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

July 14, 2010

UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 09A00014
	)	
DJ DRYWALL, INC.,	)	
Respondent.	)	
	)	

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

This is an action arising under 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 (2006). The Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a three-count complaint alleging that DJ Drywall, Inc. (DJ Drywall or the company) violated 8 U.S.C. § 1324a(b) and 8 C.F.R. § 274a.2(b) (2010) by failing to prepare I-9 forms for ten (10) named individuals (Count I); failing to properly complete section 2 of the I-9 forms for forty-seven (47) named individuals (Count II); and failing both to ensure that nine (9) individuals properly completed section 1 of their I-9 forms, and to complete properly section 2 of the I-9 forms for those individuals (Count III). Civil money penalties were sought in the amount of $4,228.00 for Count I; $22,534.00 for Count II; and $4,554.00 for Count III, or a total of $31,316.[1]

DJ Drywall filed an answer admitting that it hired the individuals named in the Notice of Intent to Fine (NIF) after November 6, 1986, admitting that it did not fully complete section 2 of the I-9

[1] As is more fully explained herein, the actual penalties requested for Count I add up to $4,268.00, not $4,228.00. The actual penalties for Count II add up to $21,252.00, rather than $22,534.00. ICE's penalty calculations as explained in the Motion for Summary Decision and accompanying memorandum add up to different amounts for Count I and II than those requested in the NIF, and the total amount requested in the motion differs from the total amount that would be calculated using the methods described in ICE's memorandum as well.

forms for the named individuals in Counts II and III, denying all other allegations, and asserting two affirmative defenses.

ICE subsequently filed a Motion to Strike DJ Drywall's affirmative defenses, to which the company filed no response. The government's motion was granted in part and denied in part on December 16, 2009. ICE then filed a Motion for Summary Decision, together with a Memorandum of Law and exhibits, and DJ Drywall filed a timely response and Cross Motion for Summary Decision, also accompanied by exhibits. Although the certificate of service for the Response and Cross Motion recites that a Memorandum of Law was included, no such Memorandum of Law was received, and the filing deadline has long since expired.

Both motions are now ripe for decision.

II. APPLICABLE LAW

A. Summary Decision Standards

OCAHO rules[2] provide that a complete or partial summary decision may issue if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that the moving party is entitled to summary decision. 28 C.F.R. § 68.38(c) (2010). This rule is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in federal cases. Accordingly OCAHO jurisprudence looks to federal case law interpreting that rule for guidance in determining when summary decision is appropriate. *See United States v. Candlelight Inn*, 4 OCAHO no. 611, 212, 222 (1994).[3]

A party seeking a summary disposition bears the initial burden of demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party satisfies its initial burden of demonstrating both the absence of a material factual

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[2] Rules of Practice and Procedure, 28 C.F.R. Part 68.

[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 on the website at (http://www.usdoj.gov/eoir/OcahoMain/ocahosibpage.htm#Published).

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. *Id.* The filing of cross motions does not necessarily mean that summary decision should issue in favor of either party; each motion must be considered on its own merits. *Santiglia v. Sun Microsystems, Inc.*, 9 OCAHO No. 1110, 8 (2004) (citing William W. Schwartzer, Alan Hirsch and David J. Barrans, *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441, 499 (1992)).

B. Employer Obligations Under 8 U.S.C. § 1324a

The INA imposes an affirmative duty upon employers to prepare and retain certain forms for any employees hired after November 6, 1986 and to make those forms available for inspection. 8 U.S.C. § 1324a(b) (2006). Forms must be completed for each new employee within three business days of the hire, regardless of the employee's citizenship or national origin. *Id.* Each separate failure to properly prepare, retain, or produce the forms upon request constitutes a violation.

Regulations designate the I-9 form as the employment eligibility verification form to be used by employers. 8 C.F.R. § 274a.2(a)(2) (2010). The form has two parts. Section 1 consists of an employee attestation, in which the employee provides information under oath about his or her status in the United States. Section 2 consists of an employer attestation, which has two separate components: a documentation part and a certification part. Both are crucial to enforcement. *See United States v. Corporate Loss Prevention Assocs., Ltd.*, 6 OCAHO no. 908, 967, 971 (1997) (modification by the Chief Administrative Hearing Officer). The documentation part requires the employer to list the specific documents which were examined to establish an individual's identity and eligibility for employment and provide certain information about the documents. The certification part requires the employer's or agent's signature attesting under penalty of perjury that the employer examined the documents and found that they appear to be genuine and to be related to the individual named.

C. 8 U.S.C. § 1324a(b)(6) Defense to Technical or Procedural Violations

Where an entity is charged with technical and procedural failures in connection with the completion of an I-9 form, 8 U.S.C. § 1324a(b)(6) may provide a narrow but complete defense. *United States v. LFW Dairy Corp.*, 10 OCAHO no. 1129, 5 (2009). The distinction between substantive violations and those that are technical or procedural was originally explained in Interim Guidelines promulgated March 6, 1997 and publicly disseminated in 74 Interpreter Releases 509 (April 28, 1997) and 2 Bender's Immigration Bulletin 430 (July 15, 1997). The subject of an ICE investigation must be given notice of minor violations and allowed ten business days in which to correct the errors. *See* Limiting Liability for Certain Technical and Procedural Violations of Paperwork Requirements, 63 Fed. Reg. 16909-13 (April 7, 1998) (proposed rule). OCAHO case law has held that if this notice and correction period is not

afforded for technical and procedural violations, the employer cannot be held liable for those violations, and they are not properly included in the NIF. *United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1071, 12-15 (2001) (*WSC Plumbing II*).

Pursuant to the guidelines and the rule, a failure to complete an I-9 form at all is not a technical or procedural failure; it is substantive in nature and defeats the purpose of the law. Other violations in section 1 of the form that are characterized as substantive rather than technical or procedural in nature include inter alia: the lack of an employee signature, the lack of an attestation by the employee as to his or her citizenship status, employee attestation to multiple statuses, and employee attestation to being a lawful permanent resident or alien authorized to work in the United States, but lacking an alien number and/or expiration date; substantive violations in section 2 include: the lack of an employer signature in the attestation section, listing of improper documents reviewed to establish identity and employment eligibility, and the lack of a complete document title, identification number, and/or expiration date where no legible copy of the document was kept as a supplement to the I-9 form.

D. Civil Money Penalties

8 U.S.C. § 1324a(e)(5) sets forth the civil money penalties that may be assessed for paperwork violations and the factors that must be considered when assessing those penalties. *See also* 8 C.F.R. § 274a.10(b)(2). With respect to employment eligibility verification failures, civil money penalties are assessed according to the parameters set forth in 8 C.F.R. § 274a.10(b)(2):[4] the minimum penalty for each individual with respect to whom the violation occurred after September 29, 1999, is $110, and the maximum penalty is $1,100.[5]

The statute requires that the following factors be considered in assessing the appropriate penalties: 1) the size of the business of the employer, 2) the good faith of the employer, 3) the seriousness of the violation(s), 4) whether or not the individuals involved were unauthorized aliens, and 5) any history of previous violations by the employer. § 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. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000).

Where the government's evaluation of the penalty factors is supported by the record, those penalty assessments need not be disturbed, so the amounts do not necessarily have to be determined de novo. *See id.* at 673 (finding that the government appropriately aggravated the

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[4] 8 U.S.C. § 1324a(e)(5) (2006) sets forth the penalty amounts for paperwork violations, and implementing regulations adjust the penalties for inflation, pursuant to the Federal Civil Monetary Penalties Inflation Adjustment Act of 1990 Pub. L. No. 101-410, 104 Stat. 890 (1990), as amended.

[5] All of the violations at issue occurred well after September 29, 1999.

penalty amount for the violations with respect to which unauthorized aliens were involved, and for those violations appropriately determined to be serious); *cf. United States v. Raygoza*, 5 OCAHO no. 729, 48, 50 (1995) (examining the "reasonableness of [the government's] assessment"). It is, however, first necessary to ensure that the evidence supports the government's conclusions with regard to those factors. *Cf. Hernandez*, 8 OCAHO no. 1043 at 673 (adjusting the government's proposed penalties because the record did not support the government's conclusions as to some factors).

III. EVIDENCE PRESENTED

The government states that its Motion for Summary Decision is supported by 12 exhibits enumerated in "Complainant's Exhibit List," which was attached to the motion and accompanying Memorandum of Law. Exhibit G-1 was not attached because it consists of the Complaint and the NIF, which are already part of the record, and Exhibit G-8 is missing because it "was to consist of exhibits regarding the size of DJ Drywall's business," but no such documents were produced during discovery. The remaining exhibits are designated: G-2) Declaration of Special Agent Lynda M. Buehring, dated May 11, 2010 (3 pages) and resumé (2 pages); G-3) Declaration of Forensic Auditor Kristina Eby, dated May 10, 2010 (7 pages) and resumé (2 pages); G-4) Notice of Inspection, dated March 25, 2008 (2 pages) and Subpoena dated March 25, 2008; G-5) I-9 Audit Results for Count II (2 pages); 47 I-9 forms and accompanying photocopies of documentation (92 pages); I-9 Audit Results for Count III; nine I-9 forms and accompanying photocopies of documentation (17 pages); G-6) I-9 Audit Results for Count I; DJ Drywall, Inc. Payroll Summary, January through March 2008 (4 pages); DJ Drywall, Inc. Payroll Summary, January through December 2006; DJ Drywall, Inc. Payroll Summary, January through December 2007; DJ Drywall, Inc. Payroll Summary, January through March 2008; DJ Drywall, Inc. Payroll Summary, January through December 2005; DJ Drywall, Inc. Payroll Summary, January through December 2007 (different from first listed document); G-7) Interim Guidelines: Section 274A(b)(6) of the Immigration and Nationality Act Added by Section 411 of the Illegal Immigration Reform & Immigrant Responsibility Act of 1996, dated March 6, 1997 (22 pages); G-9) spreadsheet entitled "Alien Registration Number Verification Results" (2 pages); G-10) a letter signed by Marci Ellsworth, Senior Attorney, and dated January 11, 2010 (2 pages); G-11) Certification of Complainant's Counsel, dated May 10, 2010 (2 pages); and G-12) DJ Fines Summary Table (4 pages).

The respondent's motion was accompanied by two exhibits: R-1) Affidavit of David Jones (3 pages); and R-2) Supplemental Declaration of David Jones (3 pages), to which were appended two exhibits: A) federal tax information for 2008 (12 pages); and B) federal tax information for 2007 (12 pages).

