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

February 18, 2016

UNITED STATES OF AMERICA, Complainant, v. WAVE GREEN, INC. D/B/A GOLDEN FARM MARKET Respondent.	))))))))	8 U.S.C. § 1324a Proceeding OCAHO Case No. 15A00015

FINAL DECISION AND ORDER

APPEARANCES:

Michele Henriques
for complainant

Herbert Greenman
for respondent

I. PROCEDURAL HISTORY

This is an action pursuant to the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a (2012). On December 1, 2014, complainant United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a complaint consisting of two counts against Wave Green, Inc. d/b/a Golden Farm Market (Wave Green, respondent, or the company). The company filed an answer and the parties completed prehearing procedures.

Presently pending is the government's Motion for Summary Decision. No response to this motion has been filed. As discussed in detail below, the government's Motion for Summary Decision will be granted.

II. BACKGROUND INFORMATION AND POSITIONS OF THE PARTIES

Wave Green is a small, domestic grocery store located in Buffalo, New York. On January 21, 2014, the government personally served Wave Green with a Notice of Inspection. The Notice of

Inspection informed Wave Green that a review of its Employment Eligibility Verification Forms (Forms I-9) was scheduled for January 27, 2014. The letter also indicated that federal regulations provide "three days' notice prior to conducting an inspection of an employer's Forms I-9." It appears from the evidence of record that Wave Green cooperated fully with the government's document review and investigation.

On June 30, 2014, the government personally served Wave Green with a Notice of Intent to Fine. The Notice of Intent to Fine identified that respondent failed to ensure that section 1 and/or sections 2 or 3 of the Forms I-9 were properly completed for seven employees, and that respondent failed to prepare and/or present a Form I-9 for one employee. As a result of these violations, ICE assessed a fine of $7106. In a letter dated July 25, 2014, Wave Green requested a hearing before an Administrative Law Judge.

On December 1, 2014, ICE filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO). Count I of the complaint alleged that respondent failed to prepare a Form I-9 for one employee, Jabr. A. Saleh, within three days of employment and/or failed to present the Form I-9 for this employee after being requested to do so by the government in violation of 8 U.S.C. § 1324a(a)(1)(B). Count II of the complaint alleged that respondent failed to ensure that the following seven employees properly completed section 1 of their Forms I-9, and/or that respondent failed to properly complete section 2 or section 3 of the Forms I-9 for these seven employees: Abdul Shalam Shuaibee, Ebrahim A. Altalas, Maged A. Qassem, Abdulla M. Kassem, Saddam S. Sifyan, Ahmed A. Qassem, and Mahmood M. Kassem. Both Counts I and II alleged that Wave Green hired for employment the eight listed individuals after November 6, 1986. The complaint also requested that OCAHO order Wave Green to pay the penalty assessed in the Notice of Intent To Fine in the amount of $7106.

On February 11, 2015, Wave Green filed its four-sentence answer to the complaint. Wave Green denied all of the allegations contained in the complaint. Wave Green also denied "any other allegations not heretofore admitted . . . ." The company did not raise any affirmative defenses and requested that OCAHO simply dismiss the complaint.

On March 24, 2015, ICE filed its prehearing statement, which included five proposed exhibits as attachments. ICE attached to its prehearing statement copies of the seven Forms I-9 it reviewed. ICE also attached respondent's Form NYS-45-ATT, Quarterly Combined Withholding, Wage Reporting, And Unemployment Insurance Return (Form NYS-45-ATT), which lists as employees the eight individuals identified in the government's complaint.

The government also proposed numerous stipulated facts in its prehearing statement. Proposed stipulated facts numbered one through nine primarily relate to the procedural history of the case. The tenth proposed stipulated fact is that respondent hired all of the employees listed in the complaint after November 6, 1986, despite respondent denying this fact in its answer. The proposed stipulated facts numbered eleven through fourteen directly relate to the government's penalty assessment, and these stipulations appear to favor respondent company with respect to ICE's fine assessment as follows: (a) respondent company is a small business; (b) there is no evidence that respondent has acted in bad faith; (c) the government's audit did not reveal the

employment of unauthorized aliens; and (d) respondent does not have a previous history of violating the employment eligibility verification requirements at 8 U.S.C. § 1324a(a)(1)(B).

The government's prehearing statement also set forth the relevant legal standards, including: the duty of employers to properly prepare, retain, and produce Forms I-9; the distinction between Form I-9 violations that are substantive and violations that are technical or procedural; and the assessment of penalties. ICE asserted that based on its inspection of Wave Green's Forms I-9, the company engaged in eight separate violations of INA § 274A(a)(1)(B). In addition, the government provided the calculation it used in determining the appropriate fine, which included adjustment for three mitigating factors and one aggravating factor.

As explained in its prehearing statement, ICE determined that Wave Green had a 100 percent violation ratio because there was at least one Form I-9 violation for each of the eight individuals employed by Wave Green during the inspection period. As such, ICE assessed a base fine per its guidelines at the highest rate of $935 per violation for each of the eight violations. However, ICE lowered each violation's fine by a total of $140.25 due to the presence of the following three mitigating factors: Wave Green is a small business; Wave Green did not hire unauthorized workers; and Wave Green did not have a prior history of Form I-9 violations. However, ICE increased each violation's fine by $46.75 due to the aggravating factor of the "seriousness" of the violations. Therefore, ICE assessed an adjusted fine of $888.25 per violation for each of the eight violations, for a total fine assessed of $7106.[1]

Specifically, ICE explained that it deemed serious the failures of the employer to ensure that all employees certified their Forms I-9, and the employer's failure to sign and certify all of the Forms I-9. ICE also noted that the same handwriting appears in sections 1 and 2 of the Forms I-9, but that section 1 should be completed by employees and section 2 should be completed by the employer. Additionally, ICE deemed serious the employer's failure to present a Form I-9 for one employee and the employer's "pattern of repeated failures in the proper completion of the Forms I-9."

Respondent filed its prehearing statement on or about June 23, 2015. In its prehearing statement on pages three and four, respondent argued that it "does not acknowledge the existence of any of the violations noted in the complaint" and that it has not "engaged in any of the 8 separate

[1] Although ICE's prehearing statement on page nine states that a "fine of $888.25 per violation was assessed for each of the six violations," it is clear from the evidence of record that there are eight violations assessed and that the reference to "six" violations is an error. Also, ICE's calculation of $888.25 per violation and a total penalty amount of $7106 do not add-up properly based on the factors assessed in the prehearing statement, which adds to the fine for one aggravating factor and subtracts from the fine for three mitigating factors. Importantly, ICE provides an additional penalty assessment in its Motion for Summary Decision, whereby it recalculates the penalty after assessing two mitigating factors instead of three mitigating factors. Therefore, the penalty assessment in the Motion for Summary Decision, discussed in detail below, comports with the violation assessed per penalty of $888.25 and the total penalty calculation of $7106.

violations." Wave Green further contended that "it hopes to show that the individuals employed by respondent were not unauthorized."[2] Wave Green also claimed that it complied with the employment eligibility verification requirements, "at the latest, after the notice of inspection." Regarding the fines, respondent claimed that the fines "should not be imposed." Respondent attached to its prehearing statement copies of the Notice of Inspection, Notice of Intent to Fine, Forms I-9 and supporting documentation, and the United States Citizenship and Immigration Services (USCIS), Handbook for Employers (M-274).

On August 20, 2015, a telephonic prehearing conference was held, and respondent alleged during the conference that it is unable to pay the penalty assessed by the government. As a result, the parties were encouraged to discuss settlement negotiations and initiate discovery requests. The government informed respondent that it would be seeking discovery in the form of Wave Green's tax returns in order to assess its ability to pay the fine.

On September 22, 2015, complainant filed a Motion to Compel Discovery, requesting that OCAHO compel respondent to turn over its tax returns. In the Motion to Compel, the government outlines the attempts made to engage in conversation with respondent's counsel and attempts made to secure the tax returns prior to seeking judicial intervention. Additionally, the government explained why the tax returns were needed and provided legal precedent to support these arguments.

Respondent did not file a response to the motion to compel. *See* 28 C.F.R. § 68.11(b). An Order Granting ICE's Motion to Compel Discovery was granted, instructing respondent to produce copies of the company's corporate tax returns no later than November 20, 2015. There is no evidence to suggest that respondent complied with the Order Granting Motion to Compel.

Complainant filed a Motion for Summary Decision on October 20, 2015 (Government's Motion). In the Government's Motion, ICE contends that it has satisfied its burden of proof as to respondent's liability for violating the INA, that its penalty assessment should be upheld, and that the government is entitled to summary decision without a hearing as there is no genuine issue of material fact in this case. *Government's Motion* at 3-8. The government argues that it has proved the threshold requirements as to respondent's liability, contending that all of respondent's employees were employed in the United States and were hired after November 6, 1986. The government argues that "[r]espondent was first authorized to conduct business by the State of New York on August 15, 2008," and that "[r]espondent's only place of business is within the United States." *Id.* at 11-12. The government attached a certificate from the State of New York, showing that respondent has been a domestic business since August 15, 2008. *Id.*, Attachment GC.

Additionally, the government reasserts its arguments that: (1) respondent is liable for Count I of the complaint by failing to prepare and/or present a Form I-9 for one employee; and (2) liable for Count II of the complaint by committing substantive paperwork violations when failing to ensure

[2] The government concedes in its proposed stipulated facts that the evidence shows Wave Green did not employ unauthorized individuals during the period of inspection. *See Government's Prehearing Statement* at 3.

that employees properly completed section 1 and/or when respondent failed to complete sections 2 or 3 of the Forms I-9 for seven employees. *Government's Motion* at 8-12. Regarding Count I of the complaint, the government relies on Form NYS-45-ATT for the tax year 2013, which lists employees and wages earned, to ascertain that respondent employed eight individuals during 2013. *Id.*, Attachment GB.

ICE argues that respondent failed to prepare and/or present a Form I-9 for a single employee, Jabr. A. Saleh, because this employee is listed on the Form NYS-45-ATT as having received wages during 2013; however, respondent failed to present a Form I-9 for this one employee during the inspection. *Government's Motion* at 8-10, Attachment GB. The government argues that this evidence establishes that: (1) respondent failed to prepare and/or present a Form I-9 for one employee; (2) the government has met its burden of proving by a preponderance of the evidence respondent's violation of 8 U.S.C. § 1324a(a)(1)(B); and (3) the government is entitled to summary decision as there is no genuine issue of material fact regarding liability for Count I of the complaint. *Id.* at 10.

