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

January 6, 2020

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 19A00011
FARIAS ENTERPRISES LLC D/B/A BARAJAS MEXICAN GRILL, Respondent.	)	

AMENDED ORDER ON MOTION FOR SUMMARY DECISION

An Order on Motion for Summary Decision was initially issued in the above-captioned case on December 26, 2019. Pursuant to 28 C.F.R. § 68.52(f), this Amended Order on Motion for Summary Decision amends the order issued on December 26, 2019, and corrects solely for clerical and typographical errors.

This case arises under the employer sanctions provisions under § 274A of the Immigration and Nationality Act (INA or the Act), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a (2019). Pending before the Court is Complainant's Motion for Summary Decision seeking $46,922.40 in penalties. Respondent filed a timely Opposition to Complainant's Motion for Summary Decision.

I. BACKGROUND

Respondent, Farias Enterprises LLC d/b/a Barajas Mexican Grill, a corporation authorized to conduct business in the State of Minnesota, is a Mexican restaurant. Answer at 1. On September 26, 2017, the Department of Homeland Security, Immigration and Customs Enforcement (Complainant or ICE), served Respondent with the Notice of Inspection (NOI). Mot. Summ. Dec. Ex. G-1. On October 23, 2017, Respondent presented Forms I-9 for twenty-four (24) employees. Mot. Summ. Dec. Exs. G-2, G-3. Complainant's auditor inspected Respondent's I-9s and determined that all of the I-9s contained substantive paperwork violations in violation of § 1324a. *Id.* at Ex. G-2. On March 1, 2018, Complainant served Respondent with the Notice of Intent to Fine (NIF). Compl. Ex. A. On March 14, 2018, Respondent timely requested a hearing. *Id.* at Ex. B. Complainant filed the Complaint on February 14, 2019, and charged

Respondent with one count for failure to prepare Forms I-9 for twenty-four employees. Complainant seeks $46,922.40 in penalties. All conditions precedent to this proceeding have been satisfied.

II. STANDARDS

A. Summary Judgment

Under the OCAHO rules, the Administrative Law Judge (ALJ) "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." 28 C.F.R. § 68.38(c).[1] "An issue of fact is genuine only if it has a real basis in the record" and "[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)). "[T]he 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.'" *United States v. 3679 Commerce Place, Inc.*, 12 OCAHO no. 1296, 4 (2017) (quoting 28 C.F.R. § 68.38(b)). The Court views all facts and reasonable inferences "in the light most favorable to the non-moving party." *United States v. Prima Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994) (citations omitted).

B. Civil Money Penalties

The Court may assess civil penalties for paperwork violations in accordance with the parameters set forth in 8 C.F.R. § 274a.10(b)(2) and 28 C.F.R. § 85.5. Complainant has the burden of proof

---

[1] *See* Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2016).

[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 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.

with respect to penalties and "must prove the existence of an aggravating factor by a preponderance of the evidence." *3679 Commerce Place*, 12 OCAHO no. 1296 at 4 (citing *United States v. March Constr., Inc.*, 10 OCAHO no. 1158, 4 (2012); *United States v. Carter*, 7 OCAHO no. 931, 121, 159 (1997)).

The civil penalties for violations of § 1324a are intended "to set a meaningful fine to promote future compliance without being unduly punitive." *3679 Commerce Place*, 12 OCAHO no. 1296 at 7. To determine the appropriate penalty amount, "the following statutory factors must be considered: 1) the size of the employer's business, 2) the employer's good faith, 3) the seriousness of the violations, 4) whether or not the individual was an unauthorized alien, and 5) the employer's history of previous violations." *Id.* at 4 (citing 8 U.S.C. § 1324a(e)(5)). The Court considers the facts and circumstances of the individual case to determine the weight it gives to each factor. *United States v. Metro. Enters.*, 12 OCAHO no. 1297, 8 (2017). While the statutory factors must be considered in every case, § 1324a(e)(5) "does not mandate any particular outcome of such consideration, and nothing in the statute or the regulations requires . . . that the same weight be given to each of the factors in every case . . . or that the weight given to any one factor is limited to any particular percentage of the total." *United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6–7 (2011) (internal citations omitted). Further, the Court may also consider other, non-statutory factors as appropriate in the specific case. *3679 Commerce Place*, 12 OCAHO no. 1296 at 4 (citation omitted). Finally, Complainant's "penalty calculations are not binding in OCAHO proceedings, and the [Administrative Law Judge] may examine the penalties *de novo* if appropriate." *United States v. Alpine Staffing, Inc.*, 12 OCAHO no. 1303, 10 (2017).

III. DISCUSSION

A. Liability

Complainant argues that there is no genuine issue of material fact as to Respondent's liability in this matter. Respondent argues that there is a genuine issue of material fact in that Respondent believes that Complainant acted in bad faith in its enforcement decision to target Respondent because of the nature of its business and the racial and ethnic background of its owners.

In the Answer filed on March 12, 2019, Respondent admitted to paragraphs A-D of the Complaint which alleged that Respondent hired the listed twenty-four individuals after November 6, 1986, and that Respondent failed to ensure that the individuals properly completed section 1 and/or Respondent failed to properly complete sections 2 or 3 of the Form I-9. Answer at 2. Respondent admitted to liability under § 274A(a)(1)(B) of the Act. *Id.* Complainant submitted the Forms I-9 at issue in this case, and the documents support the charge that Respondent did not sign and fill out or complete the employer verification section of any of the forms. Mot. Summ. Dec. Ex. G-3. Respondent did not object to the exhibits. Accordingly, the Court finds that there is no genuine issue of material fact as to Respondent's liability, and the Court finds that Respondent is liable for hiring twenty-four individuals without complying with the requirements under § 274A(b) of the Act.

As to Respondent's claim regarding the enforcement decisions of DHS, "[t]he decision as to enforcement priorities rests within the prosecutor's discretion unless it can be affirmatively established that the Government's decision to initiate a prosecution is impermissible based on a standard such as race, religion or other arbitrary classification including the exercise of protected statutory and constitutional rights." *United States v. Weymoor Invs., LLC*, 1 OCAHO no. 56, 343, 346 (1989); *Wayte v. United States*, 470 U.S. 598 (1985). There is a presumption that a prosecution is undertaken in good faith and in a non-discriminatory manner. *Wayte*, 470 U.S. at 607–10. A party must make a prima facie showing before the party is entitled to an evidentiary hearing on selective prosecution. *Weymoor Invs.*, 1 OCAHO no. 56 at 347. Respondent has not submitted any evidence beyond an unsupported statement in the brief, which is not sufficient to raise a genuine issue of material fact. *Id.*; *see also United States v. Prod. Plated Plastics, Inc.*, 742 F. Supp. 956, 962 (W.D. Mich. 1990), *aff'd*, 955 F.2d 45 (6th Cir. 1992).

As such, the only issue before this Court is the amount of civil penalties to assess.

B. Civil Penalties

Complainant contends that summary decision is appropriate as to the penalties. The Declaration of Jerry Foty, an ICE auditor, states that he calculated the penalties in accordance with ICE internal methodology set out in the "Substantive Violation Fine Schedule matrix." Mot. Summ. Dec. Ex. G-2 at 2. Foty stated that he established the base fine by first ascertaining that the percentage of employees for whom there were violations was 100% so that the base penalty for each violation was $1,862.00. *Id* at 2–3. He then considered the five statutory factors and concluded that the business size warranted mitigation, while the good faith of the business and the seriousness of the violations were both aggravating factors, resulting in a total penalty enhancement of 5%. *Id.* The government's final figure for each violation was $1,955.10, or 89% of the statutory maximum for the range that Foty used. *Id.* at 3.

Complainant submitted nine exhibits with its motion, including the Form I-9s at issue in the case (Ex. G-3), employee lists (Exs. G-4, G-8); and wage information (G-9). Respondent submitted exhibits R-1 to R-5, consisting of a declaration from one of the owners (R-3), information about the owners and their three children (R-1, R-2), demographic information about the City of International Falls, Minnesota (R-4), and a letter from the Mayor of International Falls indicating his appreciation for the restaurant and its owners on behalf of the City (R-5).

1. Statutory Factors

The Court has considered the five statutory factors in evaluating the appropriateness of Complainant's proposed penalty. 8 U.S.C. § 1324a(e)(5). It is undisputed that Respondent is a small business with fewer than 100 employees. Mot. Summ Dec. at 6. Respondent indicates that it has seven full and part-time employees. Resp't Prehearing Statement at 1. Based on this factor, Complainant mitigated the proposed penalty amount by five percent. Mot. Summ. Dec. Ex. G-2 at 3. The Court finds that mitigation is warranted based on the size of Respondent's business.

Complainant aggravated the penalties based on bad faith. Complainant argues that Respondent acted in bad faith because it made no attempt at verifying employment eligibility, Respondent did not timely respond to the NOI and submitted the I-9s after the September 29, 2018 deadline, and Respondent did not provide the names of thirteen employees who Respondent employed during the period covered by the NOI. Respondent concedes that the owners were young and inexperienced, and states that they have since become informed and rectified their mistakes. Respondent's Prehearing Statement at 2; Answer at 2.

The good faith analysis primarily focuses on the steps the employer took *before* the investigation to reasonably ascertain what the law requires and the steps it took to follow the law. *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 10 (2010); *United States v. New China Buffet Rest.*, 10 OCAHO no. 1133, 5 (2010). Prior to the investigation, while Respondent did make some attempt at compliance as it used the I-9 Form, Respondent failed to complete section 2 on nineteen of the Forms I-9. Of the five remaining, none included the employer's signature. A low compliance rate, alone, does not warrant a finding of bad faith, however. *Metropolitan Enters.*, 12 OCAHO no. 1297 at 15 (citing *New China Buffet Rest.*, 10 OCAHO no. 1133 at 6). "[T]here must be some evidence of culpable conduct beyond the mere failure of compliance." *United States v. Siam Thai Sushi Restaurant, d/b/a Four Siamese Co., Inc.*, 10 OCAHO no. 1174, 3-4 (2013). Additionally, Complainant bears the burden of proving by a preponderance of the evidence that an employer lacked good faith. *United States v. Metro. Warehouse, Inc.*, 10 OCAHO no. 1207, 5 (2013).

In support of Complainant's contention that the Respondent did not produce the Forms I-9 in a timely manner, Complainant's motion cites the NOI and the I-9s submitted. However, these exhibits do not provide any evidence that Respondent submitted its I-9s after the deadline, and the declaration from Jerry Foty does not address this point. Mot. Summ. Dec. Exs. G-1–G-3. Complainant did not charge Respondent with any violations for failure to present I-9s. Thus, Complainant failed to provide any evidence that Respondent submitted its I-9s after the September 29, 2018 deadline.

Further, Complainant argues that Respondent acted in bad faith because it did not provide a complete and accurate record of individuals that Respondent employed. Mot. Summ. Dec. at 7. Specifically, Complainant argues that these records "indicate that there were at least thirteen employees who were employed by the Respondent during the time covered by the NOI that I-9s were never submitted to [Complainant]." *Id.* Complainant cites Minnesota Unemployment Insurance Records from 2016 to 2018. Absent an indication of the instructions Complainant gave at the time of the inspection, this list alone is insufficient to meet Complainant's burden. Complainant provided the NOI and the subpoena it served on Respondent. Mot. Summ. Dec. Ex. G-1. The subpoena instructs Respondent to produce records indicated in "Box 4." *Id.* at 3. Box 4 states to "[p]lease see attachment." *Id.* Complainant did not provide the attachment. As such, Complainant has not met its burden of proof to show that Respondent acted in bad faith.

Complainant treated the seriousness of the violations as an aggravating factor. OCAHO precedent states, "[a]n employer's failure to sign the section 2 attestation is [ ] serious because this is the section that proves the employer reviewed documents sufficient to demonstrate the employee's eligibility to work in the United States." *United States v. Durable, Inc.*, 11 OCAHO

no. 1229, 15 (2014). Further, other serious violations include an employer's failure to ensure the employee timely completes section 1 or that the employee provides an alien number in section 1, if the number is not on any of the documents provided. *Id.* All of the I-9s lack the employer's attestation in section 2 as all of the I-9s either lack a page two entirely, page two is blank, or the employee completed the employer attestation. Mot. Summ. Dec. Ex. G-3. Additionally, many of the I-9s contain other substantive violations. One I-9 lacks the employee's alien registration number. Mot. Summ. Dec. G-3 at A21. One I-9 is missing page one. *Id.* at A31. Eighteen employees completed section 1 several weeks after the employee's date of hire. Mot. Summ. Dec. Ex. G-3. One employee signed her I-9 more than two years after her date of hire and two other I-9s were completed months after the employees' dates of hire. *Id.* at A27, A31, A33. Complainant has the burden to prove that an aggravation of the penalty is warranted, and in this case, the Court finds that it has met its burden. *3679 Commerce Place*, 12 OCAHO no. 1296 at 4. None of the Forms I-9 included an employer attestation and all of the I-9 forms contained multiple serious violations.

Complainant did not aggravate the penalty based upon the presence of unauthorized workers, treating it has a neutral factor. Complainant did not present any evidence of unauthorized workers, and accordingly, the Court considers this factor to be neutral.

Complainant treated the history of violations as a neutral factor because the record does not indicate that Respondent has a previous history of violations. However, a lack of a history of previous violations "does not automatically entitle the respondent to mitigation of the civil penalty[.]" *United States v. Red Coach Rest.*, 10 OCAHO no. 1200, 4 (2013) (affirmance by the Chief Administrative Hearing Officer (CAHO)). Under OCAHO precedent, "never having violated the law before does not necessarily warrant additional leniency, and it is still appropriate to treat this factor as a neutral one." *New China Buffet Rest.*, 10 OCAHO no. 1133 at 6. Thus, the Court finds Respondent's lack of history of previous violations is properly treated as a neutral factor.

2. Non-Statutory Factor

Respondent contends that the Court should mitigate the penalties based on its inability to pay the penalty. The business owners submitted an affidavit indicating that the amount assessed is too high to pay without causing great financial hardship to their family, business and community. Resp't Prehearing Statement Ex. R-2. Respondent also states that International Falls is a small rural community with a high minority poverty rate (66%), a minority population of 7%, and that the Respondent's business has made an important contribution to the diversity and employment needs of the community. Answer at 1, 2; Answer Ex. C at 8, 14. "A party seeking consideration of a non-statutory factor, such as ability to pay the penalty, bears the burden of proof in showing that the factor should be considered as a matter of equity, and that the facts support such a favorable exercise of discretion." *United States v. Pegasus Family Rest.*, 12 OCAHO no. 1293, 10 (2016) (citing *United States v. Buffalo Transp., Inc.*, 11 OCAHO no. 1263, 11 (2015)). Respondent did not provide any evidence of its financial situation, however, and therefore this Court cannot ascertain what level of fine promotes future compliance without being unduly punitive. The Court will consider the business owner's concerns as part of the mitigation afforded to a small business.

C. Penalty Range

The applicable penalty range depends on the date of the violations and the date of assessment. *See* § 274a.10(b)(2); § 85.5. If the violation occurred on or before November 2, 2015, the minimum penalty amount is $110 and the maximum is $1,100. 8 C.F.R. § 274a.10(b)(2). For violations that occur after November 2, 2015, the adjusted penalty range as set forth in § 85.5 applies. *See* § 85.5. When a violation occurs after November 2, 2015, and the penalty is assessed between February 4, 2017 and January 29, 2018, the minimum penalty amount is $220 and the maximum amount is $2,191. *Id.* If the penalty is assessed after January 29, 2018, the minimum penalty is $224 and the maximum is $2,236. *Id.*

OCAHO precedent "establishes that a paperwork violation is not a one-time occurrence, but a continuous violation until corrected." *United States v. Rupson of Hyde Park*, 7 OCAHO no. 940, 332 (1997); *United States v. W.S.C. Plumbing, Inc*., 9 OCAHO no. 1071, 9 (2001). "[A] verification failure occurs not at a single moment in time, but rather throughout the period of non-compliance." *Id.* A paperwork violation involving the failure to ensure proper completion of section 1 or failure to properly complete section 2 continues until the violation is corrected. *United States v. Curran Engineering Co., Inc.*, 7 OCAHO no. 975, 895 (1997).

The record reflects that on all twenty-four Forms I-9, Respondent failed to either provide page two, or sign the employer certification in section 2. Mot. Summ. Dec. Ex. G-3. There is no indication as to whether the violations have been corrected. As such, the violations are continuing violations and, therefore, the Court finds the violations occurred after November 2, 2015. The adjusted penalty ranges set forth in § 85.5 are applicable. ICE applied the statutory range for violations that occurred after November 2, 2015, but were assessed between February 4, 2017, and January 29, 2018, because the ICE auditor calculated the fine in November 2017. However, ICE served the NIF on March 1, 2018, at which time the penalty range had increased.

The regulation does not define how to determine the assessment date.[3] This Court finds that the assessment date is the date that ICE serves the NIF on a respondent. Using the NIF date is a reasonable interpretation of the regulation because this is the date that the penalty obligation ripens. The penalty rates are adjusted to account for inflation to ensure that the impact of the penalty, in this case to ensure future compliance, continues to be the same. Using an earlier date could arguably erode that impact. Further, the NIF date is a fixed, easily ascertainable date.

Lastly, the Complainant's proposed penalties are 89% of the maximum for the range that it considered. OCAHO case law directs that penalties approaching the maximum should be reserved for the most egregious violations. *See Fowler Equip*., 10 OCAHO no. 1169 at 6. The penalty is high in the range because of the formula Complainant uses to calculate the base fine, that is, the percentage of violations as compared to the number of employees. This calculation gives the strongest weight to a factor that is not explicitly set out in the statute, and relegates the

[3] Assessment is defined as, "1. Determination of the rate or amount of something, such as a tax or damages. 2. Imposition of something, such as a tax or fine, according to an established rate; the tax or fine so imposed." BLACK'S LAW DICTIONARY (11th ed. 2019).

statutory factors to relatively small 5% adjustments. As a consequence, the most aggravated cases are those with the highest percentage of violations, regardless of the other factors. The rate of violations is a factor to be considered along with other factors. Considering a totality of the circumstances as set forth in the evidence of record and pleadings, ICE's proposed penalty is disproportionate to the Form I-9 violations and mitigating factors present in this case. Accordingly, this Court will make adjustments to the fines based upon the five statutory factors (as well as non-statutory factors). Using a mid-range penalty as a base penalty, the Court considers that the small business mitigating factor is offset by the aggravating factor of the seriousness of the violation. While the case does not present the most serious violation, the employer's failure is considered serious, and the failures were pervasive. The Court will impose a fine of $1,453 per violation, with a total fine of $34,872.

IV. CONCLUSION

Complainant's Supplemental Motion for Summary Decision is granted. After considering the statutory factors, the unsupported non-statutory factor, and the totality of the evidence, the undersigned finds that Complainant's penalty should be adjusted. The penalty amount for twenty-four of the violations is $34,872. The Court finds the penalty amount for one violation is $1,453. Accordingly, Respondent is liable for $34,872 in civil penalties for twenty-four violations of § 1324a.

V. FINDINGS OF FACT

1. On September 26, 2017, the Department of Homeland Security, Immigration and Customs Enforcement, served Farias Enterprises LLC with a Notice of Inspection.

2. On March 1, 2018, the Department of Homeland Security, Immigration and Customs Enforcement, served Farias Enterprises LLC with a Notice of Intent to Fine.

3. Farias Enterprises LLC failed to properly complete Forms I-9 for twenty-four employees.

4. Farias Enterprises LLC is a small business with no history of previous violations.

5. Prior to the investigation, Farias Enterprises LLC had a significantly poor rate of compliance with the requirements of 8 U.S.C. § 1324a as it failed to sign section 2 on 100 percent of its Forms I-9.

6. Eighteen employees completed section 1 several weeks after the employee's date of hire, one employee signed her I-9 more than two years after her date of hire and two other I-9s were completed months after the employees' dates of hire.

VI. CONCLUSIONS OF LAW

1. Farias Enterprises LLC 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. Farias Enterprises LLC is liable for twenty-four violations of 8 U.S.C. § 1324a(1)(b).

4. 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." 28 C.F.R. § 68.38(c).

5. "An issue of fact is genuine only if it has a real basis in the record" and "[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)).

7. "[T]he party opposing the motion for summary decision 'may not rest upon 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.'" *United States v. 3679 Commerce Place, Inc.*, 12 OCAHO no. 1296, 4 (2017) (quoting 28 C.F.R. § 68.38(b)).

8. The Court views all facts and reasonable inferences "in the light most favorable to the non-moving party." *United States v. Prima Enters., Inc.*, 4 OCAHO no. 615, 261 (1994) (citations omitted).

9. The Court assesses penalties for paperwork violations in accordance with the parameters set forth in 8 C.F.R. § 274a.10(b)(2) and 28 C.F.R. § 85.5.

10. To determine the appropriate penalty amount, "the following statutory factors must be considered: 1) the size of the employer's business, 2) the employer's good faith, 3) the seriousness of the violations, 4) whether or not the individual was an unauthorized alien, and 5) the employer's history of previous violations." *United States v. 3679 Commerce Place, Inc.*, 12 OCAHO no. 1296, 4 (2017) (citing 8 U.S.C. § 1324a(e)(5)).

11. The government has the burden of proof with respect to penalties and "must prove the existence of an aggravating factor by a preponderance of the evidence." *United States v. 3679 Commerce Place, Inc.*, 12 OCAHO no. 1296, 4 (2017).

12. The Court considers the facts and circumstances of each individual case to determine the weight it should give to each factor. *United States v. Metro. Enters.*, 12 OCAHO no. 1297, 8 (2017).

13. The Court may also consider other, non-statutory factors as appropriate in the specific case. *United States v. 3679 Commerce Place, Inc.*, 12 OCAHO no. 1296, 4 (2017).

14. The government's "penalty calculations are not binding in OCAHO proceedings, and the [Administrative Law Judge] may examine the penalties *de novo* if appropriate." *United States v. Alpine Staffing, Inc.*, 12 OCAHO no. 1303, 10 (2017).

15. The good faith analysis primarily focuses on what steps the employer took *before* the investigation to reasonably ascertain what the law requires and what steps it took to follow the law. *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 10 (2010); *United States v. New China Buffet Rest.*, 10 OCAHO no. 1133, 5 (2010).

16. A low rate of compliance with the § 1324a requirements, alone, does not warrant a finding of bad faith. *United States v. Metro. Enters.*, 12 OCAHO no. 1297, 15 (2017) (citing *United States v. New China Buffet Rest.*, 10 OCAHO no. 1133, 6 (2010)).

17. OCAHO precedent states, "[f]ailure to ensure that the employee checks a box attesting to his or her status in section 1 is serious[.]" *United States v. Metro. Enters.*, 12 OCAHO no. 1297, 16 (2017) (citing *United States v. Durable, Inc.*, 11 OCAHO no. 1229, 15 (2014)).

18. "An employer's failure to sign the section two attestation is also serious because this is the section that proves the employer reviewed documents sufficient to demonstrate the employee's eligibility to work in the United States." *United States v. Pegasus Family Rest. Inc.*, 12 OCAHO no. 1293, 9 (2016) (quoting *United States v. Durable, Inc.*, 11 OCAHO no. 1229, 15 (2014)).

19. Under OCAHO precedent, "never having violated the law before does not necessarily warrant additional leniency, and it is still appropriate to treat [the history of violations factor] as a neutral one." *United States v. New China Buffet Rest.*, 10 OCAHO no. 1133, 6 (2010).

20. A party seeking consideration of a non-statutory factor has the burden of proof and must show "that the factor should be considered as a matter of equity, and that the facts support such a favorable exercise of discretion." *United States v. Pegasus Family Rest.*, 12 OCAHO no. 1293, 10 (2016) (citing *United States v. Buffalo Transp., Inc.*, 11 OCAHO no. 1263, 11 (2015)).

21. Paperwork violations, such as failure to complete section 2, are continuing violations until cured. *United States v. Curran Engineering Co., Inc.*, 7 OCAHO 975, 895 (1997).

22. When a violation occurs after November 2, 2015 and the penalty is assessed between February 4, 2017 and January 29, 2018, the minimum penalty is $220 and the maximum penalty is $2,191. If the penalty is assessed after January 29, 2018, the minimum penalty is $224 and the maximum penalty is $2,236. 28 C.F.R. § 85.5.

23. In determining a penalty range under 28 C.F.R. § 85.5, the assessment date is the date that the Immigration and Customs Enforcement serves the Notice of Intent to Fine on a respondent.

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

Complainant's Motion for Summary Decision is **GRANTED.** Respondent is liable for twenty-four violations of § 1324a(a)(1)(B) and is directed to pay civil penalties in the total amount of $34,872. The parties are free to establish a payment schedule to minimize the impact of the penalty on the operations of the company.

SO ORDERED.

Dated and entered on January 6, 2020.

_____

Jean King
Administrative Law Judge

Appeal Information

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

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

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

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