 of their Forms I-9; (b) FCP failed to identify the document issuing authority in section 2 of five Forms I-9; (c) FCP failed to sign the employer attestation in section 2 of three Forms I-9; and (d) FCP did not complete section 2 in a timely manner for eight Forms I-9.

As ICE met its burden in demonstrating that the record does not contain any genuine issues of material fact, the burden shifts to FCP to show there are facts that have a real basis in the record and that affect the outcome of this case, which would warrant an evidentiary hearing. Although FCP contended that material disputes exist as to its liability, as discussed above, it has failed to

make this showing, even when viewing the facts in the light most favorable to FCP. ICE's evidence, which FCP did not rebut, demonstrates by a preponderance of the evidence that there is no genuine issue of material fact and that a hearing is not required. Therefore, ICE is entitled to summary decision. Accordingly, FCP's request for an evidentiary hearing is denied.

3. Affirmative Defense of Good Faith

FCP's assertion that it complied in good faith is inapplicable to the issue of liability in this case. There are two good faith defenses to liability found in IRCA. The first good faith defense is found at 8 U.S.C. § 1324a(b)(6)(A) and provides a narrow but complete defense where an entity is charged with technical or procedural failures in connection with completion of the Form I-9. *See United States v. Emp'r Solutions Staffing Group II, LLC*, 11 OCAHO no. 1242, 8 (2015); *United States v. LFW Dairy Corp.*, 10 OCAHO no. 1129, 4 (2009). ICE established that FCP's paperwork violations, as charged in the complaint, are all substantive violations, not technical or procedural failures.

The second good faith defense, found at 8 U.S.C. § 1324a(a)(3), applies only to a charge of knowingly hiring unauthorized aliens for employment, which is a violation under 8 U.S.C. § 1324a(a)(1)(A). In the instant case, a "knowing hire" violation was not alleged. Therefore, this good faith defense is inapplicable to FCP's liability for paperwork violations. *See LFW Dairy*, 10 OCAHO no. 1129 at 4.

4. Equitable Barring

FCP's argument that ICE is equitably barred from imposing any penalties on the company lacks merit. First, FCP did not cite to any legal authority to support its claim that ICE is equitably barred from pursing this action.[11] Second, the record does not substantiate FCP's assertion that

[11] The government is "virtually impervious" to an *equitable estoppel* claim. *See Hartmann Studios*, 11 OCAHO no. 1255 at 13; *see also Robertson-Dewar v. Holder*, 646 F.3d 226, 229 (5th Cir. 2011) (citing *Office of Personal Mgmt v. Richmond*, 496 U.S. 414 (1990)). The burden on the party seeking estoppel is "very high," as it must establish:

> (1) affirmative misconduct by the government, (2) that the government was aware of the relevant facts and (3) intended its act or omission to be acted upon, (4) that the party seeking estoppel had no knowledge of the relevant facts, and (5) reasonably relied on the government's conduct and as a result of his reliance, suffered substantial injury.

the violations it committed are "technical" and "de minimus in nature." As set forth above, FCP was found liable for eighteen *substantive* violations, which are not "de minimus" violations.

5. Due Process Arguments

Respondent further alleged that ICE breached its duty to provide the company with three days' notice of the I-9 inspection, and thus deprived it of due process. However, the evidence of record undermines all claims raised by FCP related to ICE's alleged breach of the three-day notice requirement.

As evidenced by a visual inspection of the NOI, Mr. Moughon signed the "Waiver of the Three-Day Period." *See Complainant's Motion for Summary Decision*, Exh. G-1 at 2. This express waiver is located on the last page of the NOI, contains Mr. Moughon's printed name and signature, and is dated August 26, 2013. *Id.* Therefore, because Mr. Moughon signed the waiver of the three-day notice period and because FCP has not raised any issues regarding the validity of the signed waiver, the waiver is deemed valid. It appears that FCP overlooked the material fact that Mr. Moughon signed the waiver, which undermines FCP's due process claims.[12] Accordingly, FCP's claim that it did not receive the required three days' notice cannot be sustained and does not have any bearing on the issue of its liability.

In addition, FCP argued that its due process rights were violated because ICE did not serve it with a Notice of Technical or Procedural Failures. However, the evidence of record rebuts this claim and shows through business records that FCP received and successfully responded to a Notice of Technical or Procedural Failures by providing ICE corrected Forms I-9. Therefore, FCP's claim that ICE failed to issue a Notice of Technical or Procedural Failures does not have any objective support in the record.

