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

April 22, 2014

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 13A00075
CRESCENT CITY MEAT COMPANY, 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), in which the United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a complaint alleging that Crescent City Meat Company, Inc. (Crescent City or the company) violated 8 U.S.C. § 1324a(a)(1)(B) by failing to prepare, retain, and/or present I-9 forms for fifteen employees. The total penalty sought was $14,025.

Crescent City, by its president and owner, Gerard D. Hanford, filed an answer admitting that Crescent failed to prepare, retain, or present I-9s for fifteen individuals. A telephonic prehearing conference was conducted on September 12, 2013, at which the parties agreed that there was no dispute regarding the company's liability for the violations alleged. Hanford said the company was previously unaware of the necessity to complete these forms. The parties were given an opportunity to set out their views as to the appropriate penalties, and both parties did so. The sole issue to be determined is the penalties to be imposed for the fifteen failures involved.

II. BACKGROUND

Crescent City Meat is a small family business that was initially registered in Louisiana on October 3, 1985. Crescent City is located in Metairie, Louisiana where it makes and sells meat products to retail and wholesale customers. The company is owned by Gerard D. Hanford, and has fewer than ten employees, several of whom are family members. ICE served Crescent City with a Notice of Inspection (NOI) and administrative subpoena on May 31, 2012, requiring Crescent to produce I-9 forms for current and former employees. In response, Crescent City submitted belatedly completed I-9s for the current employees, along with other relevant documents, but was unable to prepare the forms retroactively for its former employees because specific information about their hire and termination dates was no longer unavailable after the loss of some company documents in Hurricane Katrina. ICE served Crescent City with a Notice of Intent to Fine on April 25, 2013, after which the company made a timely request for hearing on or about May 1, 2013. ICE filed a complaint with this office on May 23, 2013, and all conditions precedent to the institution of this proceeding have been satisfied.

III. PENALTY ASSESSMENT

A. Standard Applied

Civil money penalties are assessed for paperwork violations according to the parameters set forth at 8 C.F.R. § 274a.10(b)(2): the minimum penalty for each individual with respect to whom a violation occurred after September 29, 1999, is $110, and the maximum is $1100. The permissible penalties for the fifteen violations established range from a minimum of $1650 to a maximum of $16,500. In assessing an appropriate penalty, the following 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. 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).[1]

[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 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

B. The Government's Position

ICE said it calculated a baseline penalty in accordance with internal agency guidance that sets a penalty of $935 for each violation when the employer's error rate exceeds fifty percent. The government mitigated the penalty by five percent based on the small size of Crescent City's business, but aggravated the penalty by five percent based on the seriousness of the violations, citing *United States v. Davis Nursery, Inc.*, 4 OCAHO no. 694, 924, 943 (1994). ICE's penalty memorandum explains that the company completed I-9 forms for its current employees after the issuance of the NOI, but was unable to provide I-9s for its previous employees because the company did not require them to complete the form at the time of hire. ICE treated the remaining factors of good faith, history of previous violations, and presence of unauthorized workers as neutral. After mitigating and aggravating factors offset each other, the baseline penalty for each violation remained $935, for a total of $14,025.

The government's memorandum argues that its proposed penalty should not be modified because this case is distinguishable from *United States v. Mr. Mike's Pizza*, 10 OCAHO no. 1196, 3 (2013), in which the penalties for another very small family business were substantially reduced in similar circumstances where the employer was wholly unaware of the I-9 requirements until receiving the NOI. ICE points out that the company in *Mr. Mike's* presented evidence of its inability to pay, but the company here has not done that.

The government's memorandum was accompanied by exhibits consisting of: A) Excerpt from Worksite Enforcement Handbook (2 pp.); B) Memorandum to Case File/Determination of Civil Money Penalty (3 pp.); C) Quarterly Earnings Report provided by Crescent City Meat (2 pp.); and D) Crescent City Meat's Quarterly Wage and Tax Reports provided to the Louisiana Workforce Commission (2 pp.).

C. Crescent City's Position

Crescent City's response stresses that it is a small family business, and says that it did show good faith because as soon as it became aware of the I-9 form, it immediately complied with the requirements. The company says it didn't know beforehand that the I-9 form even existed because the government had never notified it about the requirements. Crescent questions how it could be expected to know of the law without hiring an attorney or a human resources administrator, which it lacks the financial resources to do. A letter Hanford wrote to government counsel notes that "[i]f there was a manual on all of the forms and documents needed to open a small business the author would certainly make a fortune."

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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.

The company says in addition that the government uses *Davis* as its "gauge of seriousness," but that Crescent's violations are not as serious as those in *Davis*, and penalties there were only $250 for each violation. The company also says that the government should not have aggravated the penalty based on the company's failure to provide I-9s for former employees because this is an unrealistic expectation with which it is "not humanly possible" to comply. The company also says it has suffered losses over the last twenty-five years, and asks for a reduction or elimination of the penalty because Hanford has had to deplete his retirement savings just to stay in business. No exhibits accompanied Crescent's memorandum.

D. Discussion and Analysis

Although the factual record is relatively barren in this case, it is evident that Crescent is a small family business of a "mom and pop" character, that there is no indication of bad faith on the company's part, no unauthorized employees, and no history of previous violations. Apart from the seriousness of the violations, the statutory factors incline in the company's favor.

There are some troubling questions that arise from a review of the record. As the government is aware, the law requires employers to complete employment eligibility verification only for employees hired after November 6, 1986. The complaint in this matter specifically alleges that the employees named in Count I were hired after November 6, 1986. The complaint is worded this way because employers have no obligation to complete I-9 forms for employees hired prior to the effective date of the statute, because of the so-called "grandfather clause." *See* 8 C.F.R. § 274a.7(a)(1); *United States v. Anodizing Indus.*, 10 OCAHO no. 1184, 5 (2013). Here, the government's memorandum to case file acknowledges that Crescent City expressly told the government that two of its nine current employees had worked there since before the effective date of the statute. Those employees are not identified by name. The government has apparently chosen to disregard that information. The government's own memorandum undermines the company's admissions of liability.[2]

Just as employers are expected to make a good faith effort to comply with the law, so too is the government, especially when dealing with an unrepresented and legally unsophisticated litigant. Where, as here, a party is unrepresented by counsel and lacks knowledge of the law, it is doubly important that the government act with scrupulous fairness. Mr. Justice Holmes famously said in another context that "[m]en must turn square corners when they deal with the Government," *Rock Island, Arkansas & Louisiana Railroad Co. v. United States*, 254 U.S. 141, 143 (1920), a precept to which Mr. Justice Jackson, dissenting in *Federal Crop Insurance Corp. v. Merrill,* 332 U.S. 380, 387-88 (1947) added the observation that "there is no reason why the square corners

[2] The record also raises serious concerns as to whether Gerard Hanford, as the working owner of the company, is an individual for whom an I-9 must be prepared.

should constitute a one-way street." A citizen has the right to expect fair dealing from the government. *S & E Contractors, Inc. v. United States*, 406 U.S. 1, 10 (1972). ICE overreaches when it issues a NIF and files a complaint containing allegations that the government actually knows to be false.

Because grandfathered status is a matter of affirmative defense, *United States v. Gasper*, 1 OCAHO no. 218, 1472, 1473-74 (1990), it is waived when not pleaded in an answer. *See United States v. Haim Co., Inc*., 7 OCAHO no. 988, 1030, 1039 (1998). A party having the benefit of counsel would know that, but a pro se party generally would not. Crescent City will be held to its admissions of liability, but the penalties in this matter will be reduced as a matter of discretion to the minimum permissible in light of the government's overreach. The total penalty for the fifteen violations in this case is $1650.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Crescent City Meat Company, Inc. is a sausage-making company located in Metairie, Louisiana.

2. Department of Homeland Security, Immigration and Customs Enforcement served Crescent City Meat Company, Inc. with a Notice of Inspection (NOI) on May 31, 2012.

3. Department of Homeland Security, Immigration and Customs Enforcement served Crescent City Meat Company, Inc. with a Notice of Intent to Fine on April 25, 2013.

4. Crescent City Meat Company, Inc. made a timely request for hearing on or about May 1, 2013.

5. Department of Homeland Security, Immigration and Customs Enforcement filed a complaint with this office on May 23, 2013.

6. Crescent City Meat Company, Inc. hired Brian Baker, Alex Bedoucha, Darnell Harding, Gerard D. Hanford, Lauren Hanford, Dennis Jackson, Alfred Jones, Donald Jones, Darren Johnson, Danielle Lathers, Cynthia Migon, Charles McClup, Randall Pete, Gregory Powell, and Sarah Reginald, and failed to prepare, retain, and/or present Forms I-9 for them.

7. The government's evidence reflects that the company informed ICE that two unnamed individuals whose I-9s are at issue have been employed at Crescent City Meat Company, Inc. since some time prior to November 6, 1986.

B. Conclusions of Law

1. Crescent City Meat Company, 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. Crescent City Meat Company, Inc. admitted liability for fifteen violations of 8 U.S.C. § 1324a(a)(1)(B).

4. In assessing an appropriate penalty, the following 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. 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).

5. A citizen has the right to expect fair dealing from the government. *S & E Contractors, Inc. v. United States*, 406 U.S. 1, 10 (1972).

6. Grandfathered status is an affirmative defense, *United States v. Gasper*, 1 OCAHO no. 218, 1472, 1473-74 (1990), and the defense is waived when not pleaded in an answer. *See United States v. Haim Co., Inc*., 7 OCAHO no. 988, 1030, 1039 (1998).

7. In consideration of what appears to be overreaching on the part of the government, the penalties in this matter are reduced to the minimum permissible.

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

ORDER

Crescent City Meat Company, Inc. is liable for fifteen violations of 8 U.S.C. § 1324a(a)(1)(B) and is ordered to pay a civil money penalty of $1650.

SO ORDERED.

Dated and entered this 22nd day of April, 2014.

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Ellen K. Thomas
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.

UNITED STATES DEPARTMENT OF JUSTICE
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OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

May 22, 2014

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 13A00075
CRESCENT CITY MEAT COMPANY, INC. Respondent.	)	

ORDER BY THE CHIEF ADMINISTRATIVE HEARING OFFICER VACATING THE ADMINISTRATIVE LAW JUDGE'S FINAL DECISION AND ORDER AND REMANDING FOR RECONSIDERATION OF THE PENALTY ASSESSMENT

I. PROCEDURAL HISTORY

This case arises under the "employer sanctions" provisions of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324a (2006). The United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or Complainant), filed a complaint alleging that Crescent City Meat Company, Inc. (Crescent City or Respondent) violated 8 U.S.C. § 1324a(a)(1)(B) by failing to prepare, retain, and/or present Employment Eligibility Verification Forms I-9 for fifteen employees. ICE sought civil money penalties totaling $14,025 for the fifteen violations alleged ($935 per violation). The case was assigned to Administrative Law Judge (ALJ) Ellen K. Thomas.

Crescent City, through its owner Gerard B. Hanford, filed an answer admitting that it had hired the fifteen named employees after November 6, 1986 (the effective date of the relevant statutory provisions), and had failed to prepare, retain, and/or present Forms I-9 for those employees. ALJ Thomas conducted a telephonic prehearing conference, during which the parties both agreed that there was no dispute regarding Crescent City's liability for the violations alleged. This agreement as to Respondent's liability for the violations at issue was memorialized in a Memorandum of Case Management Conference issued by the ALJ on September 12, 2013. However, the parties disagreed on the appropriate amount of the penalty. Accordingly, the ALJ directed ICE to file an explanation of how it arrived at its penalty assessment, and permitted Respondent to reply. ICE filed its Memorandum in Support of Civil Monetary Penalties shortly thereafter, and Respondent filed a timely Written Answer in Response.

On April 22, 2014, the ALJ issued her Final Decision and Order in the case. The final decision held Crescent City to its admissions of liability for the fifteen violations alleged, but reduced the penalties to the minimum amount permissible under the statute ($110 per violation). The ALJ based this reduction on a finding that ICE appeared to have overreached in its Notice of Intent to Fine (NIF) and subsequent complaint in the case by including penalties for violations based on two employees hired before the effective date of the act ("grandfathered employees"). The finding of apparent government overreach appears to be based on the ALJ's assumption that ICE alleged violations pertaining to the two grandfathered employees, despite being expressly told by Respondent that those employees had been hired prior to the effective date of the employment eligibility verification requirements.

After discussing the responsibility of the government to make a good faith effort to comply with the law (just as employers are expected to do), particularly when dealing with unrepresented parties, the final decision and order finds that "ICE overreaches when it issues a NIF and files a complaint containing allegations that the government actually knows to be false." Final Decision and Order, at 4. Accordingly, as a matter of discretion, the ALJ reduced the penalties "to the minimum permissible in light of the government's overreach." *Id.* at 5. The total penalty for the fifteen violations was assessed at $1,650.

On May 1, 2014, Complainant filed a request for administrative review. The request for review argued that: the ALJ made several factual errors in the final decision; the ALJ erred in concluding that ICE had overreached in issuing the NIF and filing the complaint; and the ALJ abused her discretion by reducing the penalty to the statutory minimum based on incorrect findings of fact and conclusions of law. Accordingly, Complainant requested that the Chief Administrative Hearing Officer (CAHO) vacate the ALJ's final decision and enter an appropriate penalty based on the correct facts.

The request for review was timely filed and served. However, Respondent did not file a response.[1] I have reviewed the request and considered all relevant portions of the official case record in arriving at this decision.[2] Based on this review, I hereby vacate the ALJ's Final Decision and Order and remand the case to the ALJ to reconsider the penalties assessed in light of this opinion and the findings and conclusions articulated herein.

II. JURISDICTION AND STANDARD OF REVIEW

Under 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. § 68.54, the CAHO has discretionary authority to review any final order of an ALJ in a case brought under § 1324a. A party seeking review by the CAHO may file a request for review within ten days of the date of entry of the ALJ's final order in an employer sanctions case. 28 C.F.R. § 68.54(a)(1). The CAHO may issue an order

[1] Although OCAHO's rules allow the parties to file briefs or other written statements within twenty-one days of the date of entry of the ALJ's order in a case in which administrative review has been properly requested, 28 C.F.R. § 68.54(b)(1), Respondent did not file a responsive brief or other statement.

[2] Complainant attached an exhibit to its request for review that was not part of the record below. Because it was not necessary to consult this additional exhibit in order to reach my conclusion in this case, the exhibit was not considered during the administrative review. Upon remand, the ALJ may, in her discretion, permit Complainant to introduce this documentation if it would be necessary or helpful in reevaluating the appropriate amount of the civil money penalty.

modifying, remanding and/or vacating a decision by the ALJ in such cases within thirty days of the date of the ALJ's final decision and order. 8 U.S.C. § 1324a(e)(7); 28 C.F.R. § 68.54(d)(1). Under the Administrative Procedure Act, which governs OCAHO cases, the reviewing authority in administrative adjudications "has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule." 5 U.S.C. § 557(b). This authorizes the CAHO to apply a *de novo* standard of review to final decisions and orders of an ALJ. *See Maka v. INS*, 904 F.2d 1351, 1356 (9th Cir. 1990); *Mester Mfg. Co. v. INS*, 900 F.2d 201, 203-04 (9th Cir. 1990); *United States v. Red Coach Rest.*, 10 OCAHO no. 1200, 2 (2013); *United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 477, 478 (1995).[3]

III. DISCUSSION

A. Arguments in the Request for Review

Complainant's request for review argued that the ALJ made several erroneous factual findings in the final decision and order. First, Complainant argues that the ALJ erred when she stated that the government disregarded the fact that two of Respondent's current employees had worked for the company since before November 6, 1986. Complainant notes that its Memorandum to Case File, submitted with its Memorandum in Support of Civil Monetary Penalties, states that Respondent provided a list of approximately fifty employees and identified nine current employees (two of whom were hired prior to November 1986) and eight former employees who were employed by the company within the previous year. In light of this information, ICE charged the Respondent with only fifteen violations of 8 U.S.C. § 1324a – seven violations pertaining to the current employees who were hired after November 1986, and eight violations pertaining to the employees employed within the previous year. Therefore, Complainant asserts that, contrary to the ALJ's assumption that the government apparently chose to disregard the information that two of Respondent's current employees worked for the company since before the effective date of the statute, "[a]t no point did ICE ever fine or allege that it would fine Respondent for the two employees hired before November 1986."

Additionally, Complainant argues that the ALJ was incorrect in assuming that Gerard **D.** Hanford was the working owner of the company. *See* Final Decision and Order, at 4 n.2. ICE notes that its complaint, as well as all subsequent certificates of service from both ICE and OCAHO, specifically attest to service on Gerard **B.** Hanford, who was identified on previous correspondence as the President of Crescent City. ICE asserts that it did not include Gerard **B.** Hanford in the NIF or the complaint because he was employed by the company since before November 6, 1986.[4]

[3] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and 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 volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not 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 OCAHO's website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

[4] ICE posits in a footnote in its request for review that had Gerard B. Hanford been hired after November 6, 1986, he would have been required to complete a Form I-9 for himself, despite the fact that he was Respondent's owner,

Complainant concedes that it did not previously provide the names of the two current employees who were employed by Respondent since before November 1986; however, it explains that it simply saw no reason to include that information because the parties agreed that liability was not an issue. Complainant argues that due to these inadvertent factual errors by the ALJ, the final decision and order should be vacated and reissued and the CAHO should reassess the penalties in a manner consistent with the correct facts.

Next, Complainant asserts that because the parties agreed to liability based on the facts alleged in the case, and, as such, the only issue in dispute was the amount of the penalty to be imposed, the ALJ erred in concluding that ICE overreached in issuