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

April 29, 2016

UNITED STATES OF AMERICA, Complainant, v. MUNIZ CONCRETE & CONTRACTING, INC. Respondent.	))))))))	8 U.S.C. § 1324a Proceeding OCAHO Case No. 15A00030

FINAL DECISION AND ORDER

APPEARANCES:

Philip A. Barr
for complainant

Daniel M. Kowalski
for respondent

I. PROCEDURAL HISTORY

This is an action pursuant to the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a (2012). Complainant United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a complaint consisting of three counts against Muniz Concrete & Contracting, Inc. (MCCI, 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, to which respondent filed a response. As discussed in detail below, the government's Motion for Summary Decision will be granted in part.

II. BACKGROUND INFORMATION AND POSITIONS OF THE PARTIES

MCCI is a concrete contracting business incorporated in the State of Texas. On September 27, 2013, the government personally served MCCI with a Notice of Inspection. The Notice of Inspection informed MCCI that a review of its Employment Eligibility Verification Forms (Forms I-9) was scheduled for October 3, 2013. ICE received the Forms I-9 and other requested documents from MCCI on October 3, 2013.

On or about November 12, 2013, ICE served MCCI with a Notice of Discrepancies, a Notice of Suspect Documents, and a Notice of Technical or Procedural Failures. The Notice of Discrepancies informed MCCI that after a review of the company's Forms I-9, as well as records checked by ICE's Homeland Security Investigations (HSI) unit, the government discovered a "discrepancy related to the identity and employment authorization" of nineteen employees. However, ICE indicated that the discovery of these discrepancies did not necessarily mean that the identified employees are unauthorized. ICE requested respondent's assistance and cooperation to verify the work authorization of these nineteen employees.

In the Notice of Suspect Documents, ICE stated that according to the records checked by HSI, the employee identification "documents submitted to you were found to pertain to other individuals, or there was no record of the documents being issued, or the documents pertain to other individuals, but the individuals are not employment authorized, or their employment authorization has expired" for forty-five employees. The letter instructed respondent "to take reasonable actions to verify the employment eligibility of the [listed] employees." The notice also advised MCCI that if the listed employees did not present valid documents other than the ones that were previously produced, ICE would consider them to be unauthorized. Respondent notified ICE in a letter dated November 22, 2013, that "a number of employees had been terminated in response to the Notice of Suspect Documents and Notice of Discrepancies." *See Government's Prehearing Statement* at 3.

The Notice of Technical or Procedural Failures indicated that ICE determined eighty-four Forms I-9 contain technical or procedural failures, which could constitute violations of the INA if the failures remained uncorrected. ICE requested that MCCI submit the corrected forms by December 2, 2013, to avoid the issuance of a Notice of Intent to Fine with respect to these eighty-four Forms I-9. According to ICE, MCCI fully complied with this notice and timely submitted all of the corrections. *See Government's Motion*, Attachment G-7 at 1.

On May 20, 2014, ICE personally served a Notice of Intent to Fine (NIF) on respondent. First, the NIF alleged in Count I that respondent continued to employ two individuals knowing they were or had become aliens not authorized to work in the United States in violation of 8 U.S.C. § 1324a(a)(2). Second, the NIF alleged in Count II that respondent failed to prepare and/or present Forms I-9 for ten employees in violation of "8 U.S.C. § 1324a(a)(1)(B), which renders it unlawful, after November 6, 1986, for a person or entity to hire, for employment in the United

States, an individual without complying with the requirements of . . . 8 U.S.C. § 1324a(b)." And third, the NIF alleged in Count III that respondent failed to ensure twenty employees properly completed section 1 and/or that the company itself failed to properly complete sections 2 or 3 of the Forms I-9 for the employees in violation of 8 U.S.C. § 1324a(a)(1)(B). ICE assessed a total fine of $19,989 for all three Counts. In a letter dated May 28, 2014, MCCI timely requested a hearing before an Administrative Law Judge.

On February 10, 2015, ICE filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO). Count I alleged that respondent continued to employ Ricardo Reyna-Pepi and Eduardo Valenzuela knowing they were, or had become, unauthorized to work in the United States in violation of 8 U.S.C. § 1324a(a)(2). Count II alleged that respondent failed to prepare and/or present Forms I-9 for the following ten employees after being requested to do so by the government in violation of 8 U.S.C. § 1324a(a)(1)(B): Jaime Herrera, L. Lemus, J. Leyva, Jose Muniz, Johnathan Muniz, Felix Sanchez, Victor Sanchez, Jose Luis Villanueva, Jesus Zabala, and Jose L. Zamarripa. Count III alleged that respondent failed to ensure that the following twenty employees properly completed section 1 of their Forms I-9, and/or that MCCI failed to properly complete sections 2 or 3 of their I-9s in violation of 8 U.S.C. § 1324a(a)(1)(B): Carlos Alvarez, Pablo Castillo, Humberto Castro, Eduardo Covarrubia,[1] Ramon Cruz, Ernesto del Toro, Arturo Escobedo, Jose Favela, Antonio Garcia, Francisco Garcia, Jose Hernandez, Cristobal Hortelano, Antonio Juarez, Miguel Juarez, Ismael Paez, Jose Paez, Esteban Rocha, Ricardo Sanchez, Manuel Saucedo, and Daniel Serrato Rodriguez. The complaint alleged that MCCI hired for employment these thirty-two individuals after November 6, 1986.

The complaint also charged the following individuals as unauthorized aliens: Eduardo Covarrubias, Cristobal Hortelano, Miguel Juarez, Felix Sanchez, Victor Sanchez, and Manuel Saucedo. ICE requested that OCAHO order MCCI to pay the assessed penalty of $19,989.

MCCI filed its answer to the complaint on March 11, 2015. The company "denie[d] liability as charged." MCCI also argued that ICE's fine amounts are "arbitrary and unsubstantiated number calculations and number amounts." In the alternative, MCCI sought reduction of ICE's penalty arguing that it is excessive. In support of this argument, respondent cited to *United States v. Speedy Gonzalez Construction, Inc.*, 11 OCAHO no. 1243 (2015),[2] where the Administrative

[1] According to ICE's submissions, the correct spelling of Eduardo's surname is "Covarrubias."

[2] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw

Law Judge reduced ICE's proposed penalty in part due to consideration of the general public policy of leniency to small businesses as expressed in the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq. (2006), amended by § 223(a) of the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, Pub. L. No. 104-121, 110 Stat. 864 (1996).

On April 17, 2015, ICE filed its prehearing statement, in which it proposed ten factual stipulations. The first proposed factual stipulation provides that MCCI was incorporated in Texas. Proposed factual stipulations two through eight relate to the procedural history of the case. The ninth proposed factual stipulation states that the employees listed in the complaint were employees of MCCI during some or all of ICE's inspection period from April 1, 2013, to September 27, 2013. The tenth proposed factual stipulation is that respondent hired all of the employees listed in the complaint after 1986.

MCCI filed its prehearing statement on June 15, 2015, accompanied by a Motion for Late Filing. MCCI agreed to all of ICE's proposed stipulations. However, MCCI stated that should it be found liable for the violations, "an additional issue . . . for resolution is the fine calculation, taking into consideration all the facts and circumstances and OCAHO caselaw." *Respondent's Prehearing Statement* at 2. MCCI also provided a statement of good cause for its late filing of the prehearing statement. *Id.* at 2-3.

On July 22, 2015, ICE filed a Motion for Summary Decision (Government's Motion), which included eleven proposed exhibits (Attachments G-1–G-11). In its motion, ICE contends that it has met its burden of demonstrating the absence of a genuine issue of material fact as to respondent's liability for the violations charged in Counts I, II, and III of the complaint. *Government's Motion* at 1. As to Count I, ICE argues that it demonstrated that MCCI continued to employ Ricardo Reyna-Pepi and Eduardo Valenzuela knowing they had become unauthorized for such employment because their Forms I-9 "clearly indicated when their period of authorization expired but the company continued to employ them." *Id.* at 2-3.

ICE also alleges that it met its burden of proving MCCI's liability as to Count II because the documentary evidence demonstrates that respondent failed to present Forms I-9 for ten employees after being requested to do so by the government. *Government's Motion* at 3. As to Count III, ICE contends it has met its burden of proof because a "simple visual examination" of the Forms I-9 at issue reveals their substantive paperwork violations. *Id.*

Finally, ICE also argues that there is no genuine issue of material fact with respect to its fine assessment. Attached to its motion is ICE's "Memorandum to Case File Determination of Civil Money Penalty" (Memorandum), which details the penalty assessment analysis. According to

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database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage. htm# PubDecOrders.