ICE claims in its Report of Investigation, dated October 4, 2013, that on October 2, 2013, HSI agents served FCP with a Notice of Technical or Procedural Failures, which identified seven Forms I-9 containing such violations. *See Complainant's Motion for Summary Decision*, Exh. G-20 at 3. According to ICE's report, FCP immediately corrected the seven Forms I-9. *Id.*

Robertson-Dewar, 646 F.3d at 229 (citing *United States v. Bloom*, 112 F.3d 200, 205 (5th Cir. 1997)). In the instant case, FCP has not articulated any facts that would satisfy this very high burden.

[12] Additionally, FCP did not challenge the alleged inspection on August 26, 2013. Dicta in OCAHO case law suggests that FCP's "failure to contemporaneously challenge the lack of a three day notice, precludes a subsequent claim." *See United States v. Tom & Yu, Inc.*, 3 OCAHO no. 412, 163, 167 (1992) (citing *United States v. Vanounou*, 1 OCAHO no. 54, 335, 337-38 (1989)).

Therefore, ICE did not allege any uncorrected procedural or technical failures as violations in its complaint, but charged eighteen substantive violations.

Related to this "technical or procedural failures" argument, respondent also contended that ICE violated its due process because it did not "provide notice of and an opportunity to correct the alleged paperwork violations." *See Respondent's Response* para. 4.13. As mentioned above, this claim does not contain any support in the record. More importantly, ICE does not provide a notice and corrections period for substantive violations. *See Buffalo Transp.,* 11 OCAHO no. 1263 at 7. ICE charged respondent with eighteen *substantive* violations and was not required to grant FCP an opportunity to correct them pursuant to the *Virtue Memorandum* at 2-3. *See, e.g., United States v. Forsch Polymer Corp.*, 10 OCAHO no. 1156, 3 (2012) ("[C]ase law reflects that an employer may not be held liable for [procedural or technical] violations without notice and an opportunity to correct them.").

For all of these reasons, FCP's affirmative defenses are not persuasive and do not prevail. ICE charged the company with eighteen substantive paperwork violations under 8 U.S.C. § 1324a(a)(1)(B). Therefore, neither of the statute's good faith defenses is applicable. Moreover, the government is virtually impervious to an equitable estoppel claim, and FCP did not allege any facts that would satisfy its high burden of proof required for such a claim against ICE. Finally, respondent's argument that it was denied due process fails because it signed an express waiver of the three days' notice on August 26, 2013, as evidenced by the NOI, and because FCP provided corrections of its technical and procedural paperwork failures to ICE in a timely manner on or about October 2, 2013, as evidenced by the unrebutted business records submitted by ICE.

B. Penalty Assessment

Civil money penalties are assessed based on the parameters set forth at 8 C.F.R. § 274a.10(b) for paperwork violations when an employer fails to properly prepare, retain, or produce the forms upon request. The minimum penalty for each individual with respect to whom a first offense violation occurred on or after September 29, 1999, is $110 and the maximum penalty is $1100. 8 C.F.R. § 274a.10(b)(2).

The following factors must be considered when assessing civil money penalties: (1) the size of the employer's business; (2) the employer's good faith; (3) the seriousness of the violations; (4) whether the individual was an unauthorized alien; and (5) the employer's history of previous violations. *See Buffalo Transp.*, 11 OCAHO no. 1263 at 10 (citing 8 U.S.C. § 1324a(e)(5)). "The statute does not require that equal weight be given to each factor, nor does it rule out consideration of additional factors." *United States v. Siam Thai Sushi Rest.*, 10 OCAHO no. 1174, 2 (2013) (citing *United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000)). Additional factors that may be considered include a company's ability to pay the proposed

penalty and policies of leniency established by statute. *Buffalo Transp.,* 11 OCAHO no. 1263 at 10 (citing *Keegan Variety*, 11 OCAHO no. 1238 at 6-7).

ICE set the baseline penalty at $935 for each violation based on internal agency guidance because FCP is a first-time offender and the violations involved seventy-two-percent of FCP's work force (eighteen employees out of twenty-five current employees at the time of the inspection). *Complainant's Motion for Summary Decision* para. 25. ICE stated that it then mitigated the penalties by five percent because of the small size of the business and by five percent due to the absence of any unauthorized workers. *Id.*, Exh. G-15. ICE aggravated the penalties by five percent because of the seriousness of the violations. ICE treated good faith and lack of previous violations as neutral factors. *Id.* The net effect of applying all of the factors is that the penalty was reduced to $888.25 for each violation, resulting in a total penalty of $15,988.50. *Id.* FCP opposes the fine as excessive.

1. Statutory Factors

a. Small size and absence of unauthorized workers

The parties agree that FCP is a small business and that the investigation did not reveal the presence of any unauthorized workers. These two factors are appropriate mitigating factors. *See Niche,* 11 OCAHO no. 1250 at 10 (discussing that OCAHO precedent deems businesses with less than 100 employees to be small businesses); *United States v. Four Seasons Earthworks, Inc.*, 10 OCAHO no. 1150, 8 (2012) (stating that a lack of unauthorized workers is generally considered a favorable factor to the company).

b. Good faith

According to FCP, ICE agents informed the company throughout the investigation that it acted in "good faith." *Respondent's Response* para. 4.11; Exh. R-1. ICE characterized FCP's participation as "very cooperative" and "forthcoming," but ICE also noted that the company "exhibited a disregard and adherence to the instructions contained with the Form I-9 instructions." *Complainant's Motion for Summary Decision*, Exh. G-15. ICE thus considered good faith a neutral factor in its penalty assessment.

The primary focus of a good faith analysis is on the company's compliance before the investigation. *See New China Buffet Rest.*, 10 OCAHO no. 1132 at 5 (citing *United States v. Great Bend Packing Co.*, 6 OCAHO no. 835, 129, 136 (1996); *United States v. Chef Rayko, Inc.*, 5 OCAHO no. 794, 582, 592 (1995) (modification by the Chief Administrative Hearing Officer (CAHO))). Culpable behavior going beyond mere failure to comply is required for a finding of bad faith. *United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 477, 480 (1995) (modification by the CAHO). OCAHO case law has established that absent an indication of the instructions given by the government to the company at the time of the NOI, backdating Forms I-

9 alone is insufficient to satisfy the government's burden to show by a preponderance of the evidence that an employer lacked good faith. *United States v. Holtsville 811, Inc.*, 11 OCAHO no. 1258, 8 (2015) (citing *United States v. Metro. Warehouse, Inc.*, 10 OCAHO no. 1207, 5 (2013); *United States v. Kobe Sapporo Japanese, Inc.*, 10 OCAHO no. 1204, 4 (2013)).

The record supports ICE's classification of good faith as a neutral factor in this case. It appears that FCP was generally cooperative and responsive during the government's investigation. Notably, Ms. Barton was forthcoming about the fact that the company did not complete certain portions of several Forms I-9 until after service of the NOI. *See Complainant's Motion*, Exh. G-9. Moreover, ICE did not allege that the company acted in bad faith, but ICE asserted that FCP's lack of compliance indicates its disregard for the Form I-9 instructions.

FCP was candid regarding the company's completion of certain forms after the NOI was served, which demonstrates they cooperated with ICE. However, it is undisputed that on August 26, 2013, ICE instructed FCP employees Mr. Moughon and Ms. Lafrenz not to correct the company's Forms I-9. *See Complainant's Motion for Summary Decision*, Exh. G-18 at 3; *Respondent's Prehearing Statement* para. 10. The fact that FCP completed certain sections of the Forms I-9, which had been blank prior to the NOI, contravened ICE's explicit instructions and constitutes proof of culpable conduct by FCP. *See Complainant's Motion for Summary Decision*, Exh. G-9. While Ms. Barton admitted this behavior, which weighs in FCP's favor, this alone does not demonstrate that the penalty should be mitigated for "good faith." *See Holtsville 811, Inc.*, 11 OCAHO no. 1258 at 8.

The record also contains evidence that FCP was not entirely compliant during the investigation. Ms. Barton stated that FCP's policy was not to retain copies of employees' documents in order to avoid potential identity theft issues, but that Mr. Moughon's file contained copies of his identity documents. *Complainant's Motion for Summary Decision*, Exh. G-9 at 2. Ms. Barton admitted that the information from these identity documents were used to complete Mr. Moughon's Form I-9 after the NOI was served and that these documents were "subsequently shredded." *Id.* This behavior also ignored ICE's instructions, as provided in the subpoena it served on August 26, 2013, identifying that copies of the employees' documents, if any were made, should be submitted with the Forms I-9. *See id.*, Exh. G-2. The fact that the company shredded Mr. Moughon's identity documents after service of the NOI does not demonstrate "good faith" actions by FCP.

Although the record contains instances where FCP cooperated with ICE and where FCP was forthcoming with information and acted in good faith to comply with the investigation, the record as a whole supports the conclusion that there were instances where FCP's actions lacked good faith throughout the investigation, which undercut its overall cooperative spirit. Therefore, good faith is deemed a neutral factor. *See United States v. Siwan & Brothers, Inc.*, 10 OCAHO no. 1178, 6 (2013) (citing *United States v. Pegasus Rest., Inc.*, 10 OCAHO no. 1143, 7 (2012)) ("[P]roportionality is critical to setting penalties").

c. No history of previous violations

ICE treated FCP's history of no previous violations as a neutral factor. *Complainant's Motion for Summary Decision,* Exh. G-15 at 2. This is an appropriate characterization of this factor. *See New China Buffet Rest.*, 10 OCAHO no. 1133 at 6 ("[N]ever having violated the law before does not necessarily warrant additional leniency, and it is still appropriate to treat this factor as a neutral one.").

d. Seriousness of the violations

"Paperwork violations are always potentially serious." *United States v. Skydive Acad. of Haw. Corp.*, 6 OCAHO no. 848, 235, 245 (1996). The seriousness of a violation must nevertheless be evaluated on a continuum because not all violations are necessarily equal. *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 8 (2010). The difference in degree of seriousness "'may be reflected in the final penalty.'" *Niche*, 11 OCAHO no. 1250 at 10 (quoting *Two For Seven*, 10 OCAHO no. 1208 at 10). "An Administrative Law Judge's *de novo* review of the government's fine assessment can lead to a determination that differing degrees of seriousness exist amongst the paperwork violations, which can result in different fine assessments for each count." *United States v. Wave Green, Inc.*, 11 OCAHO no. 1267, 13 (2016) *(citing Holtsville 811 Inc.*, 11 OCAHO no. 1258 at 10; *Niche,* 11 OCAHO no. 1250 at 10).

I agree with ICE's assertion that FCP's violations were serious and should aggravate the fine. FCP maintained that its violations were "inadvertent and minor errors." *Respondent's Response* para. 1.8. OCAHO case law refutes this proposition.

FCP's failure to sign the employer attestation in section 2 for three Forms I-9 is "among the most serious of possible violations." *Hartmann Studios,* 11 OCAHO no. 1255 at 14. A less serious violation, but still serious, is FCP's failure in ensuring that two of its employees signed section 1 of their Forms I-9. *United States v. Golf Int'l*, 11 OCAHO no. 1222, 14 (2014). In addition, the company's failure to identify the issuing authority in section 2 for five Forms I-9 is a serious violation, but it is less serious than failing to sign the employer attestation of section 2.

The majority of FCP's violations consist of its failure to prepare timely Forms I-9 for eight employees. Failure to prepare an I-9 in a timely fashion is a serious violation because "an employee could potentially be unauthorized for employment during the entire time his or her eligibility remains unverified." *United States v. Anodizing Indus., Inc.*, 10 OCAHO no. 1184, 4 (2013). Although respondent may have relied on accurate information that existed when the eight individuals started employment with FCP, the company did not complete and sign the employer attestation of the Forms I-9 until after August 26, 2013. Failure to complete a Form I-9 before service of the NOI "cannot be treated as anything less than serious." *Siam Thai Sushi Rest.*, 10 OCAHO no. 1174 at 8 (citing *United States v. Am. Terrazzo Corp.*, 6 OCAHO no. 877,

577, 593 (1996)). The amount of time that lapsed between completion of section 2 of the Forms I-9 (on or after August 26, 2013) and the employees' hire dates ranged from three months to nine years. *See Complainant's Motion for Summary Decision*, Exhs. G-3; G-4. The seriousness of these violations aggregates over time, as delays in preparing the Forms I-9 create greater risks for employment of unauthorized workers. *Siam Thai Sushi Rest.*, 10 OCAHO no. 1174 at 8.

FCP's claim that mitigation of this factor is justified cannot be sustained. ICE has shown by a preponderance of the evidence that aggravation is warranted because FCP committed eighteen substantive violations, which range from serious violations to very serious violations.