Regarding Count II of the complaint, the government claims that substantive paperwork violations existing on "all seven forms [include] Respondent's failure to complete the 'certification' portion of section 2," which are "sufficient to establish that no genuine issue of material fact exists with respect to the fact that substantive paperwork violations exist on each of the Forms I-9 . . . ." *Government's Motion* at 12. Therefore, ICE argues that based on the evidence of record, it has also established by a preponderance of the evidence that respondent violated 8 U.S.C. § 1324a(a)(1)(B) as alleged in Count II of the complaint, and that its motion for summary decision should be granted.

Finally, the government argues that its fine assessment of $7106 comports with internal ICE guidance, and that it was appropriately calculated by considering mitigating and aggravating factors based on "an objective review of the totality of the circumstances." *Government's Motion* at 12-14. Attached to its motion, the government included its base fine rate calculation (calculated based on a 100 violation ratio), and it included its documentation showing consideration of each of the five statutory penalty assessment factors and the associated fine calculations as follows: (a) base fine amount of $7480 (which is $935 for each of the eight violations due to the more than 50% violations to employee ratio); (b) addition of $374 (which is $46.75 for each of the eight violations) for the aggravating factor of "seriousness"; (c) subtraction of $748 (which is $93.50 for each of the eight violations) for the two mitigating factors of "small business size" and lack of "involvement of unauthorized aliens"; and (d) total fine amount of $7106. *Id.*, Attachment GD. The government also included its fine adjustment worksheet, which explains in detail the government's methodology in reaching the fine amount based on a discussion of whether each of the five statutory factors is considered a "mitigating," "aggravating," or "neutral" factor. *Id.*

The government contends that respondent made verbal assertions about a financial inability to pay the fine assessed, and the government alleges making multiple attempts to discuss settlement and secure respondent's tax returns to assess respondent's ability to pay the fine. The government argues that "no reduction in the properly assessed fine should be considered unless and until the tax return for the two shareholders are submitted for examination and review." The

government argues that its fine assessment should be upheld, citing *United States v. Hernandez*, 8 OCAHO no. 1043, 660, 673 (2000),[3] for the proposition that the Administrative Law Judge in *Hernandez* held "that there is no need for *de novo* redetermination of the penalty when the assessment made by ICE is supported by the record."[4] *Government's Motion* at 14. As such, the government seeks enforcement of the penalty as assessed by ICE of $7106.

Respondent did not file a response to the Government's Motion for Summary Decision. *See* 28 C.F.R. §§ 68.11(b), 68.38(a) (providing 10 days within which to respond to a Motion for Summary Decision). Therefore, only the Government's Motion for Summary Decision is being adjudicated. 28 C.F.R. § 68.38(a).

III. DISCUSSION

A. Applicable Legal Standards

1. Summary Decision

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." Relying on United States Supreme Court precedent, OCAHO case law has established that "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, 1014-15 (1993) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586-87 (1986)).

---

[3] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

[4] Contrary to the government's assertion in its prehearing statement that the Administrative Law Judge in *Hernandez*, held "that there is no need for *de novo* redetermination of the penalty when the assessment made by ICE is supported by the record[,]" the Administrative Law Judge in *Hernandez* conducted a thorough *de novo* review of the government's penalty assessment and of the government's request for additional penalty enhancement. 8 OCAHO no. 1043 at 665-73. The Administrative Law Judge not only found that further penalty aggravation was not warranted, but also reduced the total fine assessment for all three counts from $6925 to $5550, demonstrating that a *de novo* review was conducted. *Id.* at 673.

"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) sets forth 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, "[a]ll facts and reasonable inferences to be drawn therefrom should be viewed in the light most favorable to the non-moving party." *United States v. Primera Enters.*, 4 OCAHO no. 615, 259, 261 (1994).

"Summary decision does not issue automatically, even when the nonmoving party fails to respond to a motion." *Four Seasons Earthworks*, 10 OCAHO no. 1150 at 3-4 (citing *United States v. Sourovova*, 8 OCAHO no. 1020, 283, 284 (1998)). Pursuant to OCAHO's rules at 28 C.F.R. § 68.38(b) and (c), the moving party is required to meet its burden of proof using evidence to show that there is no genuine issue of fact and that summary decision is warranted.

2. Burdens of Proof and Production

In cases arising under 8 U.S.C. § 1324a, the government has the burden of proving by a preponderance of the evidence that respondent is liable for committing a violation of the employment eligibility verification requirements. *See United States v. Clean Sweep Janitor Serv.*, 11 OCAHO no. 1226, 2 (2014). In addition to proving liability, "[t]he government has the burden of proof with respect to the penalty, *United States v. March Construction, Inc.*, 10 OCAHO no. 1158, 4 (2012), and must prove the existence of any aggravating factor by a preponderance of the evidence, *United States v. Carter*, 7 OCAHO no. 931, 121,159 (1997)." *United States v. Niche, Inc.*, 11 OCAHO no. 1250, 6 (2015).

However, after the government has introduced evidence to meet its burden of proof, "the burden of *production* shifts to the respondent to introduce evidence . . . to controvert the government's evidence. If the respondent fails to introduce any such evidence, the unrebutted evidence introduced by the government may be sufficient to satisfy its burden." *United States v. Durable, Inc.*, 11 OCAHO no. 1231, 5 (2014) (referencing *United States v. Alvand, Inc.*, 2 OCAHO no. 352, 378, 382 (1991) (modification by the CAHO)).

