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

October 19, 2023

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	OCAHO Case No. 2022A00056
ABCO SOLAR, INC., Respondent.	)	

Appearances: James Harmony, for Complainant
John F. Wolcott, Esq., for Respondent

ORDER ON SUMMARY DECISION

I. BACKGROUND

On September 7, 2022, the United States Department of Homeland Security, Immigration and Customs Enforcement (Complainant or the government) filed a complaint against Respondent, ABCO Solar, Inc. (Respondent or the company). The complaint charges Respondent, a solar installation company incorporated in Arizona, with failure to ensure that employees properly completed Section 1 and/or failed to properly complete Section 2 or 3 of the Employment Eligibility Verification Form (Form I-9) for 45 individuals, and failed to prepare and/or present the Form I-9 for 20 individuals, in violation of 8 U.S.C. § 1324a(a)(1)(B). Complainant seeks $130,390 in penalties for these violations. Compl. at 6-7.

The complaint reflects that the government served a Notice of Intent to Fine (NIF) on February 7, 2022, and Respondent thereafter made a timely request for hearing. Respondent filed an answer to the complaint December 7, 2022, which was accepted on January 12, 2023.

On March 31, 2023, the Complainant filed Complainant's Motion for Summary Decision (C's MSD), to which the Respondent filed Respondent's Opposition to USA Summary Judgement Motion (Opp'n) on May 16, 2023. Complainant filed a reply on June 12, 2023. This Order resolves Complainant's motion for summary decision.

II. STANDARDS

A. Summary Decision

The standards for summary decision in cases brought by the government under 8 U.S.C. § 1324a are well established: the government has the burden of proving by a preponderance of the evidence that the respondent is liable for committing a violation of the employment eligibility verification requirements. *United States v. Metro. Enters., Inc.*, 12 OCAHO no. 1297, 7 (2017) (citing *United States v. Nebeker, Inc.*, 10 OCAHO no. 1165, 4 (2013)).[1] The government also "has the burden of proof with respect to the penalty" and the government "must prove the existence of any aggravating factor by the preponderance of the evidence[.]" *Id.* (quoting *United States v. Niche, Inc.*, 11 OCAHO no. 1250, 6 (2015)).

Like the Federal Rules of Civil Procedure, the Office of the Chief Administrative Hearing Officer (OCAHO) rules provide that the Administrative Law Judge (ALJ) "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c). "An issue of material fact is genuine only if it has a real basis in the record" and a "genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit." *Sepahpour v. Unisys, Inc.*, 3 OCAHO no. 500, 1012, 1014 (1993) (first citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986); and then citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

Once the government meets its "initial burden of demonstrating both the absence of a material factual issue and that the party is entitled to judgment as a matter of law, the nonmoving party must come forward with contravening evidence to avoid summary resolution." *United States v. Four Seasons Earthworks, Inc.*, 10 OCAHO no. 1150, 3 (2012) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). "[T]he party opposing the motion for summary decision 'may not rest upon the mere allegations or denials' of its pleadings, but must 'set forth specific facts showing that there is a genuine issue of fact for the hearing.'" *United States v. 3679 Com. Place, Inc.*, 12 OCAHO no. 1296, 4 (2017) (quoting 28 C.F.R. § 68.38(b)). Further, if the government satisfies

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

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). All facts and reasonable inferences are viewed in the light most favorable to the non-moving party. *United States v. Primera Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994) (citations omitted).

B. Employment Verification Requirements

The Immigration and Nationality Act makes it unlawful to employ a person who does not have authorization to work in the United States. 8 U.S.C. § 1324a(a)(1)(A). In order to enforce this provision, the Act set up a system by which employers must verify that their employees are authorized to work in the United States. 8 U.S.C. §§ 1324a(a)(1)(B) and (b)(1). Relevant to this case, 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). The employer ensures that an employee completes section 1 of the Form I-9 by signing and dating the Form I-9 no later than the first day of employment. 8 C.F.R. § 274a.2(b)(1)(i)(A), (ii)(B)); *United States v. Imacuclean Cleaning Servs., LLC*, 13 OCAHO no. 1327, 3 (2019) (citing *United States v A&J Kyoto Japanese Rest.*, 10 OCAHO no. 1186, 5 (2013). The employer must sign section 2 of the Form I-9 for employees employed for three business days or more, within three business days of the employee's first day of employment. 8 C.F.R. § 274a.2(a)(3), (b)(1)(ii)); *United States v. Alpine Staffing, Inc.*, 12 OCAHO no. 1303, 9 (2017).