2. Non-Statutory Factor

A party seeking consideration of a non-statutory factor, such as ability to pay the penalty, bears the burden of proof in showing that the factor should be considered as a matter of equity, and that the facts support a favorable exercise of discretion. *Buffalo Transp.*, 11 OCAHO no. 1263 at 11 (citing *United States v. Century Hotels Corp.*, 11 OCAHO no. 1218, 4 (2014)).

Respondent argued in its prehearing statement that imposition of the fine will cause the company financial hardship, which is an appropriate factor to consider. *Niche*, 11 OCAHO no. 1250 at 11. However, the company did not raise this argument in its response to ICE's Motion for Summary Decision and did not present any evidence to substantiate this claim. The company therefore did not meet its burden in showing that this factor supports a favorable exercise of discretion. *Id.* at 11-13 (discussing that respondent's submission of affidavits from company personnel and a "Profit and Loss Statement" to meet its burden of showing how the penalty assessment would result in economic detriment warranted mitigation of the fine).

FCP has also argued for penalty mitigation, noting that it is a small business. Leniency toward small businesses is a non-statutory factor appropriate for consideration in this penalty assessment. *See Keegan Variety*, 11 OCAHO no. 1238 at 6 (citing the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq. (2006), amended by § 223(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 864 (1996)). Respondent has not identified any other non-statutory factor that should be considered.

3. Recalculation of the Penalty

ICE's proposed civil penalty of $888.25 for each violation represents a fine in the upper-range of assessments for first-time offenses. The government's penalty guidelines are not binding in this forum, and Administrative Law Judges may review penalty assessments *de novo*. *Niche*, 11 OCAHO no. 1250 at 12.

Penalties assessed in the upper-range of penalty amounts should be reserved for the most serious and egregious violations. *See United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6

(2013). The purposes of the fines are to deter future violations and to encourage compliance with employment verification procedures. *Emp'r Solutions Staffing Grp. II,* 11 OCAHO no. 1242 at 11.

Although I agree with ICE's assessment of the statutory factors, based on a review of the totality of the evidence, the undersigned finds that the penalties proposed by ICE are disproportionate to the Form I-9 violations and mitigating factors present in this case. Specifically, ICE's proposed penalty does not distinguish between the differing Form I-9 infractions that FCP committed: (1) two violations for failing to ensure that an employee signed the attestation in section 1; (2) five violations for failing to identify the issuing authority of the employees' documents in section 2; (3) three violations for failing to complete and sign the employer attestation in section 2; and (4) eight violations for failing to timely prepare Forms I-9. These types of paperwork violations constitute differing degrees of seriousness. *See Niche*, 11 OCAHO no. 1250 at 13; *see also supra* Part III.B.1.d.

"Paperwork violations are always potentially serious. The seriousness of a violation refers to the degree to which the employer has deviated from the proper form. A violation is serious if it renders the congressional prohibition of hiring unauthorized aliens ineffective." *United States v. Sunshine Bldg. Maint., Inc.,* 7 OCAHO no. 997, 1122, 1179-80 (1998) (internal citations omitted). "Errors in completing a Form I-9 are ordinarily viewed as less serious than the failure to prepare or present the form at all," and pursuant to OCAHO case law, "failure to prepare or present an I-9 is one of the most serious violations because it frustrates the national policy intended to ensure that unauthorized aliens are excluded from the workplace." *See Century Hotels Corp.*, 11 OCAHO no. 1218 at 7 (citing *United States v. Super 8 Motel & Villella Italian Rest.,* 10 OCAHO no. 1191, 14 (2013)).

In *Wave Green*, the failure of both the employee to sign and attest to the accuracy of section 1 and the employer to sign and attest to the accuracy of section 2 was deemed as serious as the failure to prepare and/or present a Form I-9 because no one attested to the accuracy of any information contained on the Form I-9. *Wave Green,* 11 OCAHO no. 1267 at 13. Although the instant case does not present violations as serious as those found in *Wave Green*, it is a serious violation to lack signatures and attestations in either section 1 or section 2 of a Form I-9.

In FCP's case, its failure to ensure that its employees signed and attested to section 1 and its failure to sign and attest to section 2 are the most egregious of violations present in this case. In addition, FCP's failure to complete several Forms I-9 within three days of an employee's first day of employment are very serious, especially because the failures to complete timely Forms I-9 range from three months to nine years out of date. ICE has not established that all of the violations in this case are of equal seriousness, or that a fine for all violations at the upper-range of penalties is justified.