As explained in *United States v. Kumar*, 6 OCAHO no. 833, 112, 117-18 (1996),

> A summary decision, in other words, is not a penalty to be imposed for the failure of the nonmoving party to respond to a motion. Only if the evidentiary materials demonstrate by uncontradicted admissible evidence that the moving party would be entitled to judgment as a matter of law does the burden of production shift to the non-movant to set forth—by affidavit or otherwise—specific facts showing that there is a genuine issue. Assessing whether the movant has met this burden requires that the evidence be construed in the light most favorable to the non-movant, but only reasonable inferences need to be drawn.

The government has provided both arguments and evidence in an attempt to meet its burden of proving by a preponderance of the evidence Counts I and II of the complaint, its penalty assessment, and its entitlement to summary decision. Currently, respondent has the burden of producing arguments and evidence to rebut the government's arguments and to rebut the evidence of record supporting the government's arguments. Because respondent has failed to provide any response to the government's Motion for Summary Decision, the cursory arguments and evidence contained in respondent's prehearing statement and answer will be considered for the purposes of rebutting the government's claims.

3. The Employment Verification Requirements

a. Form I-9 Obligations

Title 8 C.F.R. § 274a.2(b) requires employers to prepare and retain Forms I-9 for employees hired after November 6, 1986, and requires employers to produce the Forms I-9 for inspection by the government upon three days' notice. *United States v. Keegan Variety, LLC*, 11 OCAHO no. 1238, 2 (2014). An employee must 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); 8 C.F.R. § 274a.2(b)(1)(i)(A). For employees employed for three business days or more, employers must complete section 2 of the Form I-9 within three days of an employee's first day of employment. 8 C.F.R. § 274a.2(b)(1)(ii), (iii).

Pursuant to 8 C.F.R. § 274a.2(b)(1)(ii) and (v), employers must examine an employee's identity and work authorization documents "to determine if the document reasonably appears to be genuine and to relate to the person presenting it. The person who examines the documents must be the same person who signs Section 2. The examiner of the documents and the employee must both be physically present during the examination." Form I-9 Instructions at 3 (March 8, 2013), https://www.uscis.gov/sites/default/files/files/form/i-9.pdf. After examining the documents, the employer must record the document-specific information under the List A or List B and C

sections of the Form I-9, and the employer must attest under penalty of perjury that the employer has reviewed the documentation by signing and dating section 2 of the Form I-9. 8 C.F.R. § 274a.2(a)(3) (attestation under penalty of perjury); 8 C.F.R. § 274a.2(b)(1)(ii).

Employers who make copies of employee identity and work authorization documents "must" retain those copies with the Forms I-9 or in the employees' records; however, retaining copies of the documents "does not relieve the employer from the requirement to fully complete section 2 of the Form I-9." 8 C.F.R. § 274a.2(b)(3); *see also Four Seasons Earthworks*, 10 OCAHO no. 1150 at 4-5.

b. Penalty Assessment

Civil money penalties are assessed when an employer fails to properly prepare, retain, or produce upon request the Forms I-9, which are deemed paperwork violations, 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. Pertinent regulations and OCAHO case law set forth that if a paperwork violation is proven, then a fine must be assessed. 8 C.F.R. § 274a.10(b)(2) ("A respondent determined . . . to have failed to comply with the employment verification requirements as set forth in § 274a.2(b) shall be subject to a civil penalty . . . ."); *Keegan Variety*, 11 OCAHO no. 1238 at 7 (discussing that there is no fine waiver and a penalty must be assessed). As stated above, the government must prove by a preponderance of the evidence its penalty assessment and any aggravating factors enhancing the penalty assessment. *Niche*, 11 OCAHO no. 1250 at 6.

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." *Hernandez*, 8 OCAHO no. 1043 at 664. Although not an exhaustive list, additional factors that may be considered include economic information, a company's ability to pay the proposed penalty, and policies of leniency established by statute. *See Niche*, 11 OCAHO no. 1250 at 6-7.

B. Liability for Paperwork Violations

1. Wave Green's Forms I-9 and Supporting Evidence

Both the government and Wave Green produced seven Forms I-9. Wave Green's submission includes the copies of the documents presented to Wave Green by employees to satisfy the List A and/or List B and C requirements in section 2 of the Forms I-9. A review of the evidence

submitted reveals the following omissions and irregularities present in the Forms I-9, which is not an exhaustive list of all the problems with these Forms I-9:

> (1) All seven Forms I-9 appear to contain the same handwriting in all sections of the forms. However, the instructions for section 1 of the Form I-9 states that the employee must complete and sign this section no later than the first day of employment, and that the employer must complete and sign section 2 within three business days of the employee's first day of employment.
>
> (2) None of the seven Forms I-9 are certified by the employer. There are no signatures and no dates of completion in section 2.
>
> (3) None of the seven Forms I-9 contains employee signatures or dates of completion of the forms in section 1.
>
> (4) Wave Green used the March 8, 2013, edition of the Form I-9 for seven of the eight employees at issue. Although the Form I-9 was not published until 2013, two of the Forms I-9 contain hire dates for the employees on September 1, 2009 (Saddam Sifyan and Ahmed Qassem), and one Form I-9 contains a hire date of January 1, 2012 (Ebrahim Altalas). Because the Form I-9 was not published until well after the hire dates of these three employees, these three Forms I-9 could not have been completed within three days of hiring the employees in 2009 and 2012, as required.
>
> (5) The Form I-9 for Ebrahim Altalas states that the employee's first date of hire was January 1, 2012, and includes a New York State Driver's License to satisfy the List B identity document requirement. However, the driver's license is attached and reveals that the driver's license used to complete the Form I-9 was not issued until "03-23-2013," which is more than one year after the employee's first day of employment.
>
> (6) The Form I-9 for Abdalla M. Kassem is missing the second page, which contains the employer certification and list of documents reviewed and verified. However, a copy of a social security card and passport for this individual is attached to the first page of the Form I-9.

2. Wave Green Failed To Rebut the Evidence and is Liable for All Violations

Respondent Wave Green has failed to rebut any of the evidence of paperwork violations, notably by failing to raise any arguments other than a blanket "denial" of wrongdoing. Although respondent alleges that it complied with the employment eligibility verification requirements "at the latest, after the notice of inspection," the evidence clearly shows that the Form I-9 requirements were not satisfied. In fact, the statement of respondent coupled with the state of the Forms I-9 in the record indicate that there was likely very little or no Form I-9 compliance until respondent was served with a Notice of Inspection in January 2014.

First, respondent has failed to rebut the evidence of record demonstrating that it failed to prepare and/or present a Form I-9 for employee Jabr. A. Saleh in violation of 8 U.S.C. § 1324a(a)(1)(B),

which is Count I of the complaint. The Form NYS-45-ATT provided by the government identifies Jabr. A. Saleh as an employee and shows that this employee earned wages during the 2013 tax year. *See Government's Prehearing Statement*, Attachment G5. The government, therefore, alleges that because this individual was an employee during the relevant period, respondent should have prepared and/or presented a Form I-9 for this employee. Respondent has not only failed to address the allegations in Count I, but also failed to rebut the evidence of record supporting its liability for failing to prepare and/or present a Form I-9 for Jabr. A. Saleh. Therefore, the government has sustained its burden of proof by a preponderance of the evidence that respondent is liable for the violation listed in Count I of the complaint.

Second, respondent has failed to rebut the unequivocal evidence of record supporting the seven Form I-9 violations listed in Count II of the complaint. Specifically, respondent is liable for the seven paperwork violations because there are no signatures, no dates of completion, and no attestations of either employees (in section 1) or employers (in section 2) on any of the Forms I-9 for the individuals identified in Count II of the complaint. These omissions alone are substantive paperwork violations that render respondent liable for all paperwork violations of 8 U.S.C. § 1324a(a)(1)(B) listed in Count II of the complaint.

Moreover, respondent is subject to liability based on additional violations that are clearly visible on the seven Forms I-9 presented by the employer. At least three Forms I-9 identified in Count II of the complaint contain internally inconsistent information. Two Forms I-9 (for Saddam Sifyan and Ahmed Qassem) contain hire dates in September 2009 and one Form I-9 (for Ebrahim Altalas) has a hire date in January 2012; however, respondent presented to the government the March 2013 Form I-9 edition for all employees. Therefore, based on the evidence of record, it is clear that these three Forms I-9 were not completed within three days of employment because employment began in 2009 and 2012 for these employees but the actual edition of the Forms I-9 used did not exist until 2013, which is more than one year after employment began.

In addition, the Form I-9 for Ebrahim Altalas contains another substantive error. The Form I-9 shows a hire date of January 2012; however, the List B document "driver's license" presented allegedly at the time of hire to demonstrate identity was issued in March 2013, which is more than one year after the date of hire. Therefore, this Form I-9 could not have been completed within three days of employment in 2012.

It is also clear from reviewing the Forms I-9 that all portions of the seven Forms I-9 were completed in the same handwriting by a single individual, which constitutes substantive paperwork violations. Respondent has not contested or rebutted this allegation identified by the government in its prehearing statement. Completion of all Forms I-9 in the same handwriting demonstrates that employees and employers did not separately complete their respective sections of the Forms I-9 and indicates that all forms were likely completed at the same time by the same individual. Importantly, respondent's admission in its prehearing statement that it complied with the employment eligibility verification requirements "at the latest, after the notice of inspection" indicates that some, if not all, Forms I-9 were completed after January 21, 2014, which is long after the hiring of the employees. *Respondent's Prehearing Statement* at 3.

Additionally, in its answer and prehearing statement, respondent simply "denied" all allegations contained in the complaint by refusing to "acknowledge the existence of any of the violations noted in the complaint." Moreover, respondent's mere assertions that it has not "engaged in any of the 8 separate violations," and that "it hopes to show that the individuals employed by respondent were not unauthorized" also fail to rebut the evidence of record. *Respondent's Prehearing Statement* at 3-4. It is important to note that the government proposed to stipulate to the fact that no unauthorized aliens were employed, and that the employment of unauthorized aliens is not an issue in this case.

Respondent has failed to come forward with contravening evidence to rebut the evidence of record supporting the government's case. Respondent has also failed to demonstrate the existence of a factual issue that might affect the outcome of the case and warrant a hearing. *See Sepahpour*, 3 OCAHO no. 500 at 203. Because respondent provides no evidence or explanation to rebut any of the evidence of record and fails to satisfy its burden of production, the government has met its burden of proving by a preponderance of the evidence that respondent is liable for the paperwork violations alleged in both Counts I and II. In light of the absence of any material factual dispute, the government's Motion for Summary Decision with respect to liability for the violations will be granted.

C. Penalty Assessment

1. Penalty Must Be Imposed When Liability is Found

Respondent argued on page three of its prehearing statement that fines "should not be imposed" in this case. However, because the government has met its burden of proving by a preponderance of the evidence that respondent is liable for committing eight violations of 8 U.S.C. § 1324a(a)(1)(B), fines must be imposed pursuant to 8 C.F.R. § 274a.10(b)(2). *See also Keegan Variety*, 11 OCAHO no. 1238 at 7.

Civil money penalties are assessed for paperwork violations according to the parameters set forth at 8 C.F.R. § 274a.10(b)(2). For first time violators, the minimum penalty for each individual with respect to whom a paperwork violation occurred after September 29, 1999, is $110, and the maximum penalty imposed is $1100. Therefore, in the instant case, the range of penalty assessment for respondent's eight violations is between a minimum penalty of $880 and a maximum penalty of $8800. For the reasons set forth below, the government's penalty assessment of $7106 is deemed appropriate and will not be disturbed.

2. The Government's Four Stipulated Penalty Assessment Factors

In its prehearing statement, the government proposed numerous stipulated facts, including four stipulated facts directly related to the factors the government considers when assessing penalties for paperwork violations. First, the government proposed stipulating to the fact that respondent is a small business. Second, the government proposed stipulating to the fact that there is no evidence showing respondent has acted in bad faith. Third, the government proposed stipulating to the fact that its audit did not reveal the employment of any unauthorized aliens. Fourth, the

government proposed stipulating to the fact that respondent does not have a previous history of committing paperwork violations pursuant to 8 U.S.C. § 1324a(a)(1)(B).

In addition to these proposed stipulated facts, the government filed its internal "Fine Adjustment" worksheet (worksheet), whereby it assessed and reviewed each statutory factor, the relevant law, and the facts presented in the case to determine whether each factor would mitigate the penalty, aggravate the penalty, or remain neutral with respect to the penalty assessed. *Government's Motion*, Attachment GD. The worksheet reveals the government's conclusion that the good faith of the employer and the lack of history of previous violations would remain neutral factors in the penalty assessment. The worksheet also reveals that the small size of the business and the lack of involvement of unauthorized aliens would serve as mitigating factors, causing the government to reduce the base penalty amount by five-percent for each of these factors (with a total reduction of $748).

The four proposed stipulations directly relate to neutral or respondent-favorable mitigating penalty assessment factors, and the government's worksheet reasonably assesses the factors. Therefore, the government has met its burden of proof by a preponderance of the evidence with respect to this part of the penalty assessment. Respondent has failed to challenge the assessment, other than to claim that no penalty should be imposed and has failed to submit any evidence to rebut the government's claims. Accordingly, the reasonable penalty assessment with respect to these four neutral and mitigating factors is upheld.

3. The Seriousness of the Violations

ICE considered respondent's substantive violations, as discussed above, as serious, warranting aggravation of the penalty. "Paperwork violations are always potentially serious. The seriousness of a violation refers to the degree to which the employer has deviated from the proper form. A violation is serious if it renders the congressional prohibition of hiring unauthorized aliens ineffective." *United States v. Sunshine Bldg. Maint., Inc.*, 7 OCAHO no. 997, 1122, 1179-80 (1998) (internal citations omitted). "While all paperwork violations are potentially serious because the principal purpose of the I-9 form is to allow the employer to ensure that it is not hiring an individual who is unauthorized for work, the seriousness of each violation must be determined by examining the specific failure in each case." *United States v. American Terrazzo Corp.*, 6 OCAHO no. 877, 576, 593 (1996) (internal citations omitted).

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. *See United States v. Holtsville 811 Inc.*, 11 OCAHO no. 1258, 10 (2015); *Niche*, 11 OCAHO no. 1250 at 10. Typically, a failure to prepare and/or present a Form I-9 is considered amongst the most serious of paperwork violations and considered a more serious violation than a failure to properly complete section 1 or 2 of the Form I-9. *Niche*, 11 OCAHO no. 1250 at 9-10; *see United States v. Davis Nursery, Inc.*, 4 OCAHO no. 694, 924, 943-44 (1994) (finding failure of the employer and employee to certify the information in sections 1 and 2 of the Form I-9, which is "critical for deterring hiring illegal aliens," to be a serious violation).

However, in the instant case, the seven Forms I-9 in the record contain failures to properly complete both sections 1 and 2 of the Forms I-9, and the Forms I-9 are so deficient that the paperwork violations contained therein constitute violations as serious as a complete failure to prepare and/or present a Form I-9. *See United States v. Taco Plus, Inc.*, 5 OCAHO no. 775, 416, 422 (1995) (discussing that "there are various degrees of seriousness" and characterizing an incomplete Form I-9 as "'so deficient that it is almost tantamount to a total failure to prepare . . . .'") (citation omitted). An examination of the seven Forms I-9 reveals that there are no signatures, no dates of completion, and no attestations of either employees (in section 1) or employers (in section 2). Moreover, the integrity of several of the Forms I-9 presented are compromised based on the alleged dates of hire, the date of publication of the Forms I-9 used (March 8, 2013), and the date of issue on a document used to demonstrate employee identity.[5]

In its worksheet, the government determined that the "pattern of paperwork violations" necessitated aggravation of the penalty based on the seriousness of the violations. *Government's Motion*, Attachment GD at 4. The government found that a 5% penalty aggravation (for a total of $374) was warranted due to the seriousness of the violations. Specifically, the government stated the following:

> Wave Green, Inc., DBA Golden Farm Market showed a serious disregard for the employment eligibility verification requirements by not requiring the employees to prepare the Forms I-9 completely or sign the certification of citizenship which ultimately could result in the hiring of undocumented workers. While all substantive errors are considered serious by nature, the fact that there is a pattern of repeated failures in the proper completion of the Forms I-9 (100%), it could be translated that the failure to prepare the Forms I-9 properly was committed with the intent to avoid a statutory requirement and thus renders ineffective the Congressional prohibition against the employment of unauthorized aliens (*United States v. Charles C.W. Wu*, 3 OCAHO 434, 3 (1992). Therefore, Seriousness of Hiring and Verification Violations will be considered an aggravating factor.

Id.

Although failure to prepare and/or present a Form I-9 is typically a more serious violation than a violation for failure to properly complete a Form I-9, all of the violations in both counts of the complaint are of equal seriousness. Because none of the Forms I-9 appears to have been

[5] For example, as previously noted, two Forms I-9 (for Saddam Sifyan and Ahmed Qassem) contain hire dates in September 2009 and one Form I-9 (for Ebrahim Altalas) has a hire date in January 2012, despite the March 2013 Form I-9 edition being produced well after the hire dates. In addition, the Form I-9 for Ebrahim Altalas shows a hire date of January 2012, but his driver's license used to prove identity was issued in March 2013, more than one year after the date of hire. This demonstrates that the Forms I-9 could not have been completed contemporaneously with the dates of hire as required.

completed contemporaneously with the hiring of any employees and neither employees nor the employer attested to the timeliness or accuracy of any of the Forms I-9, these Forms I-9 are rendered virtually useless and lack credibility under the employment verification scheme established at 8 U.S.C. § 1324a(b). If no one attests to the accuracy of data on the Form I-9 and no one completes the Form I-9 at the time of hire, the employment eligibility verification requirements are completely undermined as though no Form I-9 had been completed. Therefore, because these paperwork omissions in sections 1 and 2 of the Forms I-9 constitute the most serious of paperwork violations, the government has met its burden of proof by a preponderance of the evidence in demonstrating penalty enhancement for seriousness is warranted.

4. Other Penalty Assessment Factors

Respondent has failed to raise any additional factors for consideration in the penalty assessment. *See generally Holtsville 811 Inc.*, 11 OCAHO no. 1258 at 12-13; *Niche*, 11 OCAHO no. 1250 at 11-15. Although the government discussed in its prehearing statement, Motion to Compel, and Motion for Summary Decision that respondent had alleged an inability to pay for the penalty as assessed, respondent failed to provide any evidence or arguments to support consideration of financial hardship as a penalty assessment factor. Respondent had an opportunity to provide evidence of financial hardship throughout these proceedings, including in response to the Order Granting ICE's Motion to Compel Discovery of its financial situation in the form of its tax returns. However, because respondent's pleadings are devoid of any allegation of financial inability to pay the assessed fine and the record is devoid of any evidence to support that respondent would have financial difficulties paying the fine, any inability to pay the assessed penalty is not at issue in this case.

IV. CONCLUSION

The government proved by a preponderance of the evidence that respondent is liable for all eight violations of 8 U.S.C. § 1324a(a)(1)(B) as charged in the complaint, that the penalty assessment is supported by the evidence of record, and that aggravation of the penalty based on the seriousness of the violations is warranted. Wave Green failed to rebut this showing by neither presenting any countervailing arguments or evidence, nor responding to ICE's Motion for Summary Decision or to the Order Granting Motion to Compel. Accordingly, the government met its burden by showing that no genuine issue of material fact exists with respect to liability and penalty assessment and that it is entitled to the relief sought. Thus, ICE's Motion for Summary Decision will be granted.

The failure of both the employee and the employer to attest to the accuracy of data on the Forms I-9, in conjunction with failing to complete the forms contemporaneously with hiring, is tantamount to a failure to prepare a Form I-9 at all, which constitutes the most serious of paperwork violations under 8 U.S.C. § 1324a(b). The deficiencies that exist in respondent's Forms I-9 render the employment verification process useless and without assurances to prevent the employment of unauthorized workers. After conducting a *de novo* review, the undersigned finds that respondent has failed to rebut the evidence of record and has failed to rebut the reasonableness of the government's penalty assessment. Accordingly, because all eight

violations are of equal seriousness, in light of the lack of integrity and reliability of the seven Forms I-9, and because respondent failed to rebut any evidence, the government's penalty assessment of $7106 will be upheld as originally calculated.

Therefore, the fine amount of $7106 assessed by ICE for all eight violations is upheld. Additionally, because respondent has failed to rebut any evidence, failed to respond to the government's Motion for Summary Decision, and failed to respond or comply with the Motion to Compel Discovery, there is no evidence to support penalty adjustment or further penalty mitigation. As no genuine issue of material fact exists and the government has met its burden of proof with respect to liability and penalty assessment, the government's Motion for Summary Decision will be granted.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Wave Green, Inc. has been a domestic business since 2008, operating as a grocery store named Golden Farm Market in Buffalo, New York.

2. The Department of Homeland Security, Immigration and Customs Enforcement, served Wave Green, Inc. with a Notice of Inspection on January 21, 2014.

3. The Department of Homeland Security, Immigration and Customs Enforcement, served Wave Green, Inc. with a Notice of Intent to Fine on June 30, 2014.

4. Wave Green, Inc. requested a hearing with an Administrative Law Judge on or about July 25, 2014.

5. Wave Green, Inc. is a small business with no history of previous Form I-9 violations.

6. Wave Green, Inc. hired after November 6, 1986, and employed in the United States during the inspection period all eight individuals listed on its Form NYS-45-ATT, Quarterly Combined Withholding, Wage Reporting, And Unemployment Insurance Return, for the 2013 tax year.

7. No specific individual employed by Wave Green, Inc. was shown to be an alien not authorized for employment in the United States.

8. Wave Green, Inc. was not shown to have acted in bad faith.

9. Wave Green, Inc. failed to ensure that section 1 of all Forms I-9 were completed by employees no later than an employee's first day of employment.

10. Wave Green, Inc. failed to ensure that its employees attested to the accuracy of information contained in section 1 of all Forms I-9 presented for inspection.

11. Wave Green, Inc. failed to complete section 2 of all Forms I-9 within three business days of its employees' first day of employment.

12. Wave Green, Inc. failed to attest to the accuracy of information contained in section 2 of all Forms I-9 presented for inspection.

13. Wave Green, Inc. failed to file any response to either the Department of Homeland Security, Immigration and Customs Enforcement's Motion for Summary Decision or to the Order Granting Motion to Compel Discovery.

B. Conclusions of Law

1. Wave Green, 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. 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, 1014-15 (1993) (citing *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586-87 (1986)).

4. OCAHO rule 28 C.F.R. § 68.38(b) sets forth 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."

5. 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."

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. "[A]ll facts and reasonable inferences to be drawn therefrom should be viewed in the light most favorable to the non-moving party." *United States v. Primera Enters.*, 4 OCAHO no. 615, 259, 261 (1994).

8. In cases arising under 8 U.S.C. § 1324a, the government has the burden of proving by a preponderance of the evidence that respondent is liable for committing a violation of the employment eligibility verification requirements. *See United States v. Clean Sweep Janitor Serv*., 11 OCAHO no. 1226, 2 (2014). In addition to proving liability, "[t]he government has the burden of proof with respect to the penalty, *United States v. March Construction, Inc.*, 10 OCAHO no. 1158, 4 (2012), and must prove the existence of any aggravating factor by a

preponderance of the evidence, *United States v. Carter*, 7 OCAHO no. 931, 121,159 (1997)." *United States v. Niche, Inc.*, 11 OCAHO no. 1250, 6 (2015).

9. After the government has introduced evidence to meet its burden of proof, "the burden of *production* shifts to the respondent to introduce evidence . . . to controvert the government's evidence. If the respondent fails to introduce any such evidence, the unrebutted evidence introduced by the government may be sufficient to satisfy its burden." *United States v. Durable, Inc.*, 11 OCAHO no. 1231, 5 (2014) (internal citations omitted).

10. 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."

11. Wave Green, Inc. is liable for eight violations of 8 U.S.C. § 1324a(a)(1)(B).

12. Assessment of a penalty is required by 8 C.F.R. § 274a.10(b)(2), which sets forth that "[a] respondent determined . . . to have failed to comply with the employment verification requirements . . . shall be subject to a civil penalty . . . . "

13. In assessing the appropriate penalty, an Administrative Law Judge must consider the following factors: 1) the size of the employer's business, 2) the employer's good faith, 3) the seriousness of the violations, 4) whether or not the individual was an unauthorized alien, and 5) the employer's history of previous violations. 8 U.S.C. § 1324a(e)(5). The statute neither requires that equal weight be given to each factor, nor rules out consideration of additional factors. *See United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000).

14. Failure to prepare a Form I-9 is one of the most serious violations because it completely subverts the purpose of the employment verification requirements. *United States v. Niche, Inc.*, 11 OCAHO no. 1250, 9-10 (2015).

15. Failure to attest to the accuracy of data on the Forms I-9 and failure to complete the Forms I-9 within three days of hiring an employee are serious violations tantamount to one of the most serious violations of failing to prepare and/or present a Form I-9 because no assurances have been undertaken to prevent the hiring of unauthorized workers, which completely subverts the employment eligibility verification requirements at 8 U.S.C. § 1324a(b).

16. Failure of both the employee and the employer to attest to the accuracy of data on the Forms I-9 while failing to complete the forms contemporaneously with hiring is tantamount to a failure to prepare a Form I-9 as all of these deficiencies render the employment verification process useless and without assurances to prevent the employment of unauthorized workers and constitute the most serious of paperwork violations. 8 U.S.C. § 1324a(b).

17. 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. *See United States v.*

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

ORDER

ICE's Motion for Summary Decision is granted. The government met its burden in establishing that Wave Green, Inc. is liable for eight violations of 8 U.S.C. § 1324a(a)(1)(B) and the company is therefore directed to pay civil penalties in the total amount of $7106. 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 February 18, 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).

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.