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

November 7, 2016

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 15A00080
IDEAL TRANSPORTATION CO., INC., Respondent.	)	

FINAL DECISION AND ORDER

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 with the Office of the Chief Administrative Hearing Officer (OCAHO) against Ideal Transportation Co., Inc. (Ideal Transportation, Respondent, or the company). Respondent 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 is **GRANTED, IN PART**, because the government established that there is no genuine issue of material fact with respect to Ideal Transportation's liability for all charged violations. Pursuant to a *de novo* review of the totality of the evidence, however, I find that a reduced penalty assessment against Ideal Transportation is appropriate in the exercise of discretion.

II. BACKGROUND INFORMATION AND POSITIONS OF THE PARTIES

Ideal Transportation is a small trucking company that operates as an intermodal carrier for international ocean containers between ports. The company is located in Peabody,

Massachusetts and has served the ports of Boston, New York/New Jersey, and Portland, Maine, since 1975. The company employs ten drivers, three office staff members, and a mechanic.

All of Ideal Transportation's drivers are required to have a Transportation Worker Identification Credential Card (TWIC Card). TWIC is a government program, run by the United States Department of Homeland Security, Transportation Security Administration (TSA). The program "provides a tamper-resistant biometric credential to maritime workers requiring unescorted access to secure areas of port facilities, outer continental shelf facilities, and vessels regulated under the Maritime Transportation Security Act, or MTSA, and all U.S. Coast Guard credentialed merchant mariners." Answer at 3, 5; *see also* http://www.tsa.gov/for-industry/twic. In order to obtain a TWIC Card, "an individual must provide biographic and biometric information such as fingerprints, sit for a digital photograph and successfully pass a security threat assessment conducted by TSA." Answer at 3. Further, per TSA, to qualify for a TWIC Card, one is required to be a U.S. citizen or be lawfully in the country in accordance with immigration laws.

On June 10, 2014, the government served Ideal Transportation with a Notice of Inspection (NOI). In the NOI, the government requested that the company present its Employment Eligibility Verification Forms (Forms I-9) no later than June 13, 2014. On June 23, 2014, Respondent presented the following information to the government: fifteen Forms I-9; payroll records; a list of active employees with dates of hire; and miscellaneous business information. On August 14, 2014, the government served a Notice of Suspect Documents (NSD) on Respondent.

On May 11, 2015, the government served a Notice of Intent to Fine (NIF) on Respondent. The NIF contains one count, consisting of twelve violations of 8 U.S.C. § 1324a(a)(1)(B). Count I specifically alleges that Respondent failed to prepare and/or present Forms I-9 for the following twelve employees: (1) Mario Barreiro; (2) Ilir Bualli; (3) Charles Everdean; (4) Orman Melanson; (5) Christine Ostler; (6) Geraldo Paulino; (7) John Riley; (8) Dominic Sousa; (9) Bruce Thomas; (10) Paul Vaillancourt; (11) Harland Wells II; and (12) Frances Whippen.[1] For these Count I violations, ICE proposed a civil money penalty of $935 per violation, totaling $11,220.

On May 29, 2015, Ideal Transportation timely requested a hearing. In its request, the company explains that it had recently performed a document review of its files and that "[t]he review revealed that some of the documents had been damaged, torn, worn out, and on some the

[1] Nine of the individuals are drivers that operate trucks for Ideal Transportation and are required to have TWIC Cards. However, three of the individuals—Charles Everdean, Christine Ostler, and Frances Whippen—are considered office staff members and it appears that they are not required to, nor do they, have TWIC Cards.

information was outdated." Complaint at 10. The company states that as a result, it "made all new employee jackets for each employee and created all new documents for the employees to sign, including the I-9's." *Id.*

On September 24, 2015, ICE filed a complaint against Ideal Transportation which fully incorporated the count contained in the NIF, including the proposed civil money penalty.

Ideal Transportation filed an Answer to the complaint on November 2, 2015.[2] The company, who is self-represented,[3] denies the government's allegations, and avers that it provided the government with the required Forms I-9. Once again, the company avers that during this process, it noticed that some of the I-9's were "soiled, torn and illegible and information was outdated," thus, all employees signed "new[,] clean[,] and updated I-9's." Answer at 1. Further, the company notes that all of its drivers are required to have TWIC Cards, thus ensuring their authorized status.