C. Civil Penalties

When an employer is found to have violated these requirements, the Court levies civil penalties in accordance with the parameters set forth in 8 C.F.R. § 274a.10(b)(2) and 28 C.F.R. § 85.5. The civil penalties for violations of § 1324a are intended "to set a meaningful fine to promote future compliance without being unduly punitive." *Id.* at 17. To determine the appropriate penalty amount, "the following statutory factors must be considered: 1) the size of the employer's business, 2) the employer's good faith, 3) the seriousness of the violations, 4) whether or not the individual was an unauthorized alien, and 5) the employer's history of previous violations." *Id.* at 9 (citing 8 U.S.C. § 1324a(e)(5)). The Court considers the facts and circumstances of the individual case to determine the weight it gives to each factor. *Metro. Enters*., 12 OCAHO no. 1297 at 8. While the statutory factors must be considered in every case, section 1324a(e)(5) "does not mandate any particular outcome of such consideration, and nothing in the statute or the regulations requires . . . that the same weight be given to each of the factors in every case . . . or that the weight given to any one factor is limited to any particular percentage of the total." *United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6–7 (2011) (internal citations omitted). Further, the Court may also consider other, non-statutory factors—such as the Respondent's ability to pay the fine—as appropriate in the specific case. *3679 Commerce Place*, 12 OCAHO no. 1296, at 4

(citation omitted). Finally, Complainant's "penalty calculations are not binding in OCAHO proceedings, and the [Administrative Law Judge] may examine the penalties *de novo* if appropriate." *Alpine Staffing, Inc.*, 12 OCAHO no. 1303 at 10.

III. DISCUSSION

A. Position of the Parties

1. Complainant's MSD

Complainant asserts that it has met its burden of proof, and no genuine issue of material fact exists regarding Respondent's liability for the charged violations. C's MSD 10. Complainant argues that Respondent admitted to liability in its Answer and all violations are substantive. *Id.* at 3. Complainant asserts that its proposed fine is appropriate because, using the Fine Matrix the government uses in all such cases, it assessed the penalty based on the violation percentage, which in this case is 83.54 percent. *Id.* at 19-20, C's MSD Ex. C-3. The Complainant reduced the fine because Respondent is a small business, aggravated for seriousness, and treated the remaining factors as neutral. *Id.* at 20-21.

In support of the motion, Complainant submitted ten group exhibits consisting of, among other things, the original Forms I-9, an employee list with dates of employment, Memorandum to Case File and a Report of Investigation. C's MSD Exs .C-5, C-6, C-8. In the Motion for Summary Decision Memorandum, Complainant provided a summary of each alleged violation for Count I. C's MSD at 13-16. [2]

2. Respondent's Opposition to Complainant's MSD

In its Opposition to Complainant's Motion for Summary Decision, Respondent argues that Complainant should have been issued a non-fine warning notice. Opp'n. at 2-3. As regards the fines, Respondent argues that the alleged violations should be excused by Respondent's good faith. Opp'n 3. Respondent also argues that the fine should be substantially mitigated because it is a small business, with 10 to 15 employees at any one time, its income was cut in half after 2020,

[2] Complainant also included an order from the Arizona Corporation Commission. C's MSD Ex. 10. In its recitation of the facts, Complainant states that although Respondent has no previous violations of 8 U.S.C. § 1324a, it "has a history of stock sales fraud," presumably referring to this order. C's MSD at 5, Ex. C-10. Complainant makes no further mention of the exhibit and any finding of fraud, and it is unclear how the exhibit is relevant to the violations at issue in this case. *See, e.g., United States v. Bazan's Enterprises, Inc.*, 15 I&N Dec. 1408a, 6-7 (2022). The Court will not consider this exhibit.

Respondent cooperated with Complainant and became fully compliant with its I-9 Form requirements. *Id.* at 4-5. Respondent argues that it carefully checked out all prospective employees, no undocumented workers were hired, and this was its first violation. *Id.* at 5. Respondent states that it attempted to mediate but Complainant refused. Lastly, Respondent argues that case law suggests that companies like Respondent are fined at the lower range of the possible fines, and Respondent requests that it be given the same consideration. *Id.* at 5. Respondent did not submit any evidence with its opposition.

In its Request for a Hearing and Prehearing Statement, Respondent argues that any fine will likely push the Company into bankruptcy. Complaint, Attachment B, R's Preh'g Statement, Ex. R-5 at 4. In an order on summary decision, the Court may consider exhibits attached to a prehearing statement as evidence and will do so here. *See United States v. Bazan's Enters., Inc.,* 15 OCAHO no. 1408a, 8 n.7 (2022) (citing *United States v. Hair U Wear, LLC*, 11 OCAHO no. 1268, 9-10 (2016). Respondent attached income taxes from 2019, 2020, and 2021 to the prehearing statement. R's Preh'g Statement, Exs. R-2-4.

B. Liability

In its prehearing statement, Complainant proposed ten stipulations and admissions of fact, to which Respondent agreed. C's Preh'g Statement at 2-3, R's Preh'g Statement at 2. The stipulations are:

> a. At all times relevant to this matter, Respondent was and is duly authorized and registered to do business in the State of Arizona.
>
> b. All individuals listed in Counts I and II of the Complaint were employees of Respondent during the relevant period, between March 1, 2017 and March 1, 2020.
>
> c. All employees of Respondent named in the Complaint were hired on or after November 6, 1986.
>
> d. The documents provided by Respondent to ICE in response to the Notice of Inspection, served on or about March 9, 2020, were the original documents and/or true and accurate copies thereof.
>
> e. The Forms 1-9 provided by Respondent to ICE in response to the Notice of Inspection is the only Form 1-9 maintained or retained for employees working at Respondent between March 1, 2017 and March, 1, 2020.
>
> f. The documents entitled "ABCO SOLAR INC EMPLOYEE DETAILS," consisting of 3 pages, is a true and accurate copy of the employee records maintained by Respondent.

g. Copies of the Arizona Department of Economic Security Unemployment Tax and Wage Report for ABS, for 1st quarter — 4th quarter 2017; 1st quarter — 4th quarter 2018; and 1st quarter — 4th quarter 2019, are true and accurate copies of employee records maintained by Respondent.

h. Respondent failed to ensure that the employee properly completed section 1 and/or failed to properly complete section 2 or 3 of the employment eligibility verification form (Form 1-9) for forty-five individuals listed in Count I of the Notice of Intent to Fine.

i. Respondent failed to prepare or present the Employment Eligibility Verification form (Form 1-9) for the twenty individuals listed in Count II of the Notice of Intent to Fine.

j. Respondent is not and has not been the subject of any previous findings of violations of the provisions of INA § 274A.

As Respondent expressly agreed to the stipulations, which include a stipulation as to liability for Counts I and II (stipulations h and i), the Court finds that Respondent admitted liability to the allegations in the Complaint. *See* C's Prehr'g Statement at 2-3, R's Prehr'g Statement at 2. Respondent stipulated that it engaged in the conduct described at Count I and II of the Complaint. *See id.*; *see also* 28 C.F.R. § 68.47 ("Stipulations may be received in evidence . . . and when received in evidence, shall be binding on the parties[.]"). Moreover, the ALJ may consider "admissions on file" as the basis for summary decision per Federal Rule 56(c). *United States v. Maverick Constr., LLC*, 15 OCAHO no. 1405, 4 (2021) (citations omitted). From Respondent's admission on the violations, Complainant has met its burden of proof and is entitled to judgment as a matter of law on liability for Counts I and II.

C. Defenses Asserted

In its Opposition, Respondent first asserts that it should have been issued a non-fine "Warning Notice" which, according to respondent, can be issued when the government has an expectation of future compliance by an employer even when there have been substantive verification violations. Opp. at 2. OCAHO ALJs have addressed this previously and have noted that while the Complainant has several options available to it when auditing and inspecting an employer's Forms I-9, including the option to issue a warning letter, "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." *United States v. Cawoods Produce, Inc*., 12 OCAHO no. 1280, 21 (2016) (citing *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 (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. . . . "). *See also* the Government's "Fact Sheet," currently available at

www.ice.gov/factsheets/i9-inspection, dated August 7, 2023.); *United States v. Munoz Concrete & Contracting, Inc.*, 12 OCAHO no. 1278, 23 (2016). The Respondent has not asserted any impermissible basis for the Complainant's decision to prosecute this claim, and therefore this ALJ will not disturb the Government's exercise of prosecutorial discretion.

Respondent also appears to argue that it falls within the good faith provision in section 1324a(b)(6)(A). Opp. at 3. This section provides that an entity is considered to have complied with the employment verification requirements notwithstanding a technical or procedural failure if the employer made a good faith attempt to comply. 8 U.S.C. § 1324a(b)(6)(A). An employer must correct the technical or procedural failure within ten days after the date Complainant notifies the employer of the failure. 1324a(b)(6)(B)(ii); *United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1071, 2 (2001).