ICE, its fine assessment comports with internal ICE guidance and was calculated by considering the five statutory factors mandated by 8 U.S.C. § 1324a(e)(5): (1) size of the business; (2) good faith of the employer; (3) seriousness of the violations; (4) whether unauthorized workers hired; and (5) history of prior violations. *Government's Motion*, Attachment G-7; *see* ICE, *Form I-9 Inspection Overview: Fact Sheet* (Jun. 26, 2013), http://www.ice.gov/news/library/factsheets/i9-inspection.htm.

ICE calculated several different categories of fines. First, ICE set forth in its Memorandum that "[t]here are a total of thirty two (32) substantive violations out of eighty nine (89) required Forms I-9." *Government's Motion*, Attachment G-7 at 2-3.[3] Relying on its internal agency guidance, ICE assessed a base penalty rate of $605 because MCCI's substantive violation rate is thirty-six percent and because this is MCCI's first offense. *Id.* at 3. In support of its assessment, the Memorandum stated,

> Thirty-six percent (36%) of the Forms I-9 contained substantive violations. The substantive violations include: missing Forms I-9, failure to prepare the Form I-9 at the time of hire, no employee attestation, improper list A, B or C documents, no employer attestation signature, missing A#s with no documentation attached and knowingly continuing to employ.

Government's Motion, Attachment G-5 at 3.

Next, ICE enhanced the $605 base fine amount by five percent to $635.25 for twenty-four of the substantive violations due to the seriousness of the hiring violations. *Government's Motion*, Attachment G-5 at 3. In addition, ICE decided that six of the substantive violations deserved two penalty enhancements from a base fine of $605 to a fine amount of $665.50 by aggravating the penalty five percent for the seriousness of the violations and another five percent for the hiring of six unauthorized aliens. Therefore, the enhanced penalty for the thirty substantive paperwork violations was $19,239.

Second, ICE assessed a base penalty amount of $375 for each of the two violations of knowingly continuing to employ unauthorized aliens. *Id.* ICE states that it did not charge MCCI with the updated knowing hire fine amount of $1,785 per violation, which it alleges could have been charged for such violations per the guidelines. *Id.* Therefore, the penalty amount ICE assessed for the two knowing hire violations was $750.

ICE considered the three remaining factors as neutral in the penalty assessment: (1) the size of the employer's business, (2) the employer's good faith, and (3) the absence of a history of

[3] When you divide thirty-two violations by eighty-nine Forms I-9, you get a thirty-six percent Form I-9 violation rate, which was used by ICE as the substantive paperwork violation rate.

previous violations. Although ICE recognized that MCCI complied with ICE's requests and timely submitted corrected documents that the government had requested, ICE deemed these good faith activities as neutral for purposes of the penalty assessment. *Id.* MCCI also elected to participate in E-Verify during the course of the government investigation. After consideration of all five statutory factors, ICE assessed a total penalty of $19,989.

On August 6, 2015, a telephonic prehearing conference was held. During the conference call, both parties stated that they were not seeking additional discovery, and that they had been unsuccessful in achieving a settlement. However, the parties stated that they were amenable to further settlement discussions. As a result, MCCI's counsel was instructed to provide a counter-offer for settlement to ICE by August 14, 2015. Moreover, the "Order And Memorandum of Telephonic Prehearing Conference" issued on August 6, 2015, stated that "should the parties decide to pursue settlement negotiations, they should inform OCAHO immediately so that the undersigned does not render a decision that could hinder or usurp the settlement process." MCCI was also ordered to file a response to ICE's Motion for Summary Decision no later than August 14, 2015.

MCCI filed a response to the government's motion on August 14, 2015 (Respondent's Response). Respondent denied "all liability" and argued that ICE's penalty "should be mitigated to the full extent possible, in the exercise of discretion." *Respondent's Response* at 1-2 (referencing *United States v. Niche, Inc.*, 11 OCAHO no. 1250 (2015)). MCCI claims that mitigation of the assessed penalty is warranted because MCCI is a small business and because it qualifies "under the Small Business Act's leniency policy." *Id.* at 2.

Additionally, MCCI requested that this case "be held in abeyance" instead of OCAHO's Administrative Law Judge issuing a decision so that ICE can perform a compliance evaluation of MCCI, permit MCCI to "demonstrate[] sufficient compliance," and allow ICE to withdraw its complaint if MCCI is found compliant. *Respondent's Response* at 2. In support of this request, MCCI noted that "it has joined E-Verify." *Id.* Finally, MCCI posits that ICE should adopt a "better approach" than worksite enforcement actions to ensure compliance, such as working with "employers proactively . . . to educate . . . and help employers reach and maintain compliance with INA Sec. 274A." *Id.* MCCI also attaches Congressional Research Service Report R40002, authored by Andorra Bruno, "Immigration-Related Worksite Enforcement: Performance Measures" (2015).

III. DISCUSSION

A. Applicable Legal Standards

1. Summary Decision

OCAHO rule 28 C.F.R. § 68.38(c)[4] establishes that an Administrative Law Judge "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." Relying on United States Supreme Court precedent, OCAHO case law has held, "An issue of material fact is genuine only if it has a real basis in the record. A genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit." *Sepahpour v. Unisys, Inc.*, 3 OCAHO no. 500, 1012, 1014 (1993) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586-87 (1986); *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986)).

"Once the moving party satisfies its initial burden of demonstrating both the absence of a material factual issue and that the party is entitled to judgment as a matter of law, the nonmoving party must come forward with contravening evidence to avoid summary resolution." *United States v. Four Seasons Earthworks, Inc.*, 10 OCAHO no. 1150, 3 (2012) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)); *see generally* FED. R. CIV. P. 56(e). OCAHO rule 28 C.F.R. § 68.38(b) provides that the party opposing the motion for summary decision "may not rest upon the mere allegations or denials" of its pleadings, but must "set forth specific facts showing that there is a genuine issue of fact for the hearing." Moreover, "all facts and reasonable inferences to be derived therefrom are to be viewed in the light most favorable to the non-moving party." *United States v. Primera Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994) (citing *Matsushita*, 475 U.S. at 587; *Egal v. Sears Roebuck & Co.*, 3 OCAHO no. 442, 486, 495 (1992)).[5]

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. Nebeker, Inc.*, 10 OCAHO no. 1165, 4 (2013) (citing *United States v. Am. Terrazzo Corp.*, 6 OCAHO no. 877, 577, 581 (1996)). 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)." *Niche*, 11 OCAHO no. 1250 at 6.

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.*

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

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

Durable, Inc., 11 OCAHO no. 1231, 5 (2014) (referencing *United States v. Alvand, Inc*., 2 OCAHO no. 352, 378, 382 (1991) (modification by the Chief Administrative Hearing Officer (CAHO)); *United States v. Kumar*, 6 OCAHO no. 833, 112, 120-21 (1996); *Breda v. Kindred Braintree Hosp., LLC*, 10 OCAHO no. 1202, 8 (2013).

In the instant case, the government has set forth arguments and submitted documentary evidence in an attempt to meet its burden of proving by a preponderance of the evidence Counts I, II, and III 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. In its response to ICE's motion, MCCI asserted a blanket denial of liability and argued that the penalty should be reduced because of the size of the business and because of leniency considerations. As supporting evidence, MCCI attached a Congressional Research Service article, which gives an overview of ICE's work-site enforcement related to 8 U.S.C. § 1324a.

3. Continuing to Employ an Alien Who Has Become Unauthorized

Title 8 U.S.C. § 1324a(a)(2) makes it "unlawful for a person or other entity . . . to continue to employ [an] alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment." Knowing "includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition." 8 C.F.R. § 274a.1(*l*); *see United States v. Foothill Packing, Inc.*, 11 OCAHO no. 1240, 8-9 (2015). Constructive knowledge may include situations where an employer "[f]ails to complete or improperly completes the Employment Eligibility Verification Form, I-9." 8 C.F.R. § 274a.1(*l*)(1)(i).

"The basic principle underlying the doctrine of constructive knowledge as it has been articulated in OCAHO case law is that the employer is not entitled to cultivate deliberate ignorance or avoid acquiring knowledge." *Foothill Packing*, 11 OCAHO no. 1240 at 9 (citing *United States v. Sunshine Bldg. Maint., Inc.*, 7 OCAHO no. 997, 1122, 1151-52 (1998); *United States v. Aid Maint. Co.*, 7 OCAHO no. 951, 475, 485 (1997)). "Conscious disregard," "deliberate ignorance," or "other terms implying a conscious avoidance of positive knowledge" have been used to characterize the state of mind that must be shown to establish constructive knowledge. *Id.*; *United States v. Occupational Res. Mgmt., Inc.*, 10 OCAHO no. 1166, 5 (2013).

Constructive knowledge may be found when an employer receives specific information that casts doubt on the employment authorization of an individual, and the employer continues to employ the individual without taking adequate steps to reverify the individual's employment eligibility. *Foothill Packing*, 11 OCAHO no. 1240 at 9 (collecting cases); *United States v. Associated Painters, Inc.*, 10 OCAHO no. 1151, 4-5 (2012). For example, when an employee wrote the expiration date for his employment authorization document in section 1 of the Form I-9 and the employer failed to reverify the individual's work authorization prior to the expiration date of the

document, the employer was found to have constructive knowledge of the alien worker's unauthorized status. *Foothill Packing*, 11 OCAHO no. 1240 at 9 (citing *United States v. Great Bend Packing Co.*, 6 OCAHO no. 835, 129, 132-33 (1996); *United States v. Buckingham Ltd.*, 1 OCAHO no. 151, 1059, 1067 (1990)). A knowing continue to employ violation occurs only while the employee in question remains employed. *United States v. Curran Eng'g Co.*, 7 OCAHO no. 975, 874, 894 (1997). The termination date of the employee marks the last date of the alleged violation. *Id.*

Penalties assessed for the knowing hire of an unauthorized alien range from a minimum of $375 to a maximum of $3200 for the first offense. 8 C.F.R. § 274a.10(b)(1)(ii)(A). The statute does not provide any specific factors that must be considered in setting penalties for a knowing hire violation. *Foothill Packing*, 11 OCAHO no. 1240 at 12 (citing 8 U.S.C. § 1324a(e)(4)).

4. The Employment Verification Requirements

a. Form I-9 Obligations

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

Failures to meet these statutory obligations are known as "paperwork violations," which are either substantive or technical or procedural. *See* Paul W. Virtue, INS Acting Exec. Comm. of Programs, *Interim Guidelines: Section 274A(b)(6) of the Immigration & Nationality Act Added by Section 411 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (Mar. 6, 1997), *available at* 74 No. 16 Interpreter Releases 706 (Apr. 28, 1997) (Virtue Memorandum). Violations that the Virtue Memorandum characterizes as substantive include failing to ensure the employee signs the attestation in section 1 of the Form I-9, failing to ensure the employee checks one of the boxes in section 1 attesting to his or her citizenship or immigration status, failing to ensure the employee provides his or her Alien number (or A number) in section 1 next to the box identifying his or her immigration status, unless the A

number is provided in sections 2 or 3 of the form, and not signing the employer attestation in Section 2. Virtue Memorandum at 3-4.

b. Penalty Assessment

Civil money penalties are assessed when an employer fails to properly prepare, retain, or produce upon request the Forms I-9, according to the following parameters established at 8 C.F.R. § 274a.10(b)(2): the minimum penalty is $110 and the maximum penalty is $1100 for each individual with respect to whom a paperwork violation occurred after September 29, 1999. 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 set forth at 8 U.S.C. § 1324a(e)(5), the following factors must be considered when assessing civil money penalties for paperwork violations: (1) the size of the employer's business; (2) the employer's good faith; (3) the seriousness of the violations; (4) whether the employee is an unauthorized alien; and (5) the employer's history of previous violations. "The statute does not require that equal weight necessarily be given to each factor, nor does it rule out consideration of other factors." *United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000). Although not an exhaustive list, additional factors that may be considered include 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. ICE has discretion in assessing and setting the penalties; however, the Administrative Law Judge is not bound by ICE's penalty methodology and may conduct a *de novo* review of the penalty assessment. *United States v. Holtsville 811 Inc.*, 11 OCAHO no. 1258, 10 (2015) (citing *United States v. Aid Maint.*, 8 OCAHO no. 1023, 321, 343 (1999); *United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6 (2011)).

B. Respondent's Liability

As a preliminary matter, the parties concede and the record substantiates that MCCI hired all thirty-two individuals identified in the complaint after 1986 and that they were employed "during some or all of the period from April 1, 2013 until September 27, 2013." *See Government's Prehearing Statement* at 3; *Respondent's Prehearing Statement* at 2; *see also Government's Motion*, Attachments G-8; G-9. As all these individuals were receiving wages on at least April 1, 2013, MCCI was required to retain the Forms I-9 for all of the listed individuals, including those who are now former employees. 8 C.F.R. § 274a.2(b)(2)(i)(A). Accordingly, MCCI was required to prepare and/or present Forms I-9 for all thirty-two listed individuals and to present the forms to the government upon three days' notice.

1. Continuing to Employ an Alien Who Has Become Unauthorized

In section 1 of Ricardo Reyna-Pepi's Form I-9, he attested to his status as an alien authorized to work.[6] *Government's Motion*, Attachment G-6 at 1. In the space provided for "expiration date, if applicable," an eleven-digit number and "5/7/13" are written. *Id.* The eleven-digit number is his Admission Number. *See* USCIS, *Glossary* (Sept. 23, 2013), https://www.uscis.gov/e-verify/customer-support/glossary. Mr. Reyna-Pepi's employment authorization was valid until May 7, 2013. MCCI's employee roster identifies Mr. Reyna-Pepi's hire date, May 14, 2012, but no termination date. *Government's Motion*, Attachment G-9 at 2. While construing the evidence in the light most favorable to MCCI, it is a reasonable presumption that Mr. Reyna-Pepi continues to be employed by respondent, as the roster identifies termination dates for numerous other employees. *Id.*

ICE has established by a preponderance of the evidence that Mr. Reyna-Pepi is an unauthorized alien. By regulation, "unauthorized alien" means, with respect to the employment of an alien at a particular time, that the alien is not at that time either (A) an alien lawfully admitted for permanent residence, or (B) authorized to be so employed by this chapter or by the Attorney General. 8 U.S.C. § 1324a(h)(3). Neither party contends that Mr. Reyna-Pepi is an alien lawfully admitted for permanent residence. Rather, Mr. Reyna-Pepi attested in his Form I-9 to his status as an alien authorized to work in the United States for a finite period of time. Beyond this date, he is presumed to be an alien unauthorized for employment. While ICE has the duty of proving liability, "'IRCA clearly placed part of [the] burden'" of "'proving or disproving that a person is unauthorized on employers.'" *See United States v. Split Rail Fence Co.*, 11 OCAHO no. 1216a, 11 (2014) (quoting *New El Rey Sausage Co. v. INS*, 925 F.2d 1153, 1158 (9th Cir. 1991)). MCCI was required to document its reverification of either Mr. Reyna-Pepi's continuing work authorization or his new grant of work authorization subsequent to May 7, 2013, in section 3 of his Form I-9. *See* 8 C.F.R. § 274a.2(b)(1)(vii); *see also* Form I-9 Instructions at 1 (Aug. 7, 2009). The company failed to present any evidence of Mr. Reyna-Pepi's continuing work authorization beyond May 7, 2013, or a new grant of work authorization after this date.[7]

[6] The Form I-9 used for Mr. Reyna-Pepi was the Spanish version, which denotes "For use in Puerto Rico only." In Section 1, Mr. Reyna-Pepi checked the box next to, "Un extranjero autorizado a trabajar (núm. de extranjero o núm. de admisión) hasta (fecha de expiración, en caso de corresponder- *mes/día/año*). This translates as "an alien authorized to work (Alien # or Admission #) until (expiration date, if applicable- *month/day/year*)." The form used was the version dated August 7, 2009.

[7] USCIS instructed at that time, "If the employee cannot provide you with proof of current employment authorization (e.g., any document from List A or List C, including an unrestricted Social Security card), you cannot continue to employ that person." USCIS, *Handbook for Employers: Guidance for Completing Form I-9 (Employment Eligibility Verification Form)* (M-274) (Apr. 3, 2009) at 12.

As the date that Mr. Reyna-Pepi's work authorization expired was listed on his Form I-9 and the record reveals that MCCI is nevertheless continuing to employ him, MCCI was on notice of Mr. Reyna-Pepi's status as an unauthorized worker after May 7, 2013. Therefore, MCCI had constructive knowledge that Mr. Reyna-Pepi had become unauthorized with respect to his employment with the company. *Foothill Packing*, 11 OCAHO no. 1240 at 9; *Great Bend Packing*, 6 OCAHO no. 835 at 131 ("[B]y recording the alien's work authorization expiration date but continuing to employ him subsequent to that date, Respondent was on notice that the alien had become unauthorized for employment . . . .").

Respondent's general denial of liability is insufficient to rebut the government, as MCCI did not present any evidence showing that as of May 7, 2013, respondent took adequate steps to either reverify Mr. Reyna-Pepi's continued employment eligibility or to discharge him if his eligibility for such employment had in fact expired. *See Buckingham*, 1 OCAHO no. 151 at 1066. Accordingly, ICE has met its burden of demonstrating by a preponderance of the evidence that MCCI violated 8 U.S.C. § 1324a(a)(2), in that it continued to employ Mr. Reyna-Pepi knowing he had become an unauthorized alien with respect to that employment.

ICE also charged MCCI with continuing to employ Eduardo Valenzuela knowing he had become unauthorized for employment. In section 1 of his Form I-9, Mr. Valenzuela checked the box, "An alien authorized to work" and listed his nine-digit A number. *Government's Motion*, Attachment G-6 at 2. An expiration date is not provided. However, in section 2, an Employment Authorization Card is listed, albeit incorrectly, under List C. *Id.* The document's expiration date is "07/04/2012." *Id.* According to MCCI's employee roster, Mr. Valenzuela was terminated on April 13, 2013, nine months after his employment authorization card expired. *Id.*, Attachment G-9 at 2.

Based on the information in Mr. Valenzuela's Form I-9, it is presumed that he was unauthorized for employment after July 4, 2012. Mr. Valenzuela attested to his status as an alien authorized to work in the United States, like Mr. Reyna-Pepi, for a finite period of time. While Mr. Valenzuela did not provide an expiration date in section 1, the expiration date of his employment authorization card was listed in section 2. MCCI was therefore still required to document its reverification of either Mr. Valenzuela's continuing work authorization or his new grant of work authorization in section 3. *See* 8 C.F.R. § 274a.2(b)(1)(vii); Form I-9 Instructions at 1 (Aug. 7, 2009). The company failed to do so, as demonstrated by the fact that section 3 is blank. There is no other evidence in the record that indicates Mr. Valenzuela had continuing employment authorization or a new grant of employment authorization after July 4, 2012. In light of MCCI's failure to rebut the evidence of record then, ICE has shown by a preponderance of the evidence that Mr. Valenzuela was an unauthorized alien. 8 U.S.C. § 1324a(h)(3); *Split Rail Fence Co.*, 11 OCAHO no. 1216a at 11.

The record further reveals that the company continued to employ Mr. Valenzuela until April 13, 2013, nine months after his grant of employment authorization had expired. *Government's*

Motion, Attachment G-9 at 2. Therefore, because Mr. Valenzuela's Form I-9 expressly contained an expiration date for his work authorization card, no continuing work authorization was documented, and respondent continued to employ him beyond this date, respondent had constructive knowledge of the fact that Mr. Valenzuela had become an unauthorized alien worker. *Foothill Packing*, 11 OCAHO no. 1240 at 9; *Great Bend Packing*, 6 OCAHO no. 835 at 131. ICE has thus met its burden of proving that MCCI violated 8 U.S.C. § 1324a(a)(2), by continuing to employ Eduardo Valenzuela knowing he had become unauthorized with respect to such employment. While MCCI eventually terminated Mr. Valenzuela, MCCI was nevertheless in violation of 8 U.S.C. § 1324a(a)(2) during the nine-month period it continued to employ him while he was unauthorized. *Curran Eng'g Co.*, 7 OCAHO no. 975 at 894; *see, e.g.*, *Mester Mfg. Co. v. INS*, 879 F.2d 561, 568 (9th Cir. 1989) ("[W]e defer to the ALJ's conclusion, based on the relevant facts, that a two-week delay in firing Castel–Garcia amounted to an IRCA violation.").

Through the foregoing evidence, the government has met its initial burden of demonstrating there is no genuine, material dispute, shifting the burden of production to MCCI. *Durable*, 11 OCAHO no. 1231 at 5. MCCI's general denial of liability fails to rebut the evidence of record demonstrating liability for the two violations in Count I. ICE will therefore be granted summary decision as to Count I.

2. Substantive Paperwork Violations

a. Failure to Prepare and/or Present Forms I-9

ICE alleged in Count II that the company did not present Forms I-9 on behalf of Jaime Herrera, L. Lemus, J. Leyva, Jose Villanueva, and Jesus Zabala. The record does not contain Forms I-9 for these employees. Although the company denies all liability, it failed to argue or present evidence demonstrating that it prepared and/or presented Forms I-9 for any of these five individuals. MCCI is therefore liable for failing to prepare and/or present Forms I-9 for these employees, which is undoubtedly a substantive failure. *Keegan Variety*, 11 OCAHO no. 1238 at 2; *see also* Virtue Memorandum at 3.

ICE also established that respondent did not prepare timely Forms I-9 for the remaining five employees identified in Count II: Jose Muniz, Johnathan Muniz, Felix Sanchez, Victor Sanchez, and Jose Zamarripa. Pursuant to 8 C.F.R. § 274a.2(b)(1), MCCI was required to ensure that each employee completed and signed section 1 (employee attestation) of his respective Form I-9 on his first day of employment and the company itself was required to complete and sign section 2 (employer attestation) of the Form I-9 within three days of the employee's first day of employment. *Government's Motion*, Attachment G-9. Failure to timely prepare a Form I-9 is a substantive violation. *United States v. Dr. Robert Schaus, D.D.S.*, 11 OCAHO no. 1239, 7-8 (2014).

The evidence of record clearly shows that MCCI failed to prepare the Forms I-9 pursuant to the requirements of 8 U.S.C. § 1324a(a)(1)(B) for the five employees listed in Count II for whom Forms I-9 were presented to ICE. The employee roster shows that Jose Muniz was hired in December 1994. *Government's Motion*, Attachment G-9 at 2. He signed sections 1 and 2 on February 13, 2013, more than eighteen years after he began employment with MCCI.[8] In addition, the version of the Form I-9 used is dated March 8, 2013, almost one month after he purportedly completed the form. *Id.*, Attachment G-6 at 3.

Johnathan Muniz's Form I-9 and the employee roster identify his first day of employment as June 4, 2005. *Government's Motion*, Attachments G-6 at 5; G-9 at 2. However, he signed the employee attestation in section 1 on June 14, 2005, ten days later. *Id.*, Attachment G-6 at 5. Moreover, ICE claims that the List B document used, a Texas driver's license, was not in existence at the time that Johnathan's I-9 was completed. The expiration date of the driver's license is August 9, 2019. *Id.* According to the Texas Department of Public Safety, Driver License Division, a Texas driver's license must be renewed every six years. Texas Department of Public Safety, Driver License Division, *Driver License Renewal and Change of Address* (2012), https://txapps.texas.gov/tolapp/txdl/faq.dl?locale=en_US. It is therefore reasonable to infer that the State of Texas issued Johnathan Muniz a driver's license in 2013, not in 2005 when his I-9 was allegedly completed; it follows that this form was also backdated.

According to the employee roster, Felix Sanchez was hired in 2010. *Government's Motion*, Attachment G-9 at 2. However, Mr. Sanchez signed the employee attestation in section 1 on January 12, 2013, and respondent signed the employer attestation in section 2 on January 13, 2013. *Id.*, Attachment G-6 at 6. It is also evident this form was backdated because the version of the Form I-9 used (March 8, 2013) was not even in existence when Mr. Sanchez began employment or when sections 1 and 2 were allegedly signed.

[8] Jose Muniz signed section 2 of his and numerous other Forms I-9 as "president." Two corporate documents that ICE submitted identify Mr. Muniz as a director, president, and secretary of MCCI. *Government's Motion*, Attachment G-10. As a general rule, OCAHO case law has recognized that an individual is not an employee of an enterprise if he or she has an ownership interest in, and control over, all or part of the enterprise. *United States v. Speedy Gonzalez Constr. Inc.*, 11 OCAHO no. 1228, 9 (2014) (citing *United States v. Two for Seven, LLC*, 10 OCAHO no. 1208, 7 (2014)). Whether an individual is an employee is a fact-intensive inquiry because "[n]either the form of the business entity nor the individual's title is determinative. It is the function of the individual within the enterprise that governs, and all the incidents of the relationship must be considered." *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 449-51 (2003). Respondent's counsel did not assert that Jose Muniz should not be considered an employee of MCCI; consequently, the record does not contain sufficient evidence to ascertain Mr. Muniz's level of control within the company. *United States v. Jalisco's Bar and Grill*, 11 OCAHO no. 1224, 9 (2014) (referencing *Clackamas*, 538 U.S. at 445).

Victor Sanchez's first day of employment was February 5, 2007. *Government's Motion*, Attachments G-6 at 8; G-9 at 2. However, the employee attestation was completed on "February 26," but no year is listed in the attestation portion of section 1. In addition, the employer attestation in section 2 is not dated, and it is not evident whether respondent timely satisfied its duty to complete section 2. Moreover, MCCI did not allege that it completed this Form I-9 in a timely manner. It is noted that Mr. Sanchez's Form I-9 is the version of the Form I-9 published on May 31, 2005.

Finally, Jose Zamarripa's first day of employment was December 18, 2005. *Id.*, Attachments G-6 at 10; G-9 at 2. However, the employee attestation in section 1 and the employer attestation in section 2 are dated January 13, 2013, several years later. Furthermore, similar to the I-9s for Jose Muniz and Felix Sanchez, the version of the I-9 used for Jose Zamarripa was issued on March 8, 2013, almost two months *after* the form was allegedly completed.

ICE has satisfied its initial burden of establishing the absence of a genuine issue of material fact with respect to MCCI's liability. MCCI failed to present any evidence in support of its blanket denial of liability. 28 C.F.R. § 68.38(b). Accordingly, ICE proved by a preponderance of the evidence that MCCI committed ten substantive violations of 8 U.S.C. § 1324a(a)(1)(B) by failing to prepare and/or present Forms I-9 for five employees and by failing to timely prepare Forms I-9 for five employees. Although several of the forms contain multiple violations, only one penalty will be assessed for each I-9. ICE is granted summary decision as to Count II.

b. Failure to Properly Complete the Form I-9

A visual examination of the Forms I-9 pertaining to the twenty individuals listed in Count III establishes respondent's liability for the alleged substantive paperwork violations.

The Forms I-9[9] pertaining to Miguel Juarez and Manuel Saucedo do not contain a signed employee attestation in section 1. *See Government's Motion*, Attachment G-6 at 28, 34. MCCI's failure to ensure that these employees signed section 1 is a substantive violation. Virtue Memorandum at 3.

The Forms I-9 for the following individuals do not list their A numbers next to the box checked for "Lawful Permanent Resident" in section 1: Carlos Alvarez, Pablo Castillo, Humberto Castro, Ernesto del Toro, Francisco Garcia, Jose Hernandez, Antonio Juarez, Ismael Paez, Jose Paez, Esteban Rocha, and Ricardo Sanchez. *See Government's Motion*, Attachment G-6 at 11, 13-14, 18, 23-24, 27, 29-32. The A number for these individuals was not provided in sections 2 or 3 of their Forms I-9, nor did MCCI retain and present at the I-9 inspection legible copies of the

[9] The Spanish language version of the Form I-9 was used for the following individuals: Pablo Castillo, Eduardo Covarrubias, Ernesto del Toro, Jose Favela, Francisco Garcia, Cristobal Hortelano, Miguel Juarez, Ismael Paez, Jose Paez, and Esteban Rocha.

employees' documents that contained their A numbers. Therefore, MCCI's failure to ensure that these employees provided their A number in section 1 is a substantive violation. Virtue Memorandum at 3.

The Forms I-9 for the following individuals do not attest in section 1 to their citizenship or immigration status: Eduardo Covarrubias, Ramon Cruz, Arturo Escobedo-Maldonado, Antonio Garcia, and Daniel Serrato-Rodriguez. *See Government's Motion*, Attachment G-6 at 15-16, 19, 21, 35. Failure to ensure that an employee checks a box in section 1 attesting to his or her immigration status is a substantive failure. Virtue Memorandum at 3.

The Forms I-9 for the following individuals only list a Social Security card in section 2: Carlos Alvarez, Antonio Garcia, Francisco Garcia, Jose Hernandez, Ismael Paez, Jose Paez, Ricardo Sanchez, and Daniel Serrato-Rodriguez. *Government's Motion*, Attachment G-6 at 11, 21, 23-24, 29-30, 32, 35. A Social Security card, which is a List C document, only establishes work authorization; MCCI was also required to review and verify a List B document, which establishes identity. *See* 8 C.F.R. § 274a.2(b)(1)(v)(B)-(C); Form I-9 Instructions at 9 (Mar. 8, 2013). The Forms I-9 pertaining to Ramon Cruz, Jose Favela, and Cristobal Hortelano do not list any documents in section 2. *Government's Motion*, Attachment G-6 at 16, 20, 26. MCCI's failure to review and verify the correct List A or Lists B and C documents is substantive. Virtue Memorandum at 3-4.

It is also evident that MCCI backdated the Forms I-9 belonging to Carlos Alvarez and Ramon Cruz because the version used (Mar. 8, 2013) did not exist on their first day of employment or when their I-9s were allegedly completed. *Government's Motion*, Attachment G-6 at 11, 16.

Respondent did not articulate any arguments or present any evidence to support its general denial of liability and thus failed to rebut the government's showing of the company's liability as charged in Count III. Although several of the forms contain multiple violations, only one penalty will be assessed for each I-9. The government proved by a preponderance of the evidence that MCCI committed twenty substantive violations of 8 U.S.C. § 1324a(a)(1)(B). As there is no genuine issue of material fact, ICE is granted summary decision as to Count III.

C. Penalty Assessment

1. Knowingly Continued to Employ an Alien Who Has Become Unauthorized

As stated previously, 8 C.F.R. § 274a.10(b)(1)(ii)(A) provides that for first-time offenders, the penalty range for a knowing hiring violation that occurred after March 27, 2008, is between $375 and $3200. ICE established MCCI's liability for two counts of continuing to employ an alien who has become unauthorized for such employment (Ricardo Reyna-Pepi and Eduardo Valenzuela) and proposed a fine amount of $375 for each violation. ICE did not explain why it set the lowest possible base rate fine for this violation.

In light of the discussion below, the fine amount will be increased. A knowingly continued to employ violation is more serious than paperwork violations because the former completely undermines the purpose of the employment eligibility verification system, which is to prevent the hiring of unauthorized workers. *See, e.g., Foothill*, 11 OCAHO no. 1240 at 13. Consequently, "[a] greater penalty is warranted in light of the need to deter future violations of the same character." *Jonel*, 8 OCAHO no. 1008 at 201. In addition to higher penalties than paperwork violations, a cease and desist order is also required when a violation of 8 U.S.C. § 1324a(a)(2) is detected. *Id.* (citing 8 U.S.C. § 1324a(e)(5)).

Respondent employed Eduardo Valenzuela for nine months after his employment authorization document expired. Mr. Valenzuela's Form I-9 indicates that his employment authorization card expired on July 4, 2012, but MCCI's Employee Contact List indicates that Mr. Valenzuela was not terminated until April 13, 2013. *Government's Motion*, Attachments G-6 at 2; G-9 at 2. In addition, Ricardo Reyna-Pepi attests on his Form I-9 that his employment authorization expired on or about May 7, 2013, and MCCI verified in section 2 of the Form I-9 that Mr. Reyna-Pepi presented a visa with an expiration date of April 24, 2013, as a List A document. *Government's Motion*, Attachment G-6 at 1. Moreover, MCCI's Employee Contact List indicates that Mr. Reyna-Pepi was still employed by MCCI at the time of ICE's inspection, although there is no indication that his work authorization or visa had been extended. *Id.*, Attachments G-6 at 1; G-9 at 2.

MCCI has not addressed or rebutted the evidence of record with respect to these two knowingly continued to hire violations. To reflect the gravity of a knowing hire violation and in consideration of the facts at hand, these two violations will be adjusted to a fine of $800 each, and MCCI is ordered to pay $1600 in total for these two violations.

2. Paperwork Violations

If liability for paperwork violations is proven, then a penalty must be assessed. In *Keegan Variety*, 11 OCAHO no. 1238 at 7, the ALJ denied the respondent's request for a waiver of the fine, explaining,

> [T]he regulations at 8 C.F.R. § 274a.10(b)(2) set forth that "[a] respondent determined . . . to have failed to comply with the employment verification requirements . . . *shall* be subject to a civil penalty . . ." (emphasis added). Because I find that Keegan failed to comply with the employment verification requirements, assessment of a penalty is required by regulation. Moreover, OCAHO precedent case law establishes that "IRCA does not provide the option of waiving the penalty or of imposing a fine of less than $100.00 per violation found. IRCA does not state a range

> of between $0.00 and $1,000 for penalty amounts." *United States v. Applied Computer Tech.*, 2 OCAHO no. 367, 524, 529 (1991) (modification by CAHO).

In the instant case, the penalty assessment for respondent's thirty paperwork violations ranges between a minimum penalty of $3300 and a maximum penalty of $33,000. 8 C.F.R. § 274a.10(b)(2). A penalty in the mid-range is appropriate.

a. Mitigating and Neutral Factors

The government's assessment that the absence of a history of previous violations be considered a neutral factor is appropriate in this case. *See United States v. New China Buffet Rest.*, 10 OCAHO no. 1133, 6 (2010) ("[N]ever having violated the law before does not necessarily warrant additional leniency, and it is still appropriate to treat this factor as a neutral one."). The good faith of the employer should also be a neutral factor. As stated in *New China Buffet Restaurant*, "the primary focus of a good faith analysis is on the respondent's compliance *before* the investigation." *Id.* at 5 (citing *Great Bend Packing Co.*, 6 OCAHO no. 835 at 136; *United States v. Chef Rayko, Inc.*, 5 OCAHO no. 794, 582, 592 (1995) (modification by the CAHO)). Prior to the investigation, it is evident that MCCI had a poor rate of compliance. This alone, however, does not justify a finding of bad faith on behalf of the employer. *Id.* at 6 (citing *Hernandez*, 8 OCAHO no. 1043 at 670). Equities favoring respondent are its cooperation with ICE during the inspection and joining E-Verify. However, the fact that several of the Forms I-9 were backdated casts doubt on their integrity and reliability. *See supra* discussion pp. 13-14. Accordingly, the record supports the conclusion that MCCI's good faith should neither mitigate nor aggravate the fine amount.

However, ICE's treatment of respondent's business size as a neutral factor is not appropriate in this case. OCAHO case law considers businesses with 100 employees or less as small businesses. *Niche*, 11 OCAHO no. 1250 at 10 (citing *Carter*, 7 OCAHO no. 931 at 162). OCAHO cases have also looked to the United States Small Business Administration's definitions of whether a business is considered "small." *Id.* at 10-11 (citing *United States v. Pegasus*, 10 OCAHO no. 1143, 6 (2012)).

MCCI contends that it is a small business under the Small Business Administration's industry classification system. ICE concedes in its Memorandum that MCCI employs "approximately 50 people." *Government's Motion*, Attachment G-7 at 1. Moreover, the government did not explain why it treated respondent's small business size as a neutral factor in the penalty assessment, rather than a mitigating factor. Accordingly, MCCI is found to be a small business that warrants mitigation of the fine.

b. Aggravating Factors

ICE aggravated the fine on account of the seriousness of the violations and the presence of unauthorized workers. MCCI did not address either factor. "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." *Sunshine Bldg. Maint.*, 7 OCAHO no. 997 at 1179-80 (internal citations omitted). As not all violations are equally serious, the seriousness of the violations should be evaluated on a continuum. *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 8 (2010). "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 among the paperwork violations, which can result in different fine assessments for each count." *United States v. Hair U Wear*, 11 OCAHO no. 1268, 15 (2016) (citing *Holtsville 811*, 11 OCAHO no. 1258 at 10; *Niche*, 11 OCAHO no. 1250 at 10).

Here, respondent failed to prepare Forms I-9 for five employees. "Failure to prepare or present an I-9 is one of the most serious violations because it completely subverts the purpose of the employment verification requirements." *Speedy Gonzalez*, 11 OCAHO no. 1243 at 5-6 (citing *United States v. Clean Sweep Janitor Serv.*, 11 OCAHO no. 1226, 4 (2014)). Respondent's failure to timely prepare five Forms I-9 is also serious because "an employee could potentially be unauthorized for employment during the entire time his or her eligibility remains unverified." *United States v. Anodizing Indus., Inc.*, 10 OCAHO no. 1184, 4 (2013) (referencing *Sunshine Bldg. Maint.*, 7 OCAHO no. 997 at 1182). Therefore, the highest paperwork fine will be assessed for the five employees for which MCCI failed to present Forms I-9. A fine of $575 per violation, for a total fine of $2875, is assessed for MCCI's failure to present Forms I-9 for five employees listed in Count II.

The seriousness of a failure to prepare a Form I-9 aggregates over time, as delays in preparing the Forms I-9 create higher risks of unauthorized employment. *United States v. Siam Thai Sushi Rest.*, 10 OCAHO no. 1174, 4 (2013) (citing *United States v. Fortune E. Fashion, Inc.*, 7 OCAHO no. 992, 1075, 1080 (1998)). More than eighteen years lapsed between when Jose Muniz began employment with MCCI and when his Form I-9 was completed; three years lapsed between the time Felix Sanchez was hired and when MCCI completed his Form I-9. *See Government's Motion*, Attachments G-6 at 3, 6; G-9 at 2. For Jose Zamarripa, there was a seven-year delay. *Id.*, Attachments G-6 at 10; G-9 at 2. It is also likely that there was a seven-year delay in completing Johnathan Muniz's form. *Id.*, Attachments G-6 at 5; G-9 at 2. The evidence also supports a delay in the completion of the Form I-9 for Victor Sanchez. *Id.*, Attachment G-6 at 6-8. These failures in timely completing the Forms I-9 cannot be treated as anything but serious. In light of the lengthy delays of numerous years in preparing Forms I-9 for these five employees listed in Count II, a fine of $550 per violation is assessed, for a total fine of $2750.

Among the most serious Count III violations are: MCCI's failure to ensure that employees attested to their immigration status in section 1 of the Forms I-9; MCCI's failure to ensure that

employees signed the attestation in section 1 of the Forms I-9; and MCCI's failure to review the appropriate documents for establishing identity and employment authorization. *United States v. Ketchikan Drywall Servs., Inc.*, 10 OCAHO no. 1139, 10 (2011); *Sunshine Bldg. Maint.*, 7 OCAHO no. 997 at 1181 (citing *Carter*, 7 OCAHO no. 931 at 44-45). A less serious violation is MCCI's failure to ensure that the employee who attested to lawful permanent residence in section 1 enters his or her "A number." *United States v. Horno MSJ, Ltd.*, 11 OCAHO no. 1247, 11 (2015) (citations omitted). Although serious violations, the twenty violations of improperly completing the Forms I-9 in Count III are less serious than the violations in Count II, and will be assessed at $450 per violation. However, only nineteen of the violations listed in Count III will be assessed at $450, for a total fine of $8550. As discussed below, the fine associated with the Form I-9 violation for Cristobal Hortelano listed in Count III will be aggravated to $500 due to his status as an unauthorized worker.

In its Notice of Suspect Documents and the complaint, ICE alleged that the following six individuals were not authorized for employment in the United States: Eduardo Covarrubias; Cristobal Hortelano; Miguel Juarez; Felix Sanchez; Victor Sanchez; and Manuel Saucedo. *Government's Motion*, Attachments G-4; G-5; *see supra* discussion p. 2. In addition, ICE aggravated the fine by five percent for these six violations. However, the record shows that ICE met its burden of proof by a preponderance of the evidence for aggravation of only one of the Form I-9 violations related to the hiring of an unauthorized worker: Cristobal Hortelano.

Based on the information contained in the Forms I-9 for Felix Sanchez, Victor Sanchez, Eduardo Covarrubias, Miguel Juarez, and Manuel Saucedo, it is neither evident that these individuals were unauthorized for employment nor that MCCI had ignored its duty to verify their work authorization. To the contrary, Felix Sanchez, Victor Sanchez, Miguel Juarez, and Manuel Saucedo, each checked the box next to "lawful permanent resident" in section 1 of their respective Forms I-9 and presented an unexpired (in relation to their hire dates) lawful permanent resident card as their respective List A document in section 2 to prove identity and authorization to work.[10] *See Government's Motion*, Attachment G-6 at 6, 8, 28, 34. Similarly, the Form I-9 for Eduardo Covarrubias demonstrates that he presented an unexpired (in relation to his hire date) permanent resident card as a List A identity and work authorization document. Nothing on the face of these five Forms I-9 casts doubt on the employment authorization status of these individuals, despite ICE's allegations in the Notice of Suspect Documents.

[10] Felix Sanchez used his lawful permanent resident card as a List A identity document on his Form I-9, but the Form I-9 does not list an expiration date for the permanent resident card. A lawful permanent resident card (Form I-551) "may contain no expiration date, a 10-year expiration date, or a two-year expiration date." USCIS, *Handbook for Employers: Guidance for Completing Form I-9 (Employment Eligibility Verification Form)* (M-274) (Apr. 30, 2013) at 12. The M-274 further instructs, "Permanent Resident Cards with either an expiration date or no expiration date are List A documents that should not be reverified." *Id.*

It is well-established in OCAHO precedent that a Notice of Suspect Documents is alone insufficient to establish that an individual is an unauthorized worker. *United States v. Liberty Packaging, Inc.*, 11 OCAHO no. 1245, 10 (2015) (citing *United States v. Romans Racing Stables, Inc.*, 11 OCAHO no. 1230, 8 (2014); *United States v. Natural Envtl., Inc.*, 10 OCAHO no. 1197, 4-5 (2013)). Furthermore, HSI Auditor St. Michel's uncorroborated statements in her affidavit, while persuasive, do not constitute evidence of the unauthorized status of these employees. *See United States v. Platinum Builders of Cent. Fla., Inc.*, 10 OCAHO no. 1199, 9 (2013) ("A reference to discrepancies or suspect documents, standing alone, is not sufficient to establish unauthorized status . . . .").