Following a February 9, 2016, telephonic case management conference, the government filed a Motion for Summary Decision (Motion). The Motion contains six proposed exhibits: (A) Dun and Bradstreet Report & Commonwealth of Massachusetts Business Entity Summary; (B) Notice of Inspection and Subpoena; (C) Forms I-9 provided by Respondent; (D) Ideal Transportation's List of Employees and Information; (E) Respondent's Payroll; and (F) Respondent's Inspection Summary.

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 twelve violations charged in Count I of the complaint. Specifically, ICE asserts that Ideal Transportation has acknowledged in its request for a hearing and Answer that the I-9's it delivered were new documents, which were completed after the service of the Notice of Inspection and that the originals were never provided. Accordingly, Respondent failed to timely prepare twelve Forms I-9, as required.

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

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[2] On December 12, 2015, Ideal Transportation filed a "Resubmission Of Answer." The Resubmission Of Answer contains additional documentation and more legible copies of documents previously submitted. For the purposes of this decision, any citation to the Answer refers to the original Answer filed on November 2, 2015.

[3] Ideal Transportation's pleadings are signed by Joseph DiGiulio, who is listed as the company's treasurer, as well as its logistics and safety officer.

At the outset, ICE assessed a baseline fine rate of $935 for each of the twelve violations. ICE then considered the statutory factors to determine whether they would have an aggravating, mitigating, or neutral impact on the baseline fine. *See* Motion at 8-11. ICE noted that Respondent is a small business and mitigated the penalty based on this factor. ICE then found that Respondent had no history of previous violations, no presence of unauthorized aliens in its workforce, and acted in good faith. Therefore, ICE treated these three statutory factors as neutral in its fine analysis. Finally, ICE found that aggravation was warranted based on the seriousness of the violations, and noted that "Ideal Transportation was at high risk to hire employees that may not be authorized to work." Motion at 2. After considering all five statutory factors, ICE found that the single mitigating and aggravating factors offset one another, and ICE proposed a penalty of $935 per violation, totaling $11,220.

On March 29, 2016, Ideal Transportation filed a response to the government's Motion for Summary Decision (Response). The Response contains six proposed exhibits: (1) Driver's qualifications prior to 1986; (2) Requirements to qualify for a TWIC Card; (3) Email from Agent Brian Worth and Letter from Bruce Foucart; (4) DHS Receipt for Forms I-9; (5) Postal Receipts; and (6) Subpoena.

In its Response, Ideal Transportation reiterates that all of its drivers are required to have TWIC Cards and that all employees were found to be U.S. citizens. Further, although it completed Forms I-9 for each employee at the time of hire, "because they were outdated, and mutilated[,] and illegible," the company shredded the originals and created new forms. Response at 4. Respondent does "not sense that Ideal [Transportation] violated any immigration laws," and requested that the fines be waived or placed at the minimum statutory amount. *Id.* at 4-5.

III. DISCUSSION AND ANALYSIS

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, "[a]n issue of material fact is genuine only if it has a real basis in the record. A genuine issue of fact is

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

material if, under the governing law, it might affect the outcome of the suit." *Sepahpour v. Unisys, Inc.*, 3 OCAHO no. 500, 1012, 1014 (1993) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).[5]

"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).

2. The Employment Verification Requirements

Employers must prepare and retain Forms I-9 for employees hired after November 6, 1986, and are required to produce the Forms I-9 for inspection by the government upon three days' notice. 8 C.F.R. § 274a.2(b)(2)(ii); *United States v. Keegan Variety, LLC*, 11 OCAHO no. 1238, 2 (2014). Pertinent regulations at 8 C.F.R. § 274a.2(b) establish that employers "must ensure" that Forms I-9 are completed either at the time of hire or within three days of hiring an employee.

Specifically, for employees hired 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(b)(1)(ii); *see United States v. New China Buffet Rest.*, 10 OCAHO 1132, 4-5 (2010) ("Failure to complete the form within three days of the employee's hire is also a substantive violation, and is not cured or 'corrected' by belated

[5] 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.

partial completion."); *United States v. Dr. Robert Schaus, D.D.S.*, 11 OCAHO no. 1239, 8 (2014) ("Employers are required to complete an I-9 form for a new employee within three business days of the individual's date of hire."); *United States v. Buffalo Transportation*, 11 OCAHO 1263, 10 (2015) ("[F]ailing to prepare Forms I-9 within three days of hire are serious and substantive paperwork violations.").