Based on the evidence of record and consideration of all penalty factors, the penalties assessed for FCP's failure to ensure that two employees signed and attested to section 1 and for FCP's failure to sign and attest to section 2 for three Forms I-9 is adjusted to the mid-range of penalties at $650 per violation, for a penalty of $3250 for five violations, as these represent the most serious violations in this case. The penalty assessed for failing to complete eight Forms I-9 within three days of an employee's first day of employment is adjusted to $600 per violation, for a penalty of $4,800 for eight violations. The penalty assessed for failing to identify the issuing authority of identity documents in section 2 of five Forms I-9 is adjusted to $500 per violation, for a penalty of $2500 for five violations. Accordingly, the total civil money penalty assessed for all eighteen violations is adjusted to $10,550.

ICE's Motion for Summary Decision is granted in part, pursuant to 28 C.F.R. § 68.38, and respondent's penalty is reduced to a fine in the mid-range of penalty amounts based on the presence of differing degrees of serious violations and mitigating factors present in this case, which are the small size of respondent's business, the absence of unauthorized workers, and the policy of leniency toward small businesses.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Frio County Partners, Inc., is a domestic wholesaler of fruits and vegetables operating in Pearsall, Texas.

2. The Department of Homeland Security, Immigration and Customs Enforcement, served Frio County Partners, Inc., with a Notice of Inspection on August 26, 2013.

3. The Notice of Inspection informed Frio County Partners, Inc., that a review of its Employment Eligibility Verification Forms I-9 was scheduled for August 29, 2013. The Department of Homeland Security, Immigration and Customs Enforcement, received the requested Forms I-9 and additional documents on September 3, 2013.

4. Frio County Partners, Inc., employee Lee Roy Moughon signed the three-day notice waiver on the Notice of Inspection on August 26, 2013.

5. The Department of Homeland Security, Immigration and Customs Enforcement, served Frio County Partners, Inc., with a Notice of Technical or Procedural Failures on or about October 2, 2013.

6. Frio County Partners, Inc., corrected the technical and/or produral failures identified by the Department of Homeland Security, Immigration and Customs Enforcement, on or about October 2, 2013.

7. The Department of Homeland Security, Immigration and Customs Enforcement, served Frio County Partners, Inc., with a Notice of Intent to Fine on March 4, 2014.

8. Frio County Partners, Inc., filed a request for hearing on March 7, 2014.

9. Frio County Partners, Inc., is a small business, has no history of prior employment verification violations, and has not hired unauthorized workers.

10. Frio County Partners, Inc., hired and employed the eighteen individuals listed in paragraph A of the complaint.

11. Frio County Partners, Inc., hired the following two individuals listed in paragraph A of the complaint and did not ensure that they signed section 1 of their Forms I-9: Michael Saathoff and Hector Villareal.

12. Frio County Partners, Inc., hired the following five individuals listed in paragraph A of the complaint and did not identify the issuing authority of their identity documents listed in section 2 of their Forms I-9: Isidoro Camacho III, Carlos Cardona, Carlos Cardona Jr., David Jones, and Miguel Nino.

13. Frio County Partners, Inc., hired the following three individuals listed in paragraph A of the complaint and did not sign the employer attestation in section 2 of their Forms I-9: Johnny Garcia, Joshua Garcia, and Mateo Gonzalez.

14. Frio County Partners, Inc., hired the following eight individuals listed in paragraph A of the complaint and did not prepare Forms I-9 for these individuals within three days of hire: Juan Delgado, Jorge Esquivel, Christopher Flores, Jesus Gonzalez Herrada, Ezequiel Melchor, Jesus Melchor, Lee Moughon, and Jesus Puente.

B. Conclusions of Law

1. Frio County Partners, Inc., 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. Frio County Partners, Inc., is liable for eighteen violations of 8 U.S.C. § 1324a(a)(1)(B).

4. Summary decision is appropriate where the pleadings and other materials show that there is no genuine issue as to any material fact and that a party is entitled to summary decision. 28 C.F.R. § 68.38(c) (2012).

5. In considering a motion for summary decision, the facts must be viewed in the light most favorable to the nonmoving party. *United States v. Primera Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994).

6. A party seeking summary decision bears the initial burden of demonstrating the absence of a genuine issue of material fact. *United States v. Buffalo Transp., Inc.*, 11 OCAHO no. 1263, 5 (2015); *Davis v. Fort Bend Cnty.*, 765 F.3d 480, 484 (5th Cir. 2014) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

7. All facts and reasonable inferences therefrom are viewed in the light most favorable to the nonmoving party. *United States v. Primera Enters.*, 4 OCAHO no. 615, 259, 261 (1994).

8. The government has the burden of proving both liability and penalty by a preponderance of the evidence, and the government must prove the existence of aggravating factors in the penalty assessment by a preponderance of the evidence. *See United States v. Nebeker, Inc.*, 10 OCAHO no. 1165, 4 (2013) (citing *United States v. Am. Terrazzo Corp.*, 6 OCAHO no. 877, 577, 581 (1996)).

9. Employers must complete Forms I-9 for each new employee hired after November 6, 1986, to document that the employer verified the employee's identity and employment authorization status. *United States v. Keegan Variety, LLC*, 11 OCAHO no. 1238, 2 (2014).

10. Title 8 C.F.R. § 274a.2(b)(1) establishes that employers "must ensure" that Forms I-9 are completed by employees at the time of hire and completed by the employers within three business days of hire for those employees who are employed a duration of three business days or more.

11. The defense of good faith, pursuant to 8 U.S.C. § 1324a(b)(6)(A), provides a narrow but complete defense where an entity is charged with technical or procedural failures in connection with completion of the Form I-9. *See United States v. Emp'r Solutions Staffing Group II, LLC*, 11 OCAHO no. 1242, 8 (2015).

12. According to the parameters set forth at 8 C.F.R. § 274a.10(b)(2), civil money penalties are assessed for Form I-9 paperwork violations when an employer fails to properly prepare, retain, or produce the forms upon request.

13. In assessing the appropriate penalty, an Administrative Law Judge must consider the following factors: (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).

14. 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).

15. "Paperwork violations are always potentially serious. The seriousness of a violation refers to the degree to which the employer has deviated from the proper form. A violation is serious if it renders the congressional prohibition of hiring unauthorized aliens ineffective." *United States v. Sunshine Bldg. Maint., Inc.,* 7 OCAHO no. 997, 1122, 1179-80 (1998) (internal citations omitted).

16. The failure to sign the employer attestation in section 2 for three Forms I-9 is "among the most serious of possible violations." *United States v. Hartmann Studios, Inc.*, 11 OCAHO no. 1255, 14 (2015).

17. A less serious violation, but still serious, is the failure in ensuring that two employees signed section 1 of their Forms I-9. *United States v. Golf Int'l*, 11 OCAHO no. 1222, 14 (2014).

18. The company's failure to identify the issuing authority in section 2 for five Forms I-9 is a serious violation, but it is less serious than failing to sign the employer attestation of section 2.

19. The failure to prepare a Form I-9 within three days of hire is a serious violation because an employee could potentially be unauthorized for employment during the entire time his or her eligibility remains unverified. *United States v. Anodizing Indus., Inc.*, 10 OCAHO no. 1184, 4 (2013).

20. Failure to complete a Form I-9 before service of the Notice of Inspection cannot be treated as anything less than serious and the seriousness of this violation aggregates over time. *United States v. Siam Thai Sushi Rest.*, 10 OCAHO no. 1174, 8 (2013).

21. A party seeking consideration of a non-statutory factor, such as ability to pay the penalty, 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. *United States v. Century Hotels Corp.*, 11 OCAHO no. 1218, 4 (2014).

22. Leniency toward small businesses is a non-statutory factor appropriate for consideration in this penalty assessment. *See United States v. Keegan Variety, LLC*, 11 OCAHO no. 1238, 6 (2014) (citing the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq. (2006), amended by § 223(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 864 (1996)).

23. The purposes of the fines are to deter future violations and to encourage compliance with employment verification procedures. *United States v. Emp'r Solutions Staffing Grp. II, LLC*, 11 OCAHO no. 1242, 11 (2015).

ORDER

FCP's Request for a Formal Evidentiary Hearing is denied. ICE's Motion for Summary Decision is granted in part. FCP is liable for eighteen violations of 8 U.S.C. § 1324a(a)(1)(B) and is directed to pay civil penalties in the total amount of $10,550.

SO ORDERED.

Dated and entered on April 19, 2016.

____
Stacy S. Paddack
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.