Published 6/21/16 12 OCAHO no. 1281

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

June 8, 2016

UNITED STATES OF AMERICA, Complainant, v. EAST COAST FOODS, INC., D/B/A ROSCOE'S HOUSE OF CHICKEN N WAFFLES, Respondent.	)	8 U.S.C. § 1324a Proceeding OCAHO Case No. 15A00056

FINAL DECISION AND ORDER

APPEARANCES:

Hye Chon
for complainant

Carlos DeLaPaz
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). Complainant United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a three-count complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against East Coast Foods, Inc., d/b/a Roscoe's House of Chicken N Waffles (East Coast Foods, ECF, respondent, or the company). The company filed an answer, and the parties completed prehearing procedures.

Presently pending is the government's Motion to Amend Complaint and Motion for Summary Decision, to which respondent filed a Response and Counter Motion for Summary Decision. As discussed in detail below, the government's Motion for Summary Decision will be granted in part.

II. BACKGROUND INFORMATION AND POSITIONS OF THE PARTIES

East Coast Foods is a business incorporated in the State of California, which owns a restaurant located in Pasadena, California, known as "Roscoe's House of Chicken N Waffles." Government's Motion, Exs. A, C. On June 19, 2013, the government served ECF with a Notice of Inspection (NOI). In the NOI, the government requested that ECF present its Employment Eligibility Verification Forms (Forms I-9) no later than June 25, 2013. ECF timely presented sixty Forms I-9 for inspection.

On July 29, 2013, ICE served ECF with a Notice of Suspect Documents (NSD) and a Notice of Discrepancies. The NSD informed ECF that according to the records checked by ICE's Homeland Security Investigations (HSI) unit, twenty of the company's employees "appear, at the present time, not to be authorized to work in the United States." Government's Motion, Ex. I. The NSD informed ECF that it "must take reasonable action to verify employment eligibility" of its employees, and that relevant laws do not permit the continued employment of "unauthorized" workers. *Id*.

The Notice of Discrepancies notified ECF that after a review of the company's Forms I-9, as well as records checked by HSI, the government was unable to verify the identity and employment eligibility of three employees. *Id.*, Ex. J. However, ICE indicated that the discovery of these discrepancies did not necessarily mean that the identified employees are unauthorized. On October 25, 2013, ICE served respondent a Change to Notice of Inspection Results, as a result of HSI verifying that one of the employees listed in the Notice of Discrepancies was found to be authorized to work in the United States. *Id.*, Ex. K.

On May 21, 2014, the government served a Notice of Intent to Fine (NIF) on ECF. The NIF contained three counts, all violations of 8 U.S.C. § 1324a(a)(1)(B). Count I alleged that respondent failed to ensure that the following thirty-two employees properly completed section 1 of their Forms I-9: Rubidia Acosta, Samuel Arellano, Steven Arturo, Eduardo Calderon, Alvaro Cardenas, Irma Carvajal, Abraham Castaneda, Christian Christmas, Alberto Cifuentes, Aylin Cifuentas, Maria Cifuentes, Jose Contreras, Nivia Cordova, Avelino Del Rio, Jose Duarte, Ricardo Figueroa, Lucrecia Galvez, Yolanda Gonzalez, Jorge Gutierrez, Troy Hunter, Shante Jacob, Jose Loredo, Roberto Machado, Celsa Mauricio, Ana Mendez, Ana Ordaz, Angel Ortiz, Alfredo Rivera, Sarkis Saghomonian, Alfonso Valladarez, Leonia Wesley, and Delphine Williams. Count II alleged that the respondent failed to ensure that the following three employees properly completed section 2 of their Forms I-9: Jesus Carranza, Jay Henderson, and Damaris Mejia. Count III alleged that respondent failed to prepare and/or present Forms I-9 for the following four employees: Erin Christensen, Jaime Figueroa, Keith Ping, and Norma Sanchez.

As a result of these thirty-nine violations, ICE assessed a fine of $41,934.75. On May 20, 2015, ICE filed a complaint against East Coast Foods which fully incorporated the three counts contained in the NIF, including the proposed civil money penalty.

ECF filed an answer to the complaint on July 2, 2015. The company denied the government's allegations and raised several defenses, including that the penalty proposed by ICE is inappropriate and unwarranted.

On July 21, 2015, ICE filed its prehearing statement, proposing six factual stipulations. The first proposed factual stipulation provides that ECF was incorporated in California. Proposed factual stipulations two through five relate to the procedural history of the case. The sixth proposed factual stipulation states that the employees listed in the complaint were employees of ECF during some or all of the period for which respondent was required to produce Forms I-9. East Coast Foods filed its prehearing statement on September 10, 2015. ECF substantively agreed to all of ICE's proposed stipulations.

On February 11, 2016, ICE filed a Motion to Amend Complaint, pursuant to 28 C.F.R. § 68.9(e). Attached to the motion was the First Amended Complaint Regarding Unlawful Employment Practices. The amended complaint removes one violation from Count I (Steven Arturo), and two violations from Count II (Jesus Carranza and Damaris Mejia), resulting in thirty-six violations for a total penalty of $38,709.00. The government's motion to amend the complaint is hereby granted.

That same day, the government also filed a Motion for Summary Decision (Government's Motion), pursuant to 28 C.F.R. § 68.38, which included eleven proposed exhibits. In its motion, ICE contends that it has met its burden of demonstrating the absence of a genuine issue of material fact as to respondent's liability for the violations charged in Counts I, II, and III of the amended complaint. First, regarding Count I, ICE asserts that "[t]he unequivocal evidence shows that Respondent violated INA section 274A with respect to the Forms I-9 of the 31 employees listed in Count[] I of the Amended Complaint because Section 1 for these identified employees bear[s] no attestation as to their immigration status." Government's Motion at 7. Next, the motion sets forth in detail each of the thirty-one employees' Forms I-9, identifying a lack of check mark in any of the three boxes required to determine whether the employee is a citizen or national of the United States, a Lawful Permanent Resident, or an alien authorized to work. In addition, all Forms I-9 are attached to the motion for visual inspection and confirmation.

Second, with respect to Count II, ICE asserts that Jay Henderson's Form I-9 lists a Social Security number under the List C documents, but does not list or contain any information for a List B document. Third, ICE identifies four individuals who were employed by ECF during the time period for which it was required to produce Forms I-9, but no I-9s were produced for these

employees. The government asserts that all of these violations alleged in the complaint are substantive violations.

With regard to the civil money penalty, ICE argues that there is no genuine issue of material fact with respect to its fine assessment. The motion provides analysis regarding the five statutory factors set forth at 8 U.S.C. § 1324a(e)(5): (1) size of the business; (2) good faith of the employer; (3) seriousness of the violations; (4) whether the individual was an unauthorized alien; and (5) history of prior violations.

At the outset, ICE set the baseline fine at a high rate for first-time paperwork violations because more than fifty-percent of the Forms I-9 for ECF's sixty employees contained violations. ICE assessed a baseline fine rate of $935 for each violation, and the total baseline fine was $33,660 for all thirty-six violations. Then, ICE considered the statutory factors to determine whether the factors would be considered neutral without any impact on the baseline fine, or whether the fine would be aggravated or mitigated based on the statutory factors. ICE then noted that respondent is a small business with no history of previous violations. Therefore, ICE treated the statutory factors of small business size and history of prior violations as "neutral" in its fine analysis.

However, ICE proceeded to enhance the assessed baseline fine by a total of $5049, finding that aggravation of the fine amount was warranted based on the three remaining statutory factors: lack of good faith, seriousness of the violations, and involvement of unauthorized aliens. ICE found that respondent lacked good faith, noting that ECF substantially failed to comply with the employment eligibility verification requirements for the majority of its workforce.

Further, the government determined fine aggravation appropriate, noting that more than twenty employees were found to be "unauthorized" to work in the United States, based on the July 29, 2013, Notice of Suspect Documents and Notice of Discrepancies. In its motion, ICE claimed that there was "no genuine issue of material fact as to whether any violations involved unauthorized aliens." Government's Motion at 16. However, ICE failed to allege in the complaint that "any violations involved unauthorized aliens." Notably, ICE only alleged paperwork violations in the three-Count complaint. Additionally, ICE aggravated the penalty finding that all of the violations are "substantive" and "serious" violations.

ECF filed a response to the government's motion, and a counter motion for summary decision, on March 15, 2016 (Response). The response primarily addressed the factors for determining the appropriate civil money penalties and argued that ICE's penalty assessment is "unjust and not representative of the facts in this case," because "[t]here are no aggravating factors that would warrant such an increase in the penalties." Response at 5-6. ECF concludes by requesting that "any civil monetary penalties be reduced to the statutory minimum, and also [requests] entry of a summary decision in its favor with respect to the civil monetary penalties assessed." *Id.* at 6. Attached to the response is an affidavit from Herbert Hudson, an officer of the company.

III. DISCUSSION AND ANALYSIS

A. Applicable Legal Standards

1. Summary Decision

OCAHO rule 28 C.F.R. § 68.38(c)[1] establishes that an Administrative Law Judge "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." Relying on United States Supreme Court precedent, OCAHO case law has held, "[a]n issue of material fact is genuine only if it has a real basis in the record. A genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit." *Sepahpour v. Unisys, Inc.*, 3 OCAHO no. 500, 1012, 1014 (1993) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).[2]

"Once the moving party satisfies its initial burden of demonstrating both the absence of a material factual issue and that the party is entitled to judgment as a matter of law, the nonmoving party must come forward with contravening evidence to avoid summary resolution." *United States v. Four Seasons Earthworks, Inc.*, 10 OCAHO no. 1150, 3 (2012) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)); *see generally* FED. R. CIV. P. 56(e). OCAHO rule 28 C.F.R. § 68.38(b) provides that the party opposing the motion for summary decision "may not rest upon the mere allegations or denials" of its pleadings, but must "set forth specific facts showing that there is a genuine issue of fact for the hearing." Moreover, "all facts and reasonable inferences to be derived therefrom are to be viewed in the light most favorable to the non-moving party." *United States v. Primera Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994) (citing *Matsushita*, 475 U.S. at 587; *Egal v. Sears Roebuck & Co.*, 3 OCAHO no. 442, 486, 495 (1992)).[3]

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[1] *See* Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2014).

[2] 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.

[3] The decision in *Egal v. Sears Roebuck & Co.* was issued on July 23, 1992, and not on June 23, 1990, as indicated in *Primera Enters.*, 4 OCAHO no. 615 at 261.

2. The Employment Verification Requirements

Employers must prepare and retain Forms I-9 for employees hired after November 6, 1986, and are required to produce the Forms I-9 for inspection by the government upon three days' notice. 8 C.F.R. § 274a.2(b)(2)(ii); *United States v. Keegan Variety, LLC*, 11 OCAHO no. 1238, 2 (2014). Employers must ensure that an employee complete section 1 of the Form I-9 and attest to his or her citizenship or immigration status in the United States by signing and dating the Form I-9 no later than the first day of employment. 8 C.F.R. § 274a.2(a)(3) (attestation under penalty of perjury), (b)(1)(i)(A). For employees employed for three business days or more, an employer must sign section 2 of the Form I-9 within three days of the employee's first day of employment to attest under penalty of perjury that it reviewed the appropriate documents to verify the individual's identity and employment authorization. 8 C.F.R. § 274a.2(a)(3), (b)(1)(ii). The employer must record the document-specific information under List A or Lists B and C of section 2 of the Form I-9. *See* U.S. Citizenship and Immigration Services (USCIS), Form I-9 Instructions at 3 (Mar. 8, 2013).

Failures to meet these statutory obligations are known as "paperwork violations," which are either substantive violations or technical or procedural failures. *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 No. 16 Interpreter Releases 706 (Apr. 28, 1997) (Virtue Memorandum). Violations that the Virtue Memorandum characterizes as substantive include: failing to ensure the employee signs the attestation in section 1 of the Form I-9; failing to ensure the employee checks one of the boxes in section 1 attesting to his or her citizenship or immigration status; and failing to review and verify a proper List A document or proper List B and List C documents in section 2 of the Form I-9. Virtue Memorandum at 3.

B. Respondent's Liability

Visual inspection of the Forms I-9 for the thirty-one individuals named in Count I reflects that none of the individuals checked a box in section 1 attesting to a particular immigration status, as required by 8 C.F.R. § 274.2(a)(3). *See* Government's Motion, Exs. E, G; s*ee also United States v. Ketchikan Drywall Servs., Inc*., 10 OCAHO no. 1139, 4-5 (2011). Further, ECF has provided no argument or evidence to support a denial of liability for the alleged violations. Moreover, ECF has failed to rebut the evidence of record. OCAHO rules expressly provide that a party opposing a motion for summary decision may not rest on mere allegations or denials in a pleading, but must set forth specific facts showing that there is a genuine issue for trial. 28 C.F.R. § 68.38(b); *see United States v. Curran Eng'g Co*., 7 OCAHO no. 975, 874, 878 (1997). Thus, ICE has established that respondent is liable for all thirty-one violations in Count I.

Inspection of the I-9 form for Jay Henderson, named in Count II, reflects that a Social Security number is listed under List C, but no document is provided under List B. Therefore, ECF is liable for the one violation named in Count II.