IV. THE MOTION AND CROSS-MOTION

A. ICE's Motion

ICE's motion contends that DJ Drywall orally admitted to all the factual allegations of the complaint, and that it thus admitted to liability for all the violations. The motion nevertheless goes on to contend that DJ Drywall failed to prepare or present for inspection the I-9 forms for the ten individuals named in Count I; that the I-9 forms for the 47 individuals listed in Count II lack employer attestations, as well as, in some cases, information about the documents used to verify identity and/or employment eligibility in section 2; and that the I-9 forms for the nine individuals named in Count III contain substantive errors in both section 1 and section 2. ICE says that all nine forms in Count III are lacking employer attestations in section 2, and that seven of the forms contained no attestation as to citizenship status in section 1. For another individual, it says that an invalid 11-digit Alien Number was provided, that the I-9 form contained no information about the document, and that no legible copy of a document containing a valid Alien Number was attached. For the final individual named in Count III, ICE says that the "United States Citizen" box is checked in the employee attestation section, but that the individual nevertheless provided a resident alien card as proof of identity.

Attached to the government's motion are I-9 forms for all of the individuals named in Counts II and III, as well as payroll information showing that DJ Drywall employed the ten individuals named in Count I whose I-9s have never been presented. Accordingly, the government argues that there is no genuine issue of material fact with respect to the company's liability for all the violations in all three counts of the complaint.

ICE also requests summary decision with respect to the amount of civil money penalties. Its memorandum and the declaration of forensic auditor Kristina Eby (Eby Declaration), who assessed the proposed fine amount in this case, reflect that ICE calculated the penalty for each violation by starting at the regulatory minimum of $110.00, and aggravating the penalty for each penalty factor it believed to be applicable.[6]

ICE says that it treated the size of DJ Drywall's business as a neutral factor because the company never responded to its discovery requests and never provided any information that would allow ICE to consider mitigation for this factor. The Eby Declaration states that DJ Drywall cannot be considered a large business, and that aggravation for this factor would be unwarranted. ICE also says that it treated the employer's good faith as a neutral factor. The government says that

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[6] ICE's memorandum notes that the fine in this case was prepared before the release of the "Form I-9 Inspection Overview," prepared by ICE's Worksite Enforcement Unit, Office of Investigations, dated November 19, 2009, which is available at http://www.ice.gov/doclib/foia/dro_policy_memos/formi9inspectionoverview.pdf. ICE says that had it used the current guidance, it would have arrived at a much higher total penalty amount of $61,710.00 to $67,400.00 rather than the $31,316.00 it now seeks.

although the company "utterly ignored the requirements of the law" and presented no evidence that it took any steps to ascertain what its legal obligations were, there is no evidence that it acted in bad faith either, so this factor should be treated as neutral. Furthermore, ICE says that DJ Drywall has no history of previous violations, and that it therefore treated this factor as neutral as well.

ICE says that it aggravated the penalty by $198.00 for each of the violations based on seriousness, because all of the violations are serious ones, and that it aggravated the penalty amount by another $198.00 for those employees it determined to be unauthorized aliens. The Eby declaration reflects that some of the individuals were found to be unauthorized because upon cross-checking each alien number with immigration records, the declarant found that the alien number belonged to another person, had never been assigned, or was invalid for employment in the United States. Some individuals were determined to be unauthorized because the Social Security Administration's verification report found that the social security number provided belonged to another person, had never been assigned, or belonged to a deceased person. In total, ICE aggravated the fine on the basis of this factor for 57 of the 66 alleged violations.[7]

[7] There are some discrepancies in ICE's filings with regard to the number of unauthorized aliens employed by DJ Drywall. The Eby Declaration states that 58 of the employees were found to be unauthorized, but the government's memorandum alleges that 56 of the employees were unauthorized. However, the complaint, the NIF, the total penalty assessed, the Fines Summary Table (Exhibit G-8), and the individual summaries of the violations that are provided in Exhibits G05 and G-6 reflect that ICE has found 57 specific individuals to be unauthorized, and I will thus assume that it seeks to aggravate the fine on this basis for 57 individuals.

The penalty calculations described in the motion add up to the following:

Count	**Number of Individuals**	**Baseline Penalty**	**Aggravation for Seriousness**	**Aggravation because worker is unauthorized**	**Total**
Count I	4	$110.00	$198.00	n/a	$1,232.00
Count I	6	$110.00	$198.00	$198.00	$3,036.00
					Total for Count I: $4,268.00
Count II	5	$110.00	$198.00	n/a	$1,540.00
Count II	42	$110.00	$198.00	$198.00	$21,252.00
					Total for Count II: $22,792.00
Count III	9	$110.00	$198.00	$198.00	$4,554.00
Total					$31,614.00

For reasons that have not been explained, the NIF requests different amounts for Counts I and II, and the motion requests a total penalty amount of only $31,316.00.

B. DJ Drywall's Response and Cross Motion

DJ Drywall's response to the government's Motion for Summary Decision is styled as a "Response and Cross-Motion." The response says on the one hand that "[t]here are genuine issues of material fact regarding the amount of civil penalty" assessed in this case, but on the other hand it "requests that this Court determine the amount of civil penalty, if any, by summary decision." The Supplemental Declaration of David Jones says that DJ Drywall is a small business that provides drywall installation services to the construction industry. His submissions reflect that the company was established in 2001 with the affiant as the sole proprietor, and was incorporated in 2007.[8] Jones says that he has been the "sole administrative employee" since the inception of the company, and that he was responsible for all management and day-to-day operations, although he contracted out some "administrative services such as accounting." He

[8] The supplemental declaration states that incorporation occurred in 2006.

says that he interviewed all prospective employees and gave new hires an I-9 form to complete, after which he copied the documentation presented by the employee as evidence of his or her work authorization. He concedes, however, that it was not his general practice to complete section 2.

Contradicting factual admissions made orally by DJ's counsel, Jones denies the allegations in Count I of the complaint. Specifically, Jones says that I-9 forms were prepared for four of the individuals, but that there is no record available of this having been done. Jones says that for the other five individuals, I-9 forms were prepared with section 2 left blank but with photocopies of documentation attached. He asserts that these I-9 forms are attached to the affidavit, but no I-9 forms were attached. Finally, Jones says that he did not prepare an I-9 form for himself because he was unaware that he was required to do so. In response to Counts II and III, he says that he did not "properly transfer the information from the documents onto the I-9 form," and that "it is certainly possible that the new hires did not properly complete section 1."

The Jones Affidavit requests that the proposed fine be mitigated or waived, for several reasons. First, Jones says that he relied on other people, including his bookkeeper, to complete some administrative functions. He asserts that he has congenital nystagmus, an "unintentional jittery movement of the eyes," which makes it difficult for him to read and write, although he is able to focus his eyes if he needs to. He says that this condition contributed to his failure to complete section 2. Jones says in addition that he has changed his standard I-9 procedure, and now he has retained counsel to ensure that he is completing the forms properly. He says that he has contacted all of the employees still working at the company to reverify their employment eligibility, that he believes that the errors alleged in the complaint are minor, and that the "significant negative impact on [his] business . . . far outweighs the seriousness of the offense." The Supplemental Declaration adds that this is the company's first violation of § 1324a, and that Jones made a good faith attempt to comply with the regulations "in light of [his] medical condition and the size of [his] business."

V. DISCUSSION AND ANALYSIS

A. Liability for Substantive Violations of § 1324a

1. Count I

Because Jones' affidavit conflicts with the oral representation of DJ's counsel, it is unclear exactly which allegations have been admitted with regard to Count I. Jones admits to having failed to prepare an I-9 form for himself, and he does not contest having employed all of the other nine individuals named in Count I after November 6, 1986.

Jones says that he prepared I-9 forms for four of those individuals, Jose P. Avila, Jesus A.

Cardenas-Toledo, Hector Coronado-Quinones, and Francisco Perez-Cortes, but that there is "no record available." He gives no explanation for the unavailability of the records and does not deny that he failed to present them at the time of ICE's inspection. DJ Drywall presented no evidence and proffered no explanation; Jones simply asserts that the records are not available. This bald statement does not exonerate the company for liability for the allegation that it failed to present these four I-9 forms.

Jones' affidavit similarly asserts that he prepared I-9 forms for the five other individuals named in Count I: Ismael Lopez, Alfredo Perez, Gabriel Perez, Joel Sauceda, and Martin E. Saucedo, although admittedly leaving section 2 blank. He also states that these I-9 forms are attached to the affidavit, but they are not. DJ Drywall accordingly has given no reason why these I-9 forms were not presented at the time of ICE's inspection, and even if the forms were prepared as Jones contends, the company will incur liability for failing to present those forms.

2. Counts II and III

With regard to Count II, DJ Drywall admitted that it failed to properly complete section 2 of the I-9 forms for Ruben Aguilar-Espinoza, Alonzo P. Ayala, Jesus G. Avila, Julio C. Bizcara-Silla, Victor M. Bonilla, Horacio Cardenas-Aguilar, Job Cardenas-Manzano, Francisco Contreras-Rodriguez, Carlos Coronado-Hernandez, Omar Coronado-Hernandez, Tomas Coronado-Hernandez, Jose De-Los-Santos, Alvaro Diaz-Hernandez, Stewart F. Dupre Jr., Oboblio A Escobar-Avila, Mario M. Gallardo, Juan P. Gomez-Islas, Francisco Hernandez, Octavio Hernandez-Navarro, Jose Hernandez-Olvera, Miguel Huitron-Padilla, Ruben I Lebaron, Francisco Llamas-Osuna, Alan Lopez-Hernandez, Rogelio Lopez-Tiznado, Hugo Martinez, Manuel Martinez, Miguel Martinez, Ismael Martinez-Perez, Juan A. Martinez-Perez, Israel Martinez-Vallejo, Olger Morocho, Gerardo Munoz-Hernandez, Nelson Partida-Aguilar, Faustino Peraza-Coronado, Ramiro Ramirez, Jonathan Ramirez-Gomez, Jose Rodriguez-Coronado, Roman Rodriguez-Covarrubias, Mateo S. Ruiz-Olvera, Elvis Santiago-Lebaron, Jose R. Santos-Lopez, Alberto Serna-Serna, Apolinio Servin-Suarez, Juan Servin-Suarez, Leopoldo Sevilla, and Luis Viera-Coronado. Likewise, regarding Count III, DJ Drywall has admitted that it failed to ensure that the employee properly completed section 1 and that it failed to properly complete section 2 of the I-9 forms for Eugenio Celis-Corona, Victor M. Celis-Partida, Eduardo Contreras-Landeros, Isidro Curiel-Rodriguez, Adolfo G. Levya, Juan L. Martinez-Fausto,[9] Cesar F. Medina, Eduardo Pacheco, and Osvaldo I. Villa. DJ Drywall also does not contest that it employed all of these individuals after November 6, 1986.