3. Penalties

When an employer fails to properly prepare, retain, or produce Forms I-9 upon request, civil money penalties are assessed according to the following parameters established at 8 C.F.R. § 274a.10(b)(2): the minimum penalty is $110 and the maximum penalty is $1100 for each individual with respect to whom a paperwork violation occurred after September 29, 1999. For the twelve violations in this case, potential penalties range from $1320 to $13,200. Penalties assessed in the upper range of penalty amounts should be reserved for the most serious and egregious violations. *See United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013). A penalty needs to be sufficiently meaningful to accomplish the purpose of deterring future violations, *United States v. Jonel, Inc.*, 8 OCAHO no. 1008, 175, 201 (1998), while not being unduly punitive in light of the particular respondent's resources, *United States v. Minaco Fashions, Inc.*, 3 OCAHO no. 587, 1900, 1909 (1993).

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

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

B. Respondent's Liability

All twelve of the individuals named in the complaint were employees of Ideal Transportation, who were hired after November 6, 1986, and for whom Respondent was required to properly prepare, retain, and produce Forms I-9, upon request. The evidence of record reveals that the

Forms I-9 delivered to the government for these twelve employees had not been prepared contemporaneously with their hiring, but rather were prepared after service of the NOI on June 10, 2014. Ideal Transportation acknowledged as much in its pleadings when it stated that all employees completed new Forms I-9 when the company discovered that the originals had been damaged. *See* Answer at 1; Complaint at 10.

Ideal Transportation argues that Forms I-9 were actually timely prepared for these twelve individuals, but subsequently destroyed by the company when it discovered their damaged condition. This argument is an insufficient defense to liability. OCAHO case law recognizes that impossibility may provide a valid affirmative defense to the failure to present Forms I-9 where the forms were actually completed, but later became unavailable through no fault of the employer. *See United States v. Noel Plastering & Stucco, Inc*., 2 OCAHO no. 396, 763, 768 (1991) (finding that a defense of impossibility could potentially succeed if the respondent could prove that fire destroyed the offices where I-9s were kept); *United States v. Alvand, Inc*., 2 OCAHO no. 352, 378, 383 (1991) (finding that impossibility could be a valid defense if evidence established that the forms had been completed, but were subsequently lost or destroyed in the course of a burglary).

Impossibility is simply not available as an affirmative defense, however, when the destruction of the documents is attributable to the company's own actions. *See United States v. Barnett Taylor, LLC*, 10 OCAHO no. 1155, 8-9 (2012) (stating that where an employer's own employee voluntarily destroys its Forms I-9, the defense is unavailable); *United States v. SKZ Harvesting, Inc.*, 11 OCAHO no. 1266, 12 (2016). Assuming for the sake of argument that Respondent did in fact complete Forms I-9 at the time of hiring, Respondent erred in unilaterally destroying the original Forms I-9 when it received the NOI, regardless of their condition, without reaching out to the government beforehand.

While the assertion that these forms were actually prepared may be taken into account in setting a penalty, it cannot operate to avoid liability for these violations. Moreover, the submission of Forms I-9 that were completed subsequent to the service of the NOI does not cure or correct the failure to timely prepare a Form I-9 within three days of the employee's hire. *See United States v. Frio County Partners, Inc.*, 12 OCAHO 1276, 10-11 (2016) (citing *Dr. Robert Schaus, D.D.S.*, 11 OCAHO no. 1239 at 8; *New China Buffet Rest.*, 10 OCAHO 1132 at 4-5).

Accordingly, as there is no genuine issue of material fact, the government's Motion for Summary Decision with respect to liability for all twelve violations of 8 U.S.C. § 1324a(a)(1)(B) is **GRANTED**.