The parties stipulated that the four individuals named in Count III were employed by the respondent during some or all of the period during for which respondent was required to produce Forms I-9. ICE asserts that no Forms I-9 were presented and/or produced for Erin Christensen, Jaime Figueroa, Keith Ping, and Norma Sanchez, and ECF has neither argued nor shown that I-9 forms were in fact prepared and presented for any of these individuals. Accordingly, the respondent is liable for the four violations in Count III.

As there is no genuine issue of material fact, ICE is granted summary decision as it proved by a preponderance of the Forms I-9 in evidence that ECF is liable for thirty-six violations of 8 U.S.C. § 1324a(a)(1)(B).

C. Penalty Assessment

Civil money penalties are assessed when an employer fails to properly prepare, retain, or produce upon request the Forms I-9, according to the following parameters established at 8 C.F.R. § 274a.10(b)(2): the minimum penalty is $110 and the maximum penalty is $1100 for each individual with respect to whom a paperwork violation occurred after September 29, 1999. For the thirty-six violations in this case, potential penalties range from $3960 to $39,600. 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).

As set forth at 8 U.S.C. § 1324a(e)(5), the following factors must be considered when assessing civil money penalties for paperwork violations: (1) the size of the employer's business; (2) the employer's good faith; (3) the seriousness of the violations; (4) whether the employee is an unauthorized alien; and (5) the employer's history of previous violations. "The statute does not require that equal weight necessarily be given to each factor, nor does it rule out consideration of other factors." *United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000).

The government has the burden of proving both liability and an appropriate penalty. In addition, the government must prove the existence of aggravating factors by a preponderance of the evidence. *See United States v. Platinum Builders of Cent. Fla., Inc.*, 10 OCAHO no. 1199, 8 (2013) (citing *United States v. Nebeker, Inc.*, 10 OCAHO no. 1165 (2013)). ICE has discretion in assessing and setting the penalties; however, the Administrative Law Judge is not bound by ICE's penalty methodology and may conduct a *de novo* review of the penalty assessment. *United States v. Holtsville 811 Inc.*, 11 OCAHO no. 1258, 10 (2015) (citing *United States v. Aid Maint. Co., 8* OCAHO no. 1023, 321, 343 (1999); *United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6 (2011)).

1. Size of Employer's Business

In its motion, the government noted that respondent employed approximately sixty workers and that "there is no genuine issue of material fact regarding the size" of respondent's business because it "is a small business in terms of the size of its workforce." Government's Motion at 14. However, the government did not state that it was mitigating its proposed penalty based on the small size of the company and provided no explanation for not doing so.

OCAHO case law generally considers businesses with fewer than 100 employees to be small businesses. *See United States v. Carter*, 7 OCAHO no. 931, 121, 162 (1997). In addition, OCAHO case precedent has relied on the United States Small Business Administration's definitions of whether a business is considered "small." *United States v. Niche, Inc.*, 11 OCAHO no. 1250, 11 (2015) (citing *United States v. Tom & Yu, Inc.*, 3 OCAHO no. 445, 521, 524 (1992); *United States v. Widow Brown's Inn, Inc.*, 3 OCAHO no. 399, 1, 44 (1992)).

Further, 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)); *see also United States v. Red Bowl of Cary, LLC, Inc., d/b/a Red Bowl Asian Bistro*, 10 OCAHO no. 1206, 4-5 (2013). Given that there is no dispute as to whether respondent is a small business and because there is a public policy of leniency toward small businesses in calculating fine assessments, it is appropriate to mitigate the fine based on ECF's small business size, considering both the statutory and the non-statutory factor.

2. Good Faith

The government asserts that the penalty should be enhanced based on respondent's lack of good faith. Specifically, ICE's motion notes that ECF has been operating its business since 1976 and failed to substantially comply with verifying employment eligibility for more than half of its workforce. Further, ICE asserts that more than twenty employees were found to be unauthorized to work in the United States.

As ICE notes in its motion, the government cannot merely point to a company's poor rate of compliance in order to demonstrate a lack of good faith. Rather, the government must present some evidence of "'culpable behavior beyond mere failure [to comply].'" Government's Motion at 14 (citing *United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 477, 480 (1995) (modification by the CAHO)). The government's reference to ECF's failure to substantially comply with Forms I-9 for more than half of its workforce is precisely what the aforementioned case law states cannot be used to establish lack of good faith. Therefore, ICE did not meet its burden of proving by a preponderance of the evidence that ECF lacks good faith with respect to Form I-9 compliance, especially because a visual inspection of the Forms I-9 in the record shows

that ECF and its employees had completed significant portions of the various Forms I-9, albeit leaving blank some of the most critical portions.

Moreover, in the instant case, ICE cannot demonstrate that ECF lacked good faith by asserting ECF had employed twenty unauthorized workers because ICE failed to allege or charge in the NIF and complaint any violation with respect to the knowing hire of unauthorized aliens under 8 U.S.C. §§ 1324a(a)(1)(A), (2). ICE cites three exhibits in support of its assertion that ECF employed unauthorized workers: Exhibits, I, J, and K. Exhibit I is a July 29, 2013, Notice of Suspect Documents (NSD) from ICE to ECF, notifying the company of twenty employees that "appear, at the present time, not to be authorized to work in the United States." Exhibit J is a July 29, 2013, Notice of Discrepancies, from ICE to ECF, notifying the company that it was unable to verify the identity and employment eligibility of three employees. And, Exhibit K is an October 25, 2013, Change to Notice of Inspection Results, from ICE to ECF, notifying the company that one of the individuals named on the July 29, 2013, Notice of Discrepancies (Ex. J) was subsequently discovered to be authorized to work in the United States.

OCAHO case law has repeatedly held that Notices of Suspect Documents and Notices of Discrepancies do not suffice to establish that an individual is necessarily an unauthorized alien. *E.g.*, *United States v. SKZ Harvesting, Inc.* 11 OCAHO no. 1266, 16 (2016); *United States v. Liberty Packaging, Inc.* 11 OCAHO no. 1245, 10 (2015); *United States v. Romans Racing Stables, Inc.*, 11 OCAHO no. 1230, 8 (2014); *United States v. Natural Envtl., Inc.*, 10 OCAHO no. 1197, 4-5 (2013). Moreover, ICE has prosecutorial discretion to determine whether a company's actions, corrective actions, and/or failures to act warrant a warning from ICE or warrant ICE's civil enforcement through fines. In this case, ICE chose not to pursue any charges in the NIF and complaint related to the hiring or presence of unauthorized workers. Therefore, without additional evidence, the government's mere submission of a Notice of Suspect Documents and Notice of Discrepancies fails to meet its burden of demonstrating that respondent employed individuals unauthorized to work in the United States. Accordingly, this statutory factor will remain neutral in the penalty analysis and no adjustment will be made to the fine based on any perceived lack of good faith.

3. 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). "[T]he seriousness of the violations should be determined by examining the specific failure in each case." *Id*. at 246. Additionally, the seriousness of the violations is "evaluated on a continuum since not all violations are necessarily equally serious," *United States v. Siam Thai Sushi Rest*., 10 OCAHO no. 1174, 4 (2013). "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).

The complete failure to prepare a Form I-9 for an employee is among the most serious of paperwork violations, *United States v. MEMF LLC*, 10 OCAHO no. 1170, 5 (2013), and generally warrants a higher penalty than do errors or omissions in completing the form. *See United States v. Speedy Gonzalez Construction, Inc.*, 11 OCAHO no. 1243, 5-6 (2015) ("Failure to prepare or present an I-9 is one of the most serious violations because it completely subverts the purpose of the employment verification requirements."). As discussed above, respondent failed to prepare Forms I-9 for the four individuals named in Count III. Thus, the highest penalty will be assessed with respect to those four violations, which are considered to be the most serious of paperwork violations.

Regarding the thirty-one violations in Count I, it is also a serious violation for an employee to fail to identify his or her immigration status as a United States Citizen, Lawful Permanent Resident, or "alien authorized to work" in section 1 of the Form I-9. Government's Motion at 7, Ex. E. An employee's failure to attest to his or her own immigration status in section 1 of the Form I-9 jeopardizes the integrity of the entire Form I-9 verification process because the employer lacks an essential fact upon which to assess whether the employee is authorized to work in the United States. In the instant case, because the employer ensured that other information in section 1 and section 2 of the Forms I-9 for the employees listed in Count I had been significantly completed, the integrity of the Forms I-9 for these thirty-one employees was not completely undermined by the failure to identify immigration status on each Form I-9. *But see Wave Green, Inc.*, 11 OCAHO no. 1267 at 13.

The single violation in Count II is also a serious violation because the employer failed to verify and record a List B document, which demonstrates an employee's identity. Although ECF verified and recorded the Social Security Number of the employee as an appropriate List C document, which demonstrates work authorization in the United States, the failure to ensure an employee's identity is a serious violation. Because a visual inspection shows that other portions of the Form I-9 for this employee had been completed, the integrity of this Form I-9 was not completely undermined by the missing identity document. Government's Motion at 7, Ex. E. Although both the violations in Count I and Count II are serious, a higher fine will be assessed for the violations in Count I than the violation in Count II because of the differing degrees of seriousness of these paperwork violations and because it is appropriate to assess a higher fine for the more serious paperwork violations. *United States v. Muniz Concrete and Contracting, Inc.*, 12 OCAHO no. 1278, 19 (2016); *United States v. Frio County Partners, Inc.*, 12 OCAHO 1276, 18 (2016). Finally, ICE met its burden of proving that fine aggravation is warranted due to the seriousness of the violations in all three counts. *Id.*

4. Whether the Employee is Unauthorized

The government enhanced the proposed penalty based on its assertion that ECF employed at least twenty individuals who were unauthorized. However, as noted above, ICE failed to provide sufficient evidence to meet its burden of demonstrating that the individuals were unauthorized for employment. *See supra* at III.C.2. Moreover, penalties are not to be enhanced across the board even if there is a finding that *some* individuals were unauthorized; rather, an enhancement is only appropriate for the specific violations that involve an unauthorized employee. *See Romans Racing Stables*, 11 OCAHO no. 1230 at 5; *Nebeker, Inc.*, 10 OCAHO no. 1165 at 5. Absent more specific evidence that a particular individual involved in one of the thirty-six violations was unauthorized for employment in the United States, the penalties may not be enhanced on this basis.

5. History of Previous Violations

The government appropriately assessed the absence of a history of previous violations as a neutral factor. As OCAHO case law instructs, "[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." *United States v. New China Buffet Rest.*, 10 OCAHO no. 1133, 6 (2010).

6. Conclusion

Before addressing the various mitigating and aggravating statutory factors, ICE assessed a base fine amount of $935 per violation, which represents a fine in the upper-range of assessments for first-time offenses. As noted above, OCAHO case law makes clear that penalties approaching the maximum permissible fine amount should be reserved for the most egregious violations. *See Fowler Equipment*, 10 OCAHO no. 1169 at 6. Considering the record as a whole, the five statutory factors, and the general public policy of leniency toward small entities as set out in the Small Business Regulatory Enforcement Fairness Act § 601, the penalties in this case will be adjusted as a matter of discretion to an amount closer to the midrange of permissible penalties.

For the thirty-one violations in Count I, the penalty is assessed at $500 per violation, for a total penalty amount of $15,500 for the thirty-one violations. For the single violation in Count II, the penalty is assessed at $450. And, the penalty for the four violations in Count III, involving the failure to prepare and/or present Forms I-9, is assessed at $600 for each violation, for a total penalty amount of $2400 for Count III. All penalty assessments have been adjusted for the public policy of leniency toward small businesses as established by Congress in the Small Business Regulatory Enforcement Fairness Act § 601. The total civil money penalty for all thirty-six violations for which complainant is liable is assessed at $18,350.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. East Coast Foods, Inc. is an entity incorporated in the State of California.

2. On June 19, 2013, the Department of Homeland Security, Immigration and Customs Enforcement, served East Coast Foods, Inc. with a Notice of Inspection.

3. On July 29, 2013, the Department of Homeland Security, Immigration and Customs Enforcement, served East Coast Foods, Inc. with a Notice of Discrepancy and a Notice of Suspect Documents.

4. On October 25, 2013, the Department of Homeland Security, Immigration and Customs Enforcement, served East Coast Foods, Inc. a Change to Notice of Inspection Results.

5. The Department of Homeland Security, Immigration and Customs Enforcement, served East Coast Foods, Inc. with a Notice of Intent to Fine on May 21, 2014.

6. East Coast Foods, Inc. filed a request for hearing on or about June 20, 2014.

7. The Department of Homeland Security, Immigration and Customs Enforcement, filed a complaint with the Office of the Chief Administrative Hearing Officer on May 20, 2015.

8. On February 11, 2016, the Department of Homeland Security, Immigration and Customs Enforcement, filed an amended complaint.

9. East Coast Foods, Inc. hired and employed the 36 individuals identified in the amended complaint after November 6, 1986.

10. East Coast Foods, Inc. failed to ensure that the following thirty-one individuals listed in Count I of the amended complaint properly completed section 1 of their Forms I-9: Rubidia Acosta, Samuel Arellano, Eduardo Calderon, Alvaro Cardenas, Irma Carvajal, Abraham Castaneda, Christian Christmas, Alberto Cifuentes, Aylin Cifuentas, Maria Cifuentes, Jose Contreras, Nivia Cordova, Avelino Del Rio, Jose Duarte, Ricardo Figueroa, Lucrecia Galvez, Yolanda Gonzalez, Jorge Gutierrez, Troy Hunter, Shante Jacob, Jose Loredo, Roberto Machado, Celsa Mauricio, Ana Mendez, Ana Ordaz, Angel Ortiz, Alfredo Rivera, Sarkis Saghomonian, Alfonso Valladarez, Leonia Wesley, and Delphine Williams.

11. East Coast Foods, Inc. failed to properly complete section 2 of the Form I-9 for Jay Henderson, as alleged in Count II of the amended complaint.

12. East Coast Foods, Inc. failed to prepare and/or present Forms I-9 for the following four employees, as alleged in Count III of the amended complaint: Erin Christensen, Jaime Figueroa, Keith Ping, and Norma Sanchez.

13. East Coast Foods, Inc. is a small business with no history of previous Form I-9 violations.

14. East Coast Foods, Inc. was not shown to have acted in bad faith.

B. Conclusions of Law

1. East Coast Foods, 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. East Coast Foods, Inc., is liable for thirty-six violations of 8 U.S.C. § 1324a(a)(1)(B).

4. OCAHO rule 28 C.F.R. § 68.38(c) establishes that an Administrative Law Judge "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision."

5. "An issue of material fact is genuine only if it has a real basis in the record. A genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit." *Sepahpour v. Unisys, Inc.*, 3 OCAHO no. 500, 1012, 1014 (1993) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986)).

6. "Once the moving party satisfies its initial burden of demonstrating both the absence of a material factual issue and that the party is entitled to judgment as a matter of law, the nonmoving party must come forward with contravening evidence to avoid summary resolution." *United States v. Four Seasons Earthworks, Inc.*, 10 OCAHO no. 1150, 3 (2012) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)); *see generally* FED. R. CIV. P. 56(e).

7. OCAHO rule 28 C.F.R. § 68.38(b) provides that the party opposing the motion for summary decision "may not rest upon the mere allegations or denials" of its pleadings, but must "set forth specific facts showing that there is a genuine issue of fact for the hearing."

8. "[A]ll facts and reasonable inferences to be derived therefrom are to be viewed in the light most favorable to the non-moving party." *United States v. Primera Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994) (citing *Matsushita*, 475 U.S. at 587; *Egal v. Sears Roebuck & Co.*, 3 OCAHO no. 442, 486, 495 (1992)).

9. Employers must prepare and retain Forms I-9 for employees hired after November 6, 1986, and are required to produce the Forms I-9 for inspection by the government upon three days' notice. 8 C.F.R. § 274a.2(b)(2)(ii); *United States v. Keegan Variety, LLC*, 11 OCAHO no. 1238, 2 (2014).

10. Employers must ensure that an employee complete section 1 of the Form I-9 and attest to his or her citizenship or immigration status in the United States by signing and dating the Form I-9 no later than the first day of employment. 8 C.F.R. § 274a.2(a)(3) (attestation under penalty of perjury), (b)(1)(i)(A).

11. For employees employed for three business days or more, an employer must sign section 2 of the Form I-9 within three days of the employee's first day of employment to attest under penalty of perjury that it reviewed the appropriate documents to verify the individual's identity and employment authorization. 8 C.F.R. § 274a.2(a)(3), (b)(1)(ii).

12. A party opposing a motion for summary decision may not rest on mere allegations or denials in a pleading, but must set forth specific facts showing that there is a genuine issue for trial. 28 C.F.R. § 68.38(b); *see United States v. Curran Eng'g Co.*, 7 OCAHO no. 975, 874, 878 (1997).

13. 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.

14. 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).

15. As set forth at 8 U.S.C. § 1324a(e)(5), the following factors must be considered when assessing civil money penalties for paperwork violations: (1) the size of the employer's business; (2) the employer's good faith; (3) the seriousness of the violations; (4) whether the employee is an unauthorized alien; and (5) the employer's history of previous violations.

16. "The statute does not require that equal weight necessarily be given to each factor, nor does it rule out consideration of other factors." *United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000).