The good faith defense does not apply to substantive violations, however. *United States v. Super 8 Motel & Villella Italian Rest.*, 10 OCAHO no. 1191, 4 (2013). Whether a violation is substantive or procedural is set forth in a memorandum prepared by a former commissioner of the legacy Immigration and Naturalization Service, and published in the Interpreter Releases, colloquially known as the *Virtue Memorandum*. *See* Memorandum from Paul W. Virtue, INS Acting Exec. Comm'r 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). Relevant to the instant case, the Virtue Memorandum characterizes as substantive violations an employee's failing to prepare or present a Form I-9, failing to sign the attestation in section 1 of the Form I-9, failing to include the required information of a proper List A or Lists B and C document(s) in section 2, unless a legible copy of the document(s) is retained with the Form I-9- and presented at the I-9 inspection, and failing to sign the employer attestation in section 2. *Id*. at 2-4. These are the violations at issue here, *see* § *E.1.c, infra*, and therefore the good faith defense is not available to Respondent.

D. Penalties

1. Statutory Factors

The Court has considered the five statutory factors in evaluating the appropriateness of Complainant's proposed penalty. 8 U.S.C. § 1324a(e)(5).

a. Size of Business

OCAHO case law instructs that the penalty is generally mitigated when Respondent is a small, family-owned business. *See, e.g.*, *United States v. Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355a, 5 (2020) (citing *United States v. Carter*, 7 OCAHO no. 931, 121, 162 (1997)). Complainant mitigated the fine for this factor, finding that Respondent is a small business. *See* C's MSD 20.

Complainant included quarterly unemployment tax internet wage reports for 2017-2019. C's MSD Ex. C-7. The wage reports show that the number of employees fluctuated, but the company had no more than 22 employees at any time during this period. *Id.* OCAHO case law generally considers businesses with fewer than 100 employees to be a small business. *See Carter*, 7 OCAHO no. 931 at 162. The Court agrees that Respondent is a small business, and the fine will be mitigated accordingly.

b. Good Faith

In its calculation, Complainant treated the good faith factor as neutral. C's MSD 20. Complainant noted that Respondent did not demonstrate a satisfactory attention to the Form I-9 process given the numerous violations evident in many of the Forms I-9, and the failure to prepare others. *Id.* Further, Respondent did not provide any evidence about what steps it took prior to the service of the Notice of Inspection to follow the law. Reply at 5. However, Complainant did not find any specific evidence of bad faith and therefore treated the factor as neutral. *Id.* Respondent argues that it was cooperative and did its best to abide by Complainant's directives, and that it meticulously checked out all prospective employees before hiring them, which resulted in no undocumented workers ever working for Respondent. Opp'n 5.

The good faith analysis primarily focuses on the steps the employer took before the investigation to reasonably ascertain what the law requires and the steps it took to follow the law. *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 10 (2010); *United States v. New China Buffet Rest.*, 10 OCAHO no. 1133, 5 (2010) (citations omitted). In order to find that the employer lacked good faith, there must be "evidence of culpable conduct that goes beyond the mere failure to comply with the verification requirements." *United States v. Siam Thai Sushi Rest.*, 10 OCAHO no. 1174, 4 (2013) (citing *United States v. Taste of China*, 10 OCAHO no. 1164, 4–5 (2013)). Because the focus is on the company's conduct before the investigation, "subsequent attempts at compliance have minimal bearing on an analysis of its good faith because conduct occurring after the investigation is over is ordinarily outside the permissible scope of consideration." *Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, at 10; *see also United States v. Felipe, Inc.*, 1 OCAHO no. 93, 626, 634 (1989) (ignorance and mistake do not suffice to show good faith where reasonable care and diligence are required). Contrary to Complainant's statement that there is no evidence of what steps the company took to verify its employees, the Report of Investigation (ROI) submitted by Complainant with its motion for summary decision mentions a conversation with Respondent's Human Resources Manager, Joe Balinski. C's MSD Ex. C-8 at 2. The ROI reports that Mr. Balinski stated that he "personally reviews and produces the Forms I-9 for ABS, and keeps them in a separate and locked filing system from other personnel documents." *Id*. In addition, he stated that he is the primary user for ABS of the E-Verify system, and he "believes that ABS has been an E-Verify user for several years." *Id.* While these statements give some evidence of Respondent's arguments on appeal, they are not sufficiently detailed to provide probative evidence of what steps the Company took. Further, Complainant did not provide any authentication for the ROI. *United States v. Bhattacharya*, 14 OCAHO no. 1380, 5-6 (2020). However, Complainant provided no

evidence indicating bad faith, either. Therefore, the Court finds that the factor was appropriately treated as neutral.

c. Seriousness of the Violations

Complainant treated the seriousness of the violations as an aggravating factor. C's MSD 21. Complainant argues that it demonstrated the existence of 65 finable violations out of 78 total employees for an overall failure rate of 83.3 percent,[3] and each of these substantive violations are considered serious by OCAHO caselaw. *Id.* at 12, 21. Respondent does not make a specific argument as to seriousness, but generally argues that case law suggests that companies in similar circumstances are fined at the lower range of the possible fines. Opp'n 5.