With liability established, I must address Respondent's request in its Response that the penalty in this case be "waived." The 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 Ideal Transportation failed to comply with the employment verification requirements, assessment of a penalty is

required by regulation. Moreover, OCAHO precedent establishes that "IRCA does not provide the option of waiving the penalty or of imposing a fine of less than [$110] per violation found. IRCA does not state a range of between $0.00 and $[1100] for penalty amounts." *United States v. Applied Computer Tech.*, 2 OCAHO no. 367, 524, 529 (1991) (modification by Chief Administrative Hearing Officer). Accordingly, I deny Ideal Transportation's request for waiver of the penalty.[6]

C. Penalty Assessment

I have considered the five statutory factors in evaluating the appropriateness of ICE's proposed against Ideal Transportation: 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). ICE determined that only one of the five factors served to mitigate the penalty. As set forth below, in the exercise of my discretion, I find that reduction of the penalty against Ideal Transportation is warranted based on several factors.

ICE assessed a penalty of $935 per violation, totaling $11,220 for failure to timely prepare and retain Forms I-9 for twelve of Ideal Transportation's employees. This represents a fine in the highest range of permissible penalties.

ICE found that mitigation of the penalty was warranted due to Respondent's small business size. I agree. Ideal Transportation has only fifteen employees. *See United States v. Carter*, 7 OCAHO no. 931, 121, 162 (1997) (noting that OCAHO case law generally considers businesses with fewer than 100 employees to be small businesses). In addition to the statutory factor regarding business size, leniency toward small businesses is also a non-statutory factor appropriate for consideration in this penalty assessment. *See Keegan Variety*, 11 OCAHO no. 1238 at 6 (citing the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq. (2006), amended by § 223(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-

[6] Although IRCA does not provide OCAHO with the option of waiving the penalty, ICE could have issued Ideal Transportation a Warning Notice instead of a Notice of Intent to Fine for substantive violations. *See* ICE, *Form I-9 Inspection Overview: Fact Sheet* (Jun. 26, 2013), http://www.ice.gov/news/library/factsheets/i9-inspection.htm. Current interim guidelines state that, "In cases where no unauthorized aliens are found at a worksite and only failures to meet the verification requirements of section 274A(b) of the Act are discovered, [agency] policy encourages that a Warning Notice be issued in lieu of a [Notice of Intent to Fine]." *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). This option, however, is entirely within ICE's prosecutorial discretion. *See* 8 C.F.R. § 274a.9(c).

121, 110 Stat. 864 (1996)); *see also United States v. Red Bowl of Cary, LLC, Inc.*, 10 OCAHO no. 1206, 4-5 (2013); *Ice Castles Daycare Too*, 10 OCAHO no. 1142 at 7. Therefore, due to the very small size of Ideal Transportation's business and the general public policy toward leniency to small business entities, mitigation of the penalty is appropriate and adjustment of the penalty amount is warranted in the exercise of discretion.

ICE found that Respondent acted in good faith, had no history of previous violations, and there were no unauthorized aliens in its workforce. ICE treated these three statutory factors as neutral in its fine analysis. In the exercise of discretion, I find that the facts of this case, as will be addressed further below, warrant mitigation of the penalty for these three factors. *See Ice Castles Daycare Too*, 10 OCAHO no. 1142 at 6.

Lastly, ICE aggravated the penalty based on the seriousness of the violations. "Paperwork violations are always potentially serious," *United States v. Skydive Acad. Corp.*, 6 OCAHO no. 848, 235, 245 (1996), and the complete failure to prepare a Form I-9 for an employee is among the most serious of paperwork violations, *United States v. MEMF LLC*, 10 OCAHO no. 1170, 5 (2013). However, "the seriousness of the violations should be determined by examining the specific failure in each case," *Skydive Acad. of Haw.*, 6 OCAHO no. 848 at 246, and must be "evaluated on a continuum since not all violations are necessarily equally serious," *United States v. Siam Thai Sushi Rest*., 10 OCAHO no. 1174, 4 (2013).