Although DJ Drywall admitted to the factual allegations of Counts II and III, this does not amount to an admission of liability for these counts because DJ Drywall asserted an affirmative

[9] This individual's first name is listed as "Jaun" in the NIF, but all other documents refer to his first name as "Juan."

defense that under § 1324a(b)(6), these violations were merely technical and procedural, and that the company should therefore have been given notice and an opportunity to correct those errors. This defense was previously stricken as to Count I, but not as to Counts II and III, because at that stage, in the absence of I-9 forms or particularized information about the nature of the violations, it was impossible to determine whether the errors in sections 1 and 2 were substantive or merely technical and/or procedural.

It is now apparent from examination of the I-9 forms, however, that all the violations are substantive. Where a violation consists solely of the absence of a title, document number, or expiration date for a document presented to verify identity and/or work authorization, attaching a legible copy of that document can render the violation merely technical and/or procedural. 63 Fed. Reg. 16909 at 16910-11. Failure to provide an employer attestation and failure to ensure that the employee provides an attestation, however, are both clearly substantive violations, for which notice and an opportunity for correction need not be offered. *Id.* at 16911. Accordingly, § 1324a(b)(6) provides no defense, and DJ Drywall is liable for all violations alleged in Counts II and III.

B. Civil Money Penalties

Size of the Business

ICE treated the size of the respondent's business as a neutral factor, and I concur. The record does not reveal how many employees the company currently has, or how many it had when the violations occurred. Although the I-9 forms of 66 individuals are at issue, Jones' declaration indicates that DJ Drywall's workforce was at times temporary and/or variable, so it is reasonable to infer that the company had fewer employees at any given time. OCAHO case law reflects that a business employing 66 or fewer employees cannot be considered a large business. *United States v. Carter*, 7 OCAHO no. 931, 121, 162 (1998) (90 to 100 employees); *accord United States v. Vogue Pleating, Stitching & Embroidery Corp.*, 5 OCAHO no. 782, 468, 471 (1995) (approximately 100 employees). The record does not indicate, on the other hand, that the company is a minimally-staffed family business. *Cf. United States v. New China Buffet Restaurant*, 10 OCAHO no. 1133, 5 (2010) (*New China II*) (seven employees); *United States v. Hanna*, 1 OCAHO no. 200, 1327, 1332 (1990) (three to six employees). While DJ Drywall is a small business, I am not persuaded that it is so small as to warrant lowering the penalty, and I therefore concur with the government that the size of the respondent's business should be treated as neutral.

Good Faith

ICE reasonably concluded that good faith should also be treated as a neutral factor in this case. Jones' claimed ignorance of the employment eligibility verification requirements does not establish that DJ Drywall acted in good faith. *See, e.g.*, *United States v. Felipe, Inc.*, 1 OCAHO

no. 93, 626, 634 (1989). Jones' belief that photocopying documents was sufficient to fulfill his obligations, no matter how honestly held, does not demonstrate the use of reasonable care to ascertain what the law is and to follow it. *Id; United States v. Riverboat Delta King, Inc.*, 5 OCAHO no. 738, 126, 130 (1995).

Neither the fact that Jones' medical condition made it difficult for him to read and write, nor the fact that Jones entrusted some responsibilities to a bookkeeper who did not complete them fully, excuses the company's lack of compliance with the law. An employer is obligated to ensure that the person assigned to the task of completing I-9 forms is capable of verifying documentation, and the failure to so ensure does not demonstrate a good faith attempt to comply with the law. *See Carter*, 7 OCAHO no. 931 at 166-67 (explaining that delegation of I-9 function to an employee who could not read English does not constitute good faith). Finally, neither the company's subsequent attempts at compliance nor its current practices have any bearing on an analysis of its good faith because conduct occurring after the investigation is outside the permissible scope of consideration. *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 Chief Administrative Hearing Officer) (observing that employer's prospective compliance with IRCA is irrelevant to good faith). The company thus failed to make a showing of good faith.

Nonetheless, as ICE acknowledges, the record does not reflect that the company acted in bad faith either. Unlike the respondent in *United States v. Carter*, 7 OCAHO no. 931, 121, 166-67 (1998), Jones did not exhibit "callous disregard" for his I-9 responsibilities by delegating them away and never taking any steps to determine whether or not they were actually being completed.
Although Jones did not fulfill his legal obligations pursuant to § 1324a, he did make some effort to do so. That effort does not amount to good faith, but neither is there evidence that it amounts to the kind of culpable behavior that would necessitate a finding of bad faith. *Cf. United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 477, 480 (1995) (modification by Chief Administrative Hearing Officer).

History of Previous Violations

ICE appropriately concluded that this factor should be treated as a neutral one. Although DJ Drywall has no history of previous violations of §1324a, never having violated the law before is not necessarily grounds for leniency, and the company has offered no evidence or argument that such leniency is warranted in this case.

Seriousness of the Violations

ICE correctly argues that all of the violations involved in this case are serious. Failure to prepare an I-9 form at all is a very serious employment eligibility verification violation, *see*, *e.g.*, *United*

States v. Aid Maint. Co., Inc., 8 OCAHO no. 1023, 320, 354 (1999); *United States v. Fortune E. Fashion, Inc.* 7 OCAHO no. 992, 1075, 1078 (1998), as is failure to present an I-9 form for inspection, *United States v. Skydive Acad. of Haw., Inc.*, 6 OCAHO no. 848, 235, 246 (1996). The lack of a signature in the employee attestation section, the failure of an employee to select a box to indicate citizenship status, and the failure of the employer to attest to its review and verification of the employee's documents demonstrating identity and work authorization are also serious violations which lie at the heart of the verification process. *See*, *e.g.*, *United States v. Task Force Security, Inc.*, 4 OCAHO no. 625, 333, 341 (1994) (lack of employee signature); *WSC Plumbing*, 9 OCAHO no. 1062 at 7 (lack of employee attestation as to immigration status); *United States v. Reyes*, 4 OCAHO no. 592, 1, 10 (1994) (lack of employer attestation); *United States v. J.J.L.C., Inc.*, 1 OCAHO no. 154, 1089, 1098 (1990) ("failure to attest on Part 2 of Form I-9 is a serious violation, implying avoidance of liability for perjury").

Even so, in my judgment, it is not appropriate to treat all of these violations as equally serious. OCAHO case law reflects that the specific violations at issue must be analyzed on a case by case basis, and that "the seriousness of the violations should be viewed as a continuum." *Carter*, 7 OCAHO no. 931 at 169 (citing *Felipe*, 1 OCAHO no. 93 at 636). Although all of the violations committed in this case are serious, the failure to prepare or present an I-9 form at all is a somewhat more serious failure than the lack of attestation. *Aid Maint. Co., Inc.*, 8 OCAHO no. 1023 at 354; *Felipe*, 1 OCAHO no. 93 at 636. Therefore, a somewhat higher penalty is justified for violations involving failure to prepare I-9 forms at all than for those involving the failure to properly complete section 1 and/or section 2.

Involvement of Unauthorized Aliens

ICE reasonably aggravated the penalties for the 57 violations involving unauthorized aliens. *Hernandez,* 8 OCAHO no. 1043 at 668-69; *United States v. Morgan's Mexican and Lebanese Foods, Inc.*, 8 OCAHO no. 1013, 239, 248 (1998) (aggravating penalty only for the violations involving unauthorized aliens). These individuals, as designated in the government's exhibit G-12, are: Jesus A. Cardenas-Toledo, Hector Coronado-Quinones, Ismael Lopez, Alfredo Perez, Gabriel Perez, Francisco Perez-Cortes, Ruben Aguilar-Espinoza, Alonzo P. Ayala, Jesus G. Avila, Julio C. Bizcara-Silla, Victor M. Bonilla, Horacio Cardenas-Aguilar, Job Cardenas-Manzano, Francisco Contreras-Rodriguez, Carlos Coronado-Hernandez, Omar Coronado-Hernandez, Tomas Coronado-Hernandez, Jose De-Los-Santos, Alvaro Diaz-Hernandez, Oboblio A Escobar-Avila, Juan P. Gomez-Islas, Francisco Hernandez, Octavio Hernandez-Navarro, Jose Hernandez-Olvera, Miguel Huitron-Padilla, Francisco Llamas-Osuna, Alan Lopez-Hernandez, Rogelio Lopez-Tiznado, Hugo Martinez, Manuel Martinez, Miguel Martinez, Ismael Martinez-Perez, Juan A. Martinez-Perez, Olger Morocho, Gerardo Munoz-Hernandez, Nelson Partida-Aguilar, Faustino Peraza-Coronado, Ramiro Ramirez, Jonathan Ramirez-Gomez, Jose Rodriguez-Coronado, Roman Rodriguez-Covarrubias, Mateo S. Ruiz-Olvera, Jose R. Santos-Lopez, Alberto Serna-Serna, Apolinio Servin-Suarez, Juan Servin-Suarez, Leopoldo Sevilla, Luis Viera-Coronado, Eugenio Celis-Corona, Victor M. Celis-Partida, Eduardo Contreras-

Landeros, Isidro Curiel-Rodriguez, Adolfo G. Levya, Juan L. Martinez-Fausto, Cesar F. Medina, Eduardo Pacheco, and Osvaldo I. Villa.

The Eby declaration attests that all of the designated individuals were using false documentation to demonstrate work authorization, which supports the reasonable inference that those individuals were, in fact, unauthorized to work. DJ Drywall did not even deny the allegation that these individuals are unauthorized aliens, let alone present any evidence to rebut such an inference. There is, accordingly, no genuine issue of material fact as to whether the individuals are unauthorized, and ICE reasonably assessed a higher penalty for the violations involving those 57 individuals.

Hardship for the Business

Jones' assertion in his affidavit that the monetary penalty assessed "would have a significant negative impact on [his] business" should be taken into consideration. OCAHO precedent reflects that a company's inability to pay the proposed fine may be an appropriate factor to be weighed in assessing the amount of the penalty. *See*, *e.g.*, *United States v. Raygoza*, 5 OCAHO no. 729, 48, 52 (1995); *United States v. Minaco Fashions, Inc.*, 3 OCAHO no. 587, 1900, 1909 (1993). Nonetheless, I am not persuaded that the fines assessed in this case are too high for DJ Drywall to pay.