"[P]aperwork violations are always potentially serious." *United States v. Skydive Acad. Haw. Corp.*, 6 OCAHO no. 848, 235, 245 (1996). The Court evaluates the seriousness of violations "on a continuum since not all violations are necessarily equally serious." *United States v. Solutions Grp. Int'l, LLC*, 12 OCAHO no. 1288, 10 (2016) (quoting *Siam Thai Sushi Rest*., 10 OCAHO no. 1174, at 4).

i. Count I

In Count I, Respondent committed a range of paperwork violations. Many of the violations in this Count were very serious, and many of the forms had multiple violations. The forms had one of the following errors in Section 2: (1) twenty-eight forms did not include page two or left page two of the Form I-9 blank;[4] (2) in thirteen forms the certification section was entirely blank, or the employer did not sign the certification;[5] the employee signed for the employer;[6] (3) no list A,B, or C documents for one;[7] and no employee signature.[8] *See, e.g.*, *Occupational Res. Mgmt., Inc.*, 10 OCAHO no. 1166, 27–28 (2013); *United States v. New Outlook Homecare, LLC*, 10 OCAHO no. 1210, 4 (2014) (citing OCAHO case law holding that "failure to properly complete section 2 is

[3] The Memorandum to Case File Determination of Civil Money Penalty submitted with Complainant's motion indicates the violation percentage as 83.54 percent. C's MSD Ex. 3. It is unclear if there is a difference in how these were calculated but, in any event, the error is harmless.

[4] Employee Count I Numbers 1, 3, 4, 7, 8, 9, 10, 11, 16, 17, 18, 20, 21, 22, 23, 25, 27, 29, 31, 32, 33, 35, 36, 39, 41, 42, 43, 45.

[5] Employee Numbers 6, 12, 13, 14, 15, 19, 24, 26, 30, 34, 37, 38, 44.

[6] Employee Numbers 5, 28.

[7] Employee Number 2.

[8] Employee Number 40.

always a very serious violation"); *Imacuclean Cleaning Servs., LLC*, 13 OCAHO 1327, at 10 ("[T]he failure to sign the section 2 employer attestation is 'among the most serious of possible violations.'" (citation omitted)); *United States v. Super 8 Motel & Villella Italian Rest.*, 10 OCAHO no. 1191, 10, 14 (2013) ("While less serious [than failure to prepare or present], an employee's … failure to attest to his or her status in section 1 are still serious violations." (citation omitted));

Many of the Forms I-9 had multiple violations, and although an employer can only be liable for one violation per employee, the additional violations are worth noting. Those include a total of eleven I-9 Forms with no employee signature, five I-9s with missing or incomplete information for List A, B, or C documents, and one with no boxes checked in section 1. *See , e.g.*, *Super 8 Motel & Villella Italian Rest.*, 10 OCAHO no. 1191, 10, 14 (2013); *United States v. Horno MSJ, Ltd.*, 11 OCAHO no. 1247, 11 (2015) (noting that failure to check the box in Section 1, properly verify documents in Section 2, and ensure that a lawful permanent resident employee enters an alien number, are serious violations).

Considering the nature and number of the paperwork violations at issue in Count I, the Court will aggravate the penalty for these violations accordingly.

ii. Count II

In Count II, Respondent failed to present twenty Forms I-9 to inspectors. Failure to present the Form I-9 is "one of the most serious violations." *United States v. Dr. Robert Schaus, D.D.S.*, 11 OCAHO no. 1239, 12 (2014) (citing *United States v. Symmetric Solutions, Inc.*, 10 OCAHO no. 1209, 11 (2014)). Therefore, the Court aggravates the penalty for the violations in Count II.

d. History of Violations and Involvement of Unauthorized Workers

The parties agree that there is no history of previous violations and Complainant did not allege the involvement of unauthorized workers. Respondent argues in its prehearing statement that these factors should be treated as mitigating factors due to the fact that no employees were identified as using suspect documents, and Respondent carefully scrutinized eligible workers. R's Preh'g statement R-5. However, "[t]he general viewpoint in OCAHO case law is that not violating the law in the past does not, on its own, necessarily provide adequate grounds for mitigation." *United States v. El Paso Paper Box, Inc.*, 17 OCAHO no. 1451a, 11–12 (2022) (citations omitted) (collecting OCAHO cases). *See United States v. DJ Drywall, Inc.*, 10 OCAHO no. 1136, 12 (2010). Respondent did not provide any evidence, through affidavits or otherwise, regarding its processes for verifying workers.