In this case, nine of the twelve violations involved employees that had TWIC Cards. As a result, these employees underwent a thorough vetting process, including providing biographic and biometric information, thus confirming their identity and lawful status. Requiring a TWIC Card, however, does not absolve Ideal Transportation of liability because it does not satisfy the statutory requirements established by Congress at 8 U.S.C. § 1324a(a)(1)(B). OCAHO case law expressly provides that "[n]o other scheme or system an employer wishes to use can circumvent or replace the Form I-9 completion and retention requirements as established at 8 U.S.C. § 1324a(a)(1)(B)." *Holtsville 811 Inc.*, 11 OCAHO no. 1258 at 9 ("Other verification schemes merely aid an employer with their compliance efforts and do not replace an employer's obligation to comply with the law by ensuring completion and retention of Forms I-9."). Nevertheless, the fact that nine of the employees were required to, and did in fact, possess TWIC Cards, can and must be taken into consideration when determining the appropriate penalty. The presence of TWIC Cards certainly goes to the factor of seriousness of the violations as it undercuts the government's argument that Ideal Transportation was "at high risk to hire employees that may not be authorized to work." Motion at 2. The TWIC Cards also positively impact an assessment regarding the other statutory factors, including Respondent's good faith, the absence of any unauthorized aliens, and the absence of any history of previous violations. I find that additional mitigation of the penalty is warranted for the nine employees in possession of TWIC Cards.

I find that the penalty in the instant case should be reduced in the exercise of discretion. *See Ice Castles Daycare Too*, 10 OCAHO no. 1142 at 6. OCAHO case law makes clear that penalties

approaching the maximum permissible fine amount should be reserved for the most egregious violations. *See Fowler Equipment*, 10 OCAHO no. 1169 at 6. Penalty adjustment to the low range of permissible penalties is warranted due to the small size of the business and the general public policy toward leniency to small business entities, Respondent's good faith, the fact that no unauthorized aliens have been hired, the fact that the company has no history of previous violations, and the fact that most of the violations involve employees who underwent a thorough vetting process by obtaining TWIC Cards.

Accordingly, I find that in the exercise of discretion, the proposed penalty in this case should be reduced to $200 for each of the nine violations involving an employee with a TWIC Card, and $300 for each of the three violations involving an employee without a TWIC Card, for a total penalty of $2700. Consistent with OCAHO case law, and for all of the abovementioned reasons, Ideal Transportation is the type of small business enterprise that should benefit from penalty mitigation and the general public policy of leniency toward small business entities, as set forth in the Small Business Regulatory Enforcement Fairness Act.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Ideal Transportation Co., Inc. is an entity incorporated in the Commonwealth of Massachusetts.

2. On June 10, 2014, the Department of Homeland Security, Immigration and Customs Enforcement, served Ideal Transportation Co., Inc. with a Notice of Inspection.

3. On June 23, 2014, Ideal Transportation Co., Inc. presented Forms I-9 to the Department of Homeland Security, Immigration and Customs Enforcement.

4. The Department of Homeland Security, Immigration and Customs Enforcement, served Ideal Transportation Co., Inc. with a Notice of Intent to Fine on May 11, 2015.

5. The Department of Homeland Security, Immigration and Customs Enforcement, filed a complaint with the Office of the Chief Administrative Hearing Officer on September 24, 2015.

6. Ideal Transportation Co., Inc. employed the twelve individuals identified in the complaint after November 6, 1986.

7. Ideal Transportation Co., Inc. failed to timely prepare and/or present Forms I-9 for the following twelve employees: (1) Mario Barreiro; (2) Ilir Bualli; (3) Charles Everdean; (4) Orman

Melanson; (5) Christine Ostler; (6) Geraldo Paulino; (7) John Riley; (8) Dominic Sousa; (9) Bruce Thomas; (10) Paul Vaillancourt; (11) Harland Wells II; and (12) Frances Whippen.

8. Ideal Transportation Co., Inc. is a small business that was found to have acted in good faith, with no history of previous violations, and no presence of unauthorized aliens in its workforce.

B. Conclusions of Law

1. Ideal Transportation Co., 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. Ideal Transportation Co., Inc. is liable for twelve violations of 8 U.S.C. § 1324a(a)(1)(B).

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

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

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

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

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

9. Employers must prepare and retain Forms I-9 for employees hired after November 6, 1986, and are required to produce the Forms I-9 for inspection by the government upon three days'

notice. 8 C.F.R. § 274a.2(b)(2)(ii); *United States v. Keegan Variety, LLC*, 11 OCAHO no. 1238, 2 (2014).