While the evidence that ICE presented as to the employment authorization status of these six individuals is suggestive, it "does not rise to the level of a preponderance absent some evidence that the employees were afforded the opportunity to challenge their inclusion on the list and failed to do so or to present other documents." *Liberty Packaging*, 11 OCAHO no. 1245 at 10. Because five of the six individuals presented documents demonstrating that they are lawful permanent residents and because MCCI took corrective action after service of the Notice of Suspect Documents, ICE has not proven by a preponderance of the evidence that enhancement of the penalty for hiring unauthorized workers is warranted. Accordingly, the government's has failed to demonstrate that penalty enhancement is warranted for the presence of unauthorized workers for these five employees' Forms I-9 violations: Felix Sanchez, Victor Sanchez, Eduardo Covarrubias, Miguel Juarez, and Manuel Saucedo.

However, ICE established by a preponderance of the evidence that Cristobal Hortelano was unauthorized for employment. Mr. Hortelano checked the box indicating that he is a lawful permanent resident (using the Spanish-language version of the Form I-9) and listed a nine-digit A number in section 1 of his Form I-9. *Government's Motion,* Attachment G-6 at 26. Importantly, section 2 of Mr. Hortelano's Form I-9 is blank, evidencing that he did not present a List A document or List B and List C documents, to establish his employment authorization. Moreover, there is no evidence demonstrating that MCCI reviewed any documents that verified his work authorization. While Mr. Hortelano began employment with MCCI on May 5, 2012, the employer attestation in section 2 was signed three months later on August 5, 2012. Importantly, the evidence shows that Mr. Hortelano was terminated on May 10, 2013. *Government's Motion*, Attachment G-9 at 1.

Although MCCI had an affirmative duty to ascertain whether Mr. Hortelano was work authorized in the United States, it failed to do so. *New El Rey Sausage*, 925 F.2d at 1158; *United States v. Jonel, Inc.*, 8 OCAHO no. 1008, 175, 193 (1998). The deficiencies in Mr. Hortelano's Form I-9, when coupled with the information contained in the previous Notice of Suspect Documents, supports ICE's allegation that Mr. Hortelano was not authorized to work in the United States. In addition, MCCI failed to rebut the evidence of record with respect to this allegation. Therefore, ICE established by a preponderance of the evidence that Cristobal Hortelano was unauthorized for employment with MCCI. Accordingly, penalty aggravation is

warranted with respect to the paperwork violation for Cristobal Hortelano's Form I-9 due to his unauthorized status. Therefore, the fine for Count III's violation related to the Form I-9 for Cristobal Hortelano is assessed at an enhanced penalty rate of $500.

c. Other Penalty Assessment Factors

MCCI asserted that the proposed fine should be mitigated on account of the public policy of leniency to small businesses under the SBREFA. *See supra* p. 3. It is appropriate for an Administrative Law Judge to consider the public policy of leniency in the penalty determination. *Holtsville 811*, 11 OCAHO no. 1258 at 12 (citing *United States v. Red Bowl of Cary, LLC*, 10 OCAHO no. 1206, 4-5 (2013)). The evidence of record supports mitigating the penalty on account of the SBREFA public policy of leniency to small businesses. When assessing the above-listed fines for Counts I, II, and III, the public policy of leniency to small business was taken into account.

ICE also contends that MCCI's real estate and property are worth $594,255. *Id.* While this is not an insignificant amount, without additional context or information about the company's finances, it is not readily apparent that this value of property and real estate holdings somehow undercuts mitigation of the fine.[11] Importantly, MCCI did not argue that it has an inability to pay the proposed fine.

d. MCCI's Abeyance Request Is Denied

Although MCCI suggests that the interests of judicial economy and government resources would be best served by removing this case from OCAHO's docket and holding the case in abeyance while allowing MCCI and ICE to work out a compliance program or settlement of the dispute, this course of action is not a viable option at this stage of adjudication. During a telephonic prehearing conference call, the parties discussed settlement options, and MCCI was given an additional opportunity to provide a counter-offer to ICE to further the settlement process. In addition, the undersigned made clear in the post-conference call order that the parties should inform OCAHO immediately if they decide to pursue settlement negotiations so that no decision would be issued that could hinder the settlement process. The parties did not inform OCAHO that any further settlement negotiations were being pursued.

[11] The record does not contain any information regarding the company's financial information, such as annual sales or income. Under the Small Business Administration's guidelines, a "small business" is expressed in either "average annual receipts" in millions of dollars or "average employment" in the number of employees. *See* U.S. Small Business Administration, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* (Jul. 14, 2014), https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.

As explained in ICE's June 26, 2013 "Fact Sheet" setting forth its Form I-9 inspection overview, which is available on its website at http://www.ice.gov/news/library/factsheets/i9-inspection.htm, ICE has several options within its prosecutorial discretion available to it when auditing and inspecting an employer's Forms I-9, including the option to issue a Warning Notice instead of a Notice of Intent to Fine for substantive violations. Additionally, ICE's Fact Sheet states, "The employer has the opportunity to either negotiate a settlement with ICE or request a hearing before . . . OCAHO . . . . Many OCAHO cases never reach the evidentiary hearing stage because the parties either reach a settlement . . . or the ALJ reaches a decision on the merits through dispositive prehearing rulings." ICE, *Form I-9 Inspection Overview: Fact Sheet* (Jun. 26, 2013), http://www.ice.gov/news/library/factsheets/i9-inspection.htm.

Because the parties in this case did not negotiate a settlement agreement or other compliance program, the case is properly before OCAHO for adjudication of both liability and penalty. As previously discussed, once liability has been established, OCAHO must assess a penalty. 8 C.F.R. § 274a.10(b)(2) ("[a] respondent determined . . . to have failed to comply with the employment verification requirements . . . *shall* be subject to a civil penalty . . ."); *United States v. Keegan, LLC*, 11 OCAHO no. 1238, 7 (2014).

Additionally, contrary to MCCI's assertions, ICE retains prosecutorial discretion as to how it performs worksite enforcement actions and whether it decides to issue a Notice of Intent to Fine instead of a Warning Notice. *See generally Texas v. United States*, 86 F. Supp. 3d 591, 645 (S.D. Tex. 2015) ("The Judiciary has generally refrained from injecting itself into decisions involving the exercise of prosecutorial discretion or agency non-enforcement . . . . This is true whether the suit is brought under common law or the APA."); *United States v. Weymoor Invs., LLC*, 1 OCAHO no. 56, 343, 346-47 (1989) ("The 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. . . . ") (internal citations omitted).

Therefore, MCCI's request that the undersigned withdraw this case from OCAHO's docket and hold the case in abeyance in order to permit MCCI and ICE to engage in compliance efforts and further settlement negotiations is denied.

In light of the above, the penalty assessed against the company for the two knowing hire violations set forth in Count I is $1600. The penalty assessed for paperwork violations is $14,675, as follows: (a) $2875 for Count II violations for failure to present Forms I-9; (b) $2750 for Count II violations for failure to prepare timely Forms I-9; (c) $8550 for nineteen paperwork violations listed in Count III; and (d) $500 for the Count III Form I-9 paperwork violation for Cristobal Hortelano, which is enhanced due to his unauthorized status. Accordingly, MCCI is ordered to pay a total fine amount of $16,275.

IV. CONCLUSION

The government proved by a preponderance of the evidence that respondent is liable for two violations of 8 U.S.C. § 1324a(a)(2) and for thirty violations of 8 U.S.C. § 1324a(a)(1)(B). While MCCI responded to ICE's Motion for Summary Decision, the company's blanket denial of liability and lack of relevant, supporting evidence failed to overcome the government's evidence. ICE met its burden of showing that no genuine issue of material fact exists with respect to liability and that it is entitled to summary decision.

ICE also established by a preponderance of the evidence that its proposed penalty should be aggravated on account of the seriousness of the violations, but I will adjust the fine to reflect the varying degrees of seriousness. I will also reduce ICE's penalty assessment due to the small size of MCCI's business and the public policy of leniency to small businesses. In addition, ICE proved by a preponderance of the evidence that penalty aggravation is warranted for one violation in Count III because that individual was not authorized for employment in the United States. After conducting a *de novo* review of the penalty, I conclude the appropriate penalty for the thirty paperwork violations is $14,675.

Finally, ICE's proposed fine for the two violations of knowingly continued to employ will be increased to $1600 to mirror the gravity of this violation. MCCI is also ordered to CEASE AND DESIST from knowingly continuing to employ unauthorized workers.

MCCI is ordered to pay a total civil money penalty of $16,275.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Muniz Concrete & Contracting, Inc., is an entity incorporated in the State of Texas.