17. The government has the burden of proving both liability and an appropriate penalty. In addition, the government must prove the existence of aggravating factors by a preponderance of the evidence. *See United States v. Platinum Builders of Cent. Fla., Inc.*, 10 OCAHO no. 1199, 8 (2013) (citing *United States v. Nebeker, Inc.*, 10 OCAHO no. 1165 (2013)).

18. ICE has discretion in assessing and setting the penalties; however, the Administrative Law Judge is not bound by ICE's penalty methodology and may conduct a *de novo* review of the penalty assessment. *United States v. Holtsville 811 Inc.*, 11 OCAHO no. 1258, 10 (2015) (citing *United States v. Aid Maint. Co., 8* OCAHO no. 1023, 321, 343 (1999); *United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6 (2011)).

19. OCAHO case law generally considers businesses with fewer than 100 employees to be small businesses. *See United States v. Carter*, 7 OCAHO no. 931, 121, 162 (1997).

20. OCAHO case precedent has relied on the United States Small Business Administration's definitions of whether a business is considered "small." *United States v. Niche, Inc.*, 11 OCAHO no. 1250, 11 (2015) (citing *United States v. Tom & Yu, Inc.*, 3 OCAHO no. 445, 521, 524 (1992); *United States v. Widow Brown's Inn, Inc.*, 3 OCAHO no. 399, 1, 44 (1992)).

21. 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)); *see also United States v. Red Bowl of Cary, LLC, Inc., d/b/a Red Bowl Asian Bistro*, 10 OCAHO no. 1206, 4-5 (2013).

22. The government cannot merely point to a company's poor rate of compliance in order to demonstrate a lack of good faith. Rather, the government must present some evidence of "culpable behavior beyond mere failure [to comply]." *United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 477, 480 (1995) (modification by the CAHO).

23. Notices of Suspect Documents and Notices of Discrepancies do not suffice to establish that an individual is necessarily an unauthorized alien. *E.g., United States v. SKZ Harvesting, Inc.* 11 OCAHO no. 1266, 16 (2016); *United States v. Liberty Packaging, Inc.* 11 OCAHO no. 1245, 10 (2015); *United States v. Romans Racing Stables, Inc.*, 11 OCAHO no. 1230, 8 (2014); *United States v. Natural Envtl., Inc.*, 10 OCAHO no. 1197, 4-5 (2013).

24. "Paperwork violations are always potentially serious." *United States v. Skydive Acad. of Haw. Corp.*, 6 OCAHO no. 848, 235, 245 (1996).

25. "[T]he seriousness of the violations should be determined by examining the specific failure in each case." *United States v. Skydive Acad. of Haw. Corp.*, 6 OCAHO no. 848, 235, 246 (1996).

26. The seriousness of the violations is "evaluated on a continuum since not all violations are necessarily equally serious," *United States v. Siam Thai Sushi Rest*., 10 OCAHO no. 1174, 4 (2013).

27. "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 United States v. Holtsville 811 Inc.*, 11 OCAHO no. 1258, 10 (2015); *United States v. Niche*, 11 OCAHO no. 1250, 10 (2015)).

28. The complete failure to prepare a Form I-9 for an employee is among the most serious of paperwork violations, *United States v. MEMF LLC*, 10 OCAHO no. 1170, 5 (2013), and generally warrants a higher penalty than do errors or omissions in completing the form. *See United States v. Speedy Gonzalez Construction, Inc.*, 11 OCAHO no. 1243, 5-6 (2015) ("Failure to prepare or present an I-9 is one of the most serious violations because it completely subverts the purpose of the employment verification requirements.").

29. Penalties are not to be enhanced across the board even if there is a finding that *some* individuals were unauthorized; rather, an enhancement is only appropriate for the specific violations that involve an unauthorized employee. *See Romans Racing Stables*, 11 OCAHO no. 1230 at 5; *United States v. Nebeker, Inc.*, 10 OCAHO no. 1165, 5 (2013).

30. "[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." *United States v. New China Buffet Rest.*, 10 OCAHO no. 1133, 6 (2010).

ORDER

ICE's February 11, 2016, Motion to Amend Complaint is hereby granted. Further, ICE's Motion for Summary Decision is granted in part. The government met its burden of proving that East Coast Foods, Inc., is liable for thirty-six violations of 8 U.S.C. § 1324a(a)(1)(B). The company is therefore directed to pay civil money penalties in the total amount of $18,350. The parties are free to establish a payment schedule in order to minimize the impact of the penalty on the operations of the company.

SO ORDERED.

Dated and entered on June 8, 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.