10. For employees hired 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(b)(1)(ii); *see United States v. New China Buffet Rest.*, 10 OCAHO 1132, 4-5 (2010); *United States v. Dr. Robert Schaus, D.D.S.*, 11 OCAHO no. 1239, 8 (2014); *United States v. Buffalo Transportation*, 11 OCAHO 1263, 10 (2015).

11. According to the parameters set forth at 8 C.F.R. § 274a.10(b)(2), civil money penalties are assessed for Form I-9 paperwork violations when an employer fails to properly prepare, retain, or produce the forms upon request.

12. Penalties assessed in the upper-range of penalty amounts should be reserved for the most serious and egregious violations. *See United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013).

13. A penalty needs to be sufficiently meaningful to accomplish the purpose of deterring future violations, *United States v. Jonel, Inc.*, 8 OCAHO no. 1008, 175, 201 (1998), while at the same time not being unduly punitive in light of the particular respondent's resources, *United States v. Minaco Fashions, Inc.*, 3 OCAHO no. 587, 1900, 1909 (1993).

14. 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.

15. "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).

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

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

18. Impossibility may provide a valid affirmative defense to the failure to present Forms I-9 where the forms were actually completed, but later became unavailable through no fault of the employer. *See United States v. Noel Plastering & Stucco, Inc*., 2 OCAHO no. 396, 763, 768 (1991); *United States v. Alvand, Inc*., 2 OCAHO no. 352, 378, 383 (1991).

19. Impossibility is simply not available as an affirmative defense, however, when the destruction of the documents is attributable to the company's own actions. *See United States v. Barnett Taylor, LLC,* 10 OCAHO no. 1155, 8-9 (2012); *United States v. SKZ Harvesting, Inc.,* 11 OCAHO no. 1266, 12 (2016).

20. The submission of Forms I-9 that were completed subsequent to the service of the NOI does not cure or correct the failure to timely prepare a Form I-9 within three days of the employee's hire. *See United States v. Frio County Partners, Inc.*, 12 OCAHO 1276, 10-11 (2016) (citing *Dr. Robert Schaus, D.D.S.*, 11 OCAHO no. 1239 at 8; *New China Buffet Rest.*, 10 OCAHO 1132 at 4-5).

21. "A respondent determined . . . to have failed to comply with the employment verification requirements . . . *shall* be subject to a civil penalty . . ." 8 C.F.R. § 274a.10(b)(2) (emphasis added).

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

23. Leniency toward small businesses is another non-statutory factor appropriate for consideration in this penalty assessment. *See United States v. Keegan Variety, LLC,* 11 OCAHO no. 1238, 6 (2014) (citing the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq. (2006), amended by § 223(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 864 (1996)); *see also United States v. Red Bowl of Cary, LLC, Inc., d/b/a Red Bowl Asian Bistro,* 10 OCAHO no. 1206, 4-5 (2013).

24. "Paperwork violations are always potentially serious," *United States v. Skydive Acad. Corp.,* 6 OCAHO no. 848, 235, 245 (1996), and the complete failure to prepare a Form I-9 for an employee is among the most serious of paperwork violations, *United States v. MEMF LLC*, 10 OCAHO no. 1170, 5 (2013).

25. "[T]he seriousness of the violations should be determined by examining the specific failure in each case," *Skydive Acad. of Haw.,* 6 OCAHO no. 848 at 246, and must be "evaluated on a continuum since not all violations are necessarily equally serious," *United States v. Siam Thai Sushi Rest*., 10 OCAHO no. 1174, 4 (2013).

26. "No other scheme or system an employer wishes to use can circumvent or replace the Form I-9 completion and retention requirements as established at 8 U.S.C. § 1324a(a)(1)(B)." *Holtsville 811 Inc.*, 11 OCAHO no. 1258 at 9 ("Other verification schemes merely aid an employer with their compliance efforts and do not replace an employer's obligation to comply with the law by ensuring completion and retention of Forms I-9.").

ORDER

ICE's Motion for Summary Decision is **GRANTED, IN PART**. The government met its burden of proving that Ideal Transportation, Co., Inc. is liable for twelve violations of 8 U.S.C. § 1324a(a)(1)(B). Respondent is directed to pay civil money penalties in the total amount of $2700. 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 this 7th day of November, 2016.

_____

Thomas P. McCarthy
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.