2. On September 27, 2013, the Department of Homeland Security, Immigration and Customs Enforcement, served Muniz Concrete & Contracting, Inc., with a Notice of Inspection.

3. On November 12, 2013, the Department of Homeland Security, Immigration and Customs Enforcement, served Muniz Concrete & Contracting, Inc., with three Notices: Notice of Discrepancy, Notice of Technical or Procedural Failures, and Notice of Suspect Documents.

4. The Department of Homeland Security, Immigration and Customs Enforcement, served Muniz Concrete & Contracting, Inc. with a Notice of Intent to Fine on May 20, 2014.

5. Muniz Concrete & Contracting Inc., filed a request for hearing on or about May 28, 2014.

6. Muniz Concrete & Contracting, Inc., hired all thirty-two individuals identified in the complaint after 1986 and employed these individuals during some or all of the period from April 1, 2013, to September 27, 2013.

7. Muniz Concrete & Contracting, Inc., hired Ricardo Reyna-Pepi on or about May 14, 2012, at which time he had employment authorization until May 7, 2013.

8. Muniz Concrete & Contracting, Inc., has continued to employ Ricardo Reyna-Pepi after May 14, 2012, without verifying that he possesses updated employment authorization documents and without completion of section 3 of his Employment Eligibility Verification Form I-9.

9. Muniz Concrete & Contracting, Inc., hired Eduardo Valenzuela on or about August 2, 2011, at which time Eduardo Valenzuela presented an Employment Authorization Card authorizing him to work in the United States until July 4, 2012.

10. Muniz Concrete & Contracting, Inc., continued to employ Eduardo Valenzuela until April 13, 2013, without any updated documents being recorded and without completion of section 3 of his Form I-9.

11. Muniz Concrete & Contracting, Inc., failed to present Forms I-9 for Jaime Herrera, L. Lemus, J. Leyva, Jose Villanueva, and Jesus Zabala.

12. Muniz Concrete & Contracting, Inc., did not ensure that Jose Muniz, Johnathan Muniz, Felix Sanchez, Victor Sanchez, and Jose Zamarripa completed section 1 of their Forms I-9 on their first day of employment, or the company itself failed to complete section 2 of these Forms I-9 within three days of the employees' first day of employment.

13. Muniz Concrete & Contracting, Inc., failed to ensure that Carlos Alvarez, Pablo Castillo, Humberto Castro, Eduardo Covarrubias, Ramon Cruz, Ernesto del Toro, Arturo Escobedo, Jose Favela, Antonio Garcia, Francisco Garcia, Jose Hernandez, Cristobal Hortelano, Antonio Juarez, Miguel Juarez, Ismael Paez, Jose Paez, Esteban Rocha, Ricardo Sanchez, Manuel Saucedo, and Daniel Serrato-Rodriguez properly completed section 1 of their Forms I-9, or the company itself did not properly complete section 2 of these employees' Forms I-9.

14. Muniz Concrete & Contracting, Inc., asserted a general denial against all of ICE's allegations and presented one report from the Congressional Research Service in an effort to rebut the government's evidence.

15. Muniz Concrete & Contracting, Inc., is a small business with no history of previous Form I-9 violations.

16. Muniz Concrete & Contracting, Inc., was not shown to have acted in bad faith.

17. Visual inspection of the Form I-9 for Cristobal Hortelano reflects that Muniz Concrete & Contracting, Inc., did not record a document for List A or both Lists B and C as required.

18. The Department of Homeland Security, Immigration and Customs Enforcement, identified in its Notice of Suspect Documents dated November 12, 2013, that Cristobal Horetlano appeared to be unauthorized to work in the United States.

B. Conclusions of Law

1. Muniz Concrete & Contracting, 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. 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."

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

5. "[A]ll facts and reasonable inferences to be derived therefrom are to be viewed in the light most favorable to the non-moving party." *United States v. Primera Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986); *Egal v. Sears Roebuck & Co.*, 3 OCAHO no. 442, 486, 495 (1992)).

6. 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. Nebeker, Inc.*, 10 OCAHO no. 1165, 4 (2013) (citing *United States v. Am. Terrazzo Corp.*, 6 OCAHO no. 877, 577, 581 (1996)).

7. "The 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).

8. 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 Chief Administrative Hearing Officer); *United States v. Kumar*, 6 OCAHO no. 833, 112, 120-21 (1996); *Breda v. Kindred Braintree Hosp., LLC*, 10 OCAHO no. 1202, 8 (2013)).

9. If liability for paperwork violations is proven, then a penalty must be assessed. 8 C.F.R. § 274a.10(b)(2); *United States v. Keegan Variety, LLC*, 11 OCAHO no. 1238, 7 (2014).

10. It is unlawful for a person or entity to continue to employ an alien in the United States knowing the alien is or has become unauthorized with respect to such employment. 8 U.S.C. § 1324a(a)(2).

11. Regulations provide that constructive knowledge includes situations where an employer failed to complete or improperly completed the Form I-9. *See* 8 C.F.R. § 274a.1(*l*)(1); *United States v. Foothill Packing, Inc.*, 11 OCAHO no. 1240, 8-9 (2015).

12. "The basic principle underlying the doctrine of constructive knowledge as it has been articulated in OCAHO case law is that the employer is not entitled to cultivate deliberate ignorance or avoid acquiring knowledge." *United States v. Foothill Packing, Inc.*, 11 OCAHO no. 1240, 9 (2015) (citing *United States v. Sunshine Bldg. Maint., Inc.*, 7 OCAHO no. 997, 1122, 1151-52 (1998); *United States v. Aid Maint. Co.*, 7 OCAHO no. 951, 475, 485 (1997)).

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

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

15. Muniz Concrete & Contracting, Inc., is liable for two violations of 8 U.S.C. § 1324a(a)(2), for continuing to employ two aliens knowing they had become unauthorized with respect to such employment.

16. Violations of 8 U.S.C. § 1324a(a)(2) require the issuance of a cease and desist order as well as civil money penalties. 8 U.S.C. § 1324a(e)(4).

17. Muniz Concrete & Contracting, Inc., is liable for thirty violations of 8 U.S.C. § 1324a(a)(1)(B), for failing to prepare and/or present five Forms I-9, failing to timely prepare five Forms I-9, and failing to properly complete twenty Forms I-9.

18. 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).

19. Muniz Concrete & Contracting, Inc., is a small business warranting penalty mitigation.

20. Muniz Concrete & Contracting, Inc., is a small business and warrants penalty mitigation pursuant to the Small Business Act's policy of leniency toward small businesses.

21. The Department of Homeland Security, Immigration and Customs Enforcement, met its burden of proof by a preponderance of the evidence that penalty enhancement was warranted for Muniz Concrete & Contracting, Inc.'s hiring of an unauthorized worker, Cristobal Hortelano.

22. As not all violations are equally serious, the seriousness of the violations should be evaluated on a continuum. *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 8 (2010).

23. 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 among the paperwork violations, which can result in different fine assessments for each count. *United States v. Hair U Wear*, 11 OCAHO no. 1268, 15 (2016) (citing *United States v. Holtsville 811 Inc.*, 11 OCAHO no. 1258, 10 (2015); *United States v. Niche, Inc.*, 11 OCAHO no. 1250, 10 (2015)).

24. The Department of Homeland Security, Immigration and Customs Enforcement, has prosecutorial discretion to determine how to perform worksite enforcement audits and whether to issue a Notice of Intent to Fine. *See generally Texas v. United States*, 86 F. Supp. 3d 591, 645 (S.D. Tex. 2015); *United States v. Weymoor Invs., LLC*, 1 OCAHO no. 56, 343, 346-47 (1989).

25. It is well-established in OCAHO precedent that a Notice of Suspect Documents is alone insufficient to establish that an individual is an unauthorized worker. *United States v. Liberty Packaging, Inc.*, 11 OCAHO no. 1245, 10 (2015).

ORDER

The request to hold this case in abeyance by Muniz Concrete & Contracting, Inc., is denied. ICE's Motion for Summary Decision is granted in part. The government met its burden of proving that Muniz Concrete & Contracting, Inc., is liable for two violations of 8 U.S.C. § 1324a(a)(2) and for thirty violations of 8 U.S.C. § 1324a(a)(1)(B). The company is therefore directed to cease and desist from violations of 8 U.S.C. § 1324a(a)(2), and to pay civil money penalties in the total amount of $16,275. 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 April 29, 2016.

_____

Stacy S. Paddack
Administrative Law Judge

Appeal Information

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

Provisions governing administrative reviews by the CAHO are set forth at 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. pt. 68. Note in particular that a request for administrative review must be filed with the CAHO within ten (10) days of the date of this order, pursuant to 28 C.F.R. § 68.54(a)(1) (2012).

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

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