2. Non-Statutory Factors

Respondent argues in its brief that it was seriously hurt financially during the COVID-19 pandemic, losing approximately 50 percent of its gross income. Opp'n at 4. Respondent's tax statements, included with its prehearing statement, reveal that in 2019, Respondent reported $2,352,167 in gross receipts and $650,814 in gross profit and taxable income loss of $766,542. R's Preh'g statement, Ex. R-2. In 2020, Respondent reported $1,161,106 in gross receipts, $367,143 in total income, and a taxable income loss of $523,891. *Id.,* Ex. R-3. 2021 saw a small rebound, with a gross profit increase of $200,000 from 2020, an increase in total income of $265,423, and a taxable loss very similar to 2020. *Id.*, Ex. R-4.

"[P]enalties are not meant to force employers out of business or result in the loss of employment for workers." *United States v. Two for Seven, LLC*, 10 OCAHO no. 1208, 9 (2014). Thus, OCAHO precedent recognizes an inability to pay as a non-statutory factor, bearing in mind that the respondent has the burden of proof, and the facts support a favorable exercise of discretion. *See United States v. Pegasus Family Rest.*, 12 OCAHO no. 1293, 10 (2016) (citations omitted).

In assessing inability to pay, OCAHO ALJs have focused on the respondent's overall financial health, as supported by material and reliable evidence of its financial state. *See Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355a, at 7–8 (quoting in part *United States v. Integrity Concrete, Inc.*, 13 OCAHO no. 1307, 17 (2017)) ("Typically, this Court expects an employer to submit detailed financial statements so that the Court can consider the 'complete picture of [the business's] financial health.'"); *see also* 28 C.F.R. § 68.40. Thus, this tribunal has favored documents that show longitudinal financial performance. *See, e.g.*, *United States v. R&SL, Inc.*, 13 OCAHO no. 1333b, 28 (2022) (crediting the multi-year, highly detailed financial information provided by the respondent as "highly probative," as it provided a "sufficiently complete and clear description of [its] financial state"). This tribunal has disfavored conclusory statements about financial status, absent corroborating evidence. *See, e.g.*, *Cityproof Corp.*, 15 OCAHO no. 1392a, at 7 (giving little weight to affidavit by the respondent's owner and president about the financial impact of penalties, as it was vague and "[did] not provide the full picture of the company's financial situation," and was not accompanied by financial documents). This tribunal has also disfavored making determinations on inability to pay based on isolated metrics. For example, "it is well established in our case law that a corporation's ability to demonstrate tax losses does not necessarily establish a company's poor financial condition or its inability to pay." *United States v. Mott Thoroughbred Stables, Inc.*, 11 OCAHO no. 1233, 5 (2014) (citation omitted).

In this case, the only evidence before the Court are tax statements, which show that gross income was substantially reduced from 2019. The Court finds that Respondent's evidence is not detailed enough to show a complete picture of its overall financial health, however. Evidence such as cash flow or balance sheets would provide a better picture of whether the company has the ability to pay the fine. Given the above, the Court concludes that Respondent has not met its burden of proof

that it is unable to pay the proposed penalty, based on its overall financial health. The Court will not mitigate the penalties on account of this non-statutory factor.

Respondent also argues that a proportionate fine would be near the low end of the statutory range. R's Preh'g Statement, Ex. R-5. Respondent contends that ICE's proposed penalty, which is near the high end of the statutory range, is disproportionate to its violations, citing to *Buffalo Transp. Inc. v. United States*, 844 F.3d 381 (2d Cir. 2016).

Complainant believes the proposed penalty is appropriate given Respondent's violation rate. *See* C's Mot. Summ. Dec. 18-20. Complainant states that 83.54 percent of Respondent's Forms I-9 were found to have substantive errors. *Id.* at 19-20. Complainant explains that under its fine matrix, *see id.* at Ex. C-3, the baseline fine is calculated based on the number of finable violations in relation to the number of Forms I-9 the company is required to maintain. Complainant argues that "the large percentage of serious violations found…are concerning and warrant assigned fine." *Id.* at 20. Accordingly, Complainant assessed a penalty of ninety-four percent of the statutory range because of the formula it uses to calculate its fines. *Id.*

The Court finds that Complainant's proposed penalty is disproportionate to the I-9 violations and factors present in this case. This Court makes its adjustments based upon statutory factors and any supported non-statutory factors. Complainant's formula gives the most weight to a non-statutory factor: the percentage of violations as compared to the number of employees. *See United States v. Farias Enters., LLC*, 13 OCAHO no. 1338, 7–8 (2020). While this Court considers the violation percentage, which it agrees is an aggravating factor, it does not find that all the factors here merit a fine close to the statutory maximum, even when considered with the seriousness of the violations.