Unlike the respondent in *United States v. New China Buffet Restaurant*, 10 OCAHO no. 1133, 6 (2010) (*New China II*), DJ Drywall is not insolvent, and its business is still operational and profitable. The penalty proposed is not a disproportionately large fraction of the company's annual income. Federal income tax returns submitted as exhibits A and B to the Supplemental Declaration of David Jones reflect that the company had a gross annual income of $1,145,146.00 in 2007 and $966,077.00 in 2008. Any penalty will of course have some negative impact on a respondent; a penalty must, however, be sufficiently meaningful to accomplish its purpose of deterring future violations and enhancing the probability of future compliance. *See Unites States v. Jonel, Inc.,* 8 OCAHO no. 1008, 175, 201 (1998). In light of DJ Drywall's income, the proposed penalty not overly punitive, *cf. Minaco Fashions, Inc.*, 3 OCAHO no. 587 at 1909 (reducing a $50,000.00 penalty assessment where the respondent's gross annual income was $105,000.00); *New China II*, 10 OCAHO no. 1133 at 7. I therefore decline to reduce the penalty because of the purported hardship to the company's business.

VI. SUMMARY AND CONCLUSION

I concur with ICE's conclusion that the size of the business, good faith, and any history of previous violations should be treated as neutral factors, neither aggravating nor mitigating the penalties to be assessed. I also concur that all of the violations committed are serious, and that aggravation is warranted based this factor, but I will assess a somewhat higher penalty for the

violations that are the most serious. Because DJ Drywall employed 57 unauthorized aliens, the penalties should be higher for the violations respecting these individuals.

After consideration the employer's ability to pay, I will enhance the penalties by another $100.00 for each of the 10 violations in Count I, resulting in a total of $5,228.00 for that Count. ICE's proposed penalties of $22,534.00 for Count II and $4,554.00 for Count III are reasonable and are adopted. The total penalty assessed is therefore $32,316.00.

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. DJ Drywall, Inc. is a business that was established in 2001, and it provides drywall installation services for the construction industry.

2. ICE served a Notice of Intent to Fine on DJ Drywall on April 2, 2009.

3. On May 1, 2009, DJ Drywall requested a hearing before an administrative law judge.

4. ICE filed a complaint with this office against DJ Drywall on June 30, 2009.

5. DJ Drywall hired all 66 of the individuals named in the complaint after November 6, 1986.

6. DJ Drywall failed to prepare or present I-9 forms for Jose P. Avila, Jesus A. Cardenas-Toledo, Hector Coronado-Quinones, David Jones, Ismael Lopez, Alfredo Perez, Gabriel Perez, Francisco Perez-Cortes, Joel Sauceda, and Martin E. Saucedo.

7. DJ Drywall admitted that it failed to properly complete section 2 of the I-9 forms for Ruben Aguilar-Espinoza, Alonzo P. Ayala, Jesus G. Avila, Julio C. Bizcara-Silla, Victor M. Bonilla, Horacio Cardenas-Aguilar, Job Cardenas-Manzano, Francisco Contreras-Rodriguez, Carlos Coronado-Hernandez, Omar Coronad-Hernandez, Tomas Coronado-Hernandez, Jose De-Los-Santos, Alvaro Diaz-Hernandez, Stewart F. Dupre Jr., Oboblio A Escobar-Avila, Mario M. Gallardo, Juan P. Gomez-Islas, Francisco Hernandez, Octavio Hernandez-Navarro, Jose Hernandez-Olvera, Miguel Huitron-Padilla, Ruben I Lebaron, Francisco Llamas-Osuna, Alan Lopez-Hernandez, Rogelio Lopez-Tiznado, Hugo Martinez, Manuel Martinez, Miguel Martinez, Ismael Martinez-Perez, Juan A. Martinez-Perez, Israel Martinez-Vallejo, Olger Morocho, Gerardo Munoz-Hernandez, Nelson Partida-Aguilar, Faustino Peraza-Coronado, Ramiro Ramirez, Jonathan Ramirez-Gomez, Jose Rodriguez-Coronado, Roman Rodriguez-Covarrubias, Mateo S. Ruiz-Olvera, Elvis Santiago-Lebaron, Jose R. Santos-Lopez, Alberto Serna-Serna, Apolinio Servin-Suarez, Juan Servin-Suarez, Leopoldo Sevilla, and Luis Viera-Coronado.

8. DJ Drywall admitted that it failed to ensure that the employee properly completed section 1 and that it failed to properly complete section 2 of the I-9 forms for Eugenio Celis-Corona, Victor M. Celis-Partida, Eduardo Contreras-Landeros, Isidro Curiel-Rodriguez, Adolfo G. Levya, Juan L. Martinez-Fausto,[10] Cesar F. Medina, Eduardo Pacheco, and Osvaldo I. Villa.

9. Fifty-seven of the individuals named in the complaint used false documentation to demonstrate work authorization.
10. DJ Drywall employed no more than 66 individuals at any given time.

11. DJ Drywall had an gross annual income of $1,145,146.00 in 2007 and $996,077.00 in 2008.

12. DJ Drywall hired the following individuals, who were unauthorized to work in the United States: Jesus A. Cardenas-Toledo, Hector Coronado-Quinones, Ismael Lopez, Alfredo Perez, Gabriel Perez, Francisco Perez-Cortes, Ruben Aguilar-Espinoza, Alonzo P. Ayala, Jesus G. Avila, Julio C. Bizcara-Silla, Victor M. Bonilla, Horacio Cardenas-Aguilar, Job Cardenas-Manzano, Francisco Contreras-Rodriguez, Carlos Coronado-Hernandez, Omar Coronado-Hernandez, Tomas Coronado-Hernandez, Jose De-Los-Santos, Alvaro Diaz-Hernandez, Oboblio A Escobar-Avila, Juan P. Gomez-Islas, Francisco Hernandez, Octavio Hernandez-Navarro, Jose Hernandez-Olvera, Miguel Huitron-Padilla, Francisco Llamas-Osuna, Alan Lopez-Hernandez, Rogelio Lopez-Tiznado, Hugo Martinez, Manuel Martinez, Miguel Martinez, Ismael Martinez-Perez, Juan A. Martinez-Perez, Olger Morocho, Gerardo Munoz-Hernandez, Nelson Partida-Aguilar, Faustino Peraza-Coronado, Ramiro Ramirez, Jonathan Ramirez-Gomez, Jose Rodriguez-Coronado, Roman Rodriguez-Covarrubias, Mateo S. Ruiz-Olvera, Jose R. Santos-Lopez, Alberto Serna-Serna, Apolinio Servin-Suarez, Juan Servin-Suarez, Leopoldo Sevilla, Luis Viera-Coronado, Eugenio Celis-Corona, Victor M. Celis-Partida, Eduardo Contreras-Landeros, Isidro Curiel-Rodriguez, Adolfo G. Levya, Juan L. Martinez-Fausto, Cesar F. Medina, Eduardo Pacheco, and Osvaldo I. Villa.

B. Conclusions of Law

1. DJ Drywall, Inc. is an entity within the meaning of 8 U.S.C. § 1324a(a)(1) (2006).

2. All jurisdictional prerequisites to this action have been satisfied.

3. DJ Drywall engaged in 66 separate violations of 8 U.S.C. § 1324a(b) (2006).

4. In assessing the appropriate amounts of civil money penalties for violations of 8 U.S.C. § 1324a(b), the law requires consideration of the following factors: 1) the size of the business of

[10] This individual's first name is listed as "Jaun" in the NIF, but all other documents refer to his first name as "Juan."

the employer, 2) the good faith of the employer, 3) the seriousness of the violation(s), 4) whether or not the individuals involved were unauthorized aliens, and 5) any history of previous violations of the employer. 8 U.S.C. § 1324a(e)(5) (2006).

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. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000).

6. DJ Drywall is a small business, but assessment of a lower penalty based on this factor is not appropriate. *Cf. United States v. New China Buffet Restaurant*, 10 OCAHO no. 1132, 7 (2010); *United States v. Carter*, 7 OCAHO no. 931, 121, 160-62 (1997); *United States v. Hanna*, 1 OCAHO no. 200, 1327, 1332 (1990).

7. David Jones' ignorance of the law does not constitute good faith. *See*, *e.g.*, *United States v. Felipe, Inc.*, 1 OCAHO no. 93, 626, 634 (1989); *United States v. Hernandez*, 8 OCAHO no. 1043, 660, 670 (2000) (citing *United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 477, 480 (1995) (modification by the Chief Administrative Hearing Officer)).

8. David Jones' congenital eye condition, reliance on a bookkeeper, and current compliance efforts have no bearing on a determination of good faith. *Carter*, 7 OCAHO no. 931 at 166-67; *United States v. Great Bend Packing Co.*, 6 OCAHO no. 835, 129, 136 (1996).

9. The evidence in the record does not suggest that the company acted in bad faith. *Cf. Karnival Fashion, Inc.*, 5 OCAHO no. 783 at 480.

10. DJ Drywall has no history of previous violations of 8 U.S.C. § 1324a.

11. DJ Drywall's violations of § 1324a were serious. *United States v. Reyes*, 4 OCAHO no. 592, 1, 10 (1994); *United States v. J.J.L.C., Inc.*, 1 OCAHO no. 154, 1089, 1098 (1990).

12. The seriousness of violations is evaluated on a continuum, and not all violations are equally serious. *Carter*, 7 OCAHO no. 931 at 169 (citing *United States v. Felipe*, 1 OCAHO no. 93, 626, 636 (1989).

13. The failure to prepare or present an I-9 form at all is a more serious failure than the lack of attestation. *United States v. Aid Maint. Co., Inc.*, 8 OCAHO no. 1023, 320, 354 (1999); *Felipe*, 1 OCAHO no. 93 at 636.

14. The penalty assessed will not have such a significant impact on DJ Drywall's business that a reduction in the penalty amount is merited. *Cf. New China Buffet Restaurant*, 10 OCAHO no. 1132 at 6-7; *United States v. Raygoza*, 5 OCAHO no. 729, 48, 52 (1995).

15. There is no genuine issue of material fact at issue as to either liability or the amount of civil monetary penalties assessed.

16. ICE is entitled to judgment as a matter of law with respect to both DJ Drywall's liability and the amount of civil monetary penalties assessed as modified.

17. ICE's Motion for Summary Decision is granted with respect to liability, and granted as modified with respect to the civil monetary penalties.

18. DJ Drywall's Motion for Summary Decision is denied.

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

ORDER

DJ Drywall, Inc. is directed to pay a total of $32,316.00 in civil money penalties.

SO ORDERED.

Dated and entered this 14th day of July, 2010.

____
Ellen K. Thomas
Administrative Law Judge

Appeal Information

This order shall become the final agency order after 30 days 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) (2006) and 28 C.F.R. Part 68 (2010). Note in particular that a request for administrative review must be filed with the CAHO within ten (10) days of the date of this order, pursuant to 28 C.F.R. § 68.54(a)(1).

Provisions governing the Attorney General's review of this order, or any CAHO order modifying or vacating this order, are set forth at 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. Part 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.