A balancing of the factors, which include mitigation based on the size of the business, aggravation based on seriousness, a neutral good faith assessment, and the non-statutory factor of violation percentage, results in penalties closer to the middle of the statutory range.

3. Penalties

The applicable penalty range depends on the date of the violations and the date of assessment. *See* 8 C.F.R. § 274a.10(b)(2); 28 C.F.R. § 85.5. For violations that occur after November 2, 2015, the adjusted penalty range as set forth in § 85.5 applies. *Id.* When a violation occurs after November 2, 2015, and the penalty is assessed after December 21, 2021, but before May 9, 2022, the minimum penalty is $237 and the maximum is $2,360. Civil Monetary Penalties Inflation Adjustment, 86 Fed. Reg. 70740-746 (December 13, 2021).

Generally, paperwork violations are "continuing" violations until they are corrected or until the employer is no longer required to retain I-9 forms pursuant to IRCA's retention requirements. *See* § 274a.2(b)(2)(i)(A); *United States v. Curran Eng'g, Co.*, 7 OCAHO no. 975, 874, 895 (1997) (citations omitted); *see also United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1061, 11 (2000).

Thus, "a verification failure occurs not at a single moment in time, but rather throughout the period of non-compliance." *United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1071, 9 (2001) (citation omitted).

The record reflects that the charges are continuing violations that were assessed when the NIF was served, on February 7, 2022. Compl. Ex. A at 2. The range is therefore $237-2,360 per violation.[9]

Complainant proposed a base penalty of $2,006 for each violation based upon the percentage of violations compared to the number of employees. It mitigated the fine five percent for business size, aggravated the fine five percent for seriousness and treated all other factors as neutral. The total penalty sought is $130,390.

The Court begins with a mid-range penalty and adjusts up or down based upon the factors. In this case, the Court, like the Complainant, adjusts downward for size of business, upward for seriousness of the offense and the violation percentage, and treats all other factors as neutral.

The Court will impose a penalty of $1,300 each for the forty-five paperwork violations in Count I and $1,350 for each of the twenty paperwork violations in Count II. The total penalty is $85,500.

IV. CONCLUSION

The Court finds there is no genuine issue of material fact. Complainant's Motion for Summary Decision relating to penalties is GRANTED IN PART. The Court ORDERS Respondent to pay $85,500 in penalties for failing to ensure that employees properly completed Section 1 and/or failed to properly complete Section 2 or 3 of the Employment Eligibility Verification Form (Form I-9) for 45 individuals, and failing to prepare and/or present the Form I-9 for 20 individuals, in violation of 8 U.S.C. § 1324a(a)(1)(B).

[9] The Court is mindful that another, unrelated, case raises the issue of the appropriate date selection for the "date of assessment," (which bears on the correct penalty range). See *United States v. Edgemont Grp.*, LLC, 17 OCAHO no. 1450b, 4–11 (2023) (CAHO Order) (discussing possible interpretations of the relevant date for penalty assessment); *United States v. Edgemont Grp., LLC*, 17 OCAHO no. 1450c (2023) (order for briefing on this question on remand). As the matter remains unresolved, this Order uses the NIF as the date of assessment. However, whether the Court selected a range of $237–$2,360 using the date of the NIF as the date of assessment, or a range of $272–$2,701 using the date of the final order as the date of assessment, see 28 C.F.R. § 85.5, the penalty falls within both ranges and is appropriate in either range.

V. FINDINGS OF FACT

1. This Order incorporates the stipulations listed in part C above to the extent they are findings of fact.

2. ABCO Solar, Inc., had no more than 22 employees at any time.

3. ABCO Solar, Inc., did not provide evidence of its compliance process with the employment eligibility verification requirements before the Department of Homeland Security investigation.

4. ABCO Solar, Inc., experienced a significant decrease in income from tax year 2019 to tax year 2020, with a small rebound in 2021. R's Preh'g statement, Exs. R-2-4.

IV. CONCLUSIONS OF LAW

1. This Order incorporates the stipulations listed in part C above to the extent they are conclusions of law.

2. Federal Rule of Civil Procedure 56(c), a permissible guidance in OCAHO proceedings, *see* 28 C.F.R. § 68.1, allows an ALJ to consider "admissions on file" for the basis of summary decision, and thus will consider stipulations by ABCO Solar, Inc. in finding it liable for violations of 8 U.S.C. § 1324a(a)(1)(B). *United States v. St. Croix Pers. Servs., Inc.*, 12 OCAHO no. 1289, 9 (2016) (citations omitted).

3. In an order on summary decision, the Court may consider exhibits attached to a prehearing statement as evidence and did so here. *See United States v. Hair U Wear, LLC*, 11 OCAHO no. 1268, 9–10 (2016) (citing *United States v Kumar*, 6 OCAHO no. 833, 111, 117–18 (1996)).

4. Given that ABCO Solar Inc. employs no more than 22 persons at any given time, the Court finds that ABCO Solar, Inc. is a small business and will mitigate the paperwork violations penalty accordingly. *See United States v. Pegasus Family Rest., Inc.*, 10 OCAHO no. 1143, 6 (2012); *United States v. Symmetric Sols, Inc.*, 10 OCAHO no. 1209, 10–11 (2013).

5. The good faith factor analysis primarily focuses on the steps the employer took before the investigation to reasonably ascertain what the law requires and the steps it took to follow the law, evidence of which ABCO Solar Inc. did not provide. *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 10 (2010); *United States v. New China Buffet Rest.*, 10 OCAHO no. 1133, 5 (2010) (citations omitted).

6. In order to find that the employer lacked good faith, there must be "evidence of culpable conduct that goes beyond the mere failure to comply with the verification requirements," evidence of which the Complainant did not provide, resulting in a neutral finding for this factor. *United States v. Siam Thai Sushi Rest.*, 10 OCAHO no. 1174, 4 (2013) (citing *United States v. Taste of China*, 10 OCAHO no. 1164, 4–5 (2013)).

7. The Court will treat ABCO Solar Inc.'s paperwork violations in Count I as very serious and aggravates the fine for this factor. *See, e.g.*, *Occupational Res. Mgmt., Inc.*, 10 OCAHO no. 1166, 27–28 (2013); *United States v. New Outlook Homecare, LLC*, 10 OCAHO no. 1210, 4 (2014); *Imacuclean Cleaning Servs., LLC*, 13 OCAHO 1327, 10(2019); *United States v. Super 8 Motel & Villella Italian Rest.*, 10 OCAHO no. 1191, 10, 14 (2013).

8. The Court will treat ABCO Solar Inc.'s paperwork violations in Count II as very serious, since "it is well-established in OCAHO case law that the failure to prepare or present an I-9 is one of the most serious violations because it frustrates the national policy intended to ensure that unauthorized aliens are excluded from the workplace" and aggravates the fine for this factor. *United States v. Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355a, 6 (2020) (citations omitted).

9. The Court evaluates the seriousness of violations "on a continuum since not all violations are necessarily equally serious." *United States v. Solutions Grp. Int'l, LLC*, 12 OCAHO no. 1288, 10 (2016) (citations omitted).

10. OCAHO precedent recognizes an inability to pay as a non-statutory factor, bearing in mind that the respondent has the burden of proof. *See United States v. Pegasus Family Rest.*, 12 OCAHO no. 1293, 10 (2016) (citations omitted). In assessing inability to pay, OCAHO ALJs have focused on the respondent's overall financial health, as supported by material and reliable evidence of its financial state which Respondent did not provide in this case. *See Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355a, at 7–8 (quoting in part *United States v. Integrity Concrete, Inc.*, 13 OCAHO no. 1307, 17 (2017)).

11. Complainant's proposed penalty is disproportionate, even taking into account the high percentage of violations as compared to the Forms I-9 required to be kept by the business. *See United States v. Safe-Air of Ill.*, 12 OCAHO no. 1270, 5 (2016); *United States v. Century Hotels Corp.*, 11 OCAHO no. 1218, 8 (2014).

12. The paperwork violations are continuing violations that were assessed when the Notice of Intent to Fine was served, on February 7, 2022. The range is therefore $237-2,360 per violation. *See United States v. Curran Eng'g Co.*, 9 OCAHO no. 1061, 11 (2000); *United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1061, 11 (2000).

13. The Court will impose a penalty of $1,300 for the forty-five paperwork violations in Count I. The Court will impose a penalty of $1,350 for the twenty paperwork violations in Count II. The total penalty for Respondent's violations of 8 U.S.C. § 1324a(a)(1)(B) is $85,500.

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

SO ORDERED.

Dated and entered on October 19, 2023.

_____
Honorable Jean C. King
Chief Administrative Law Judge

Appeal Information

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

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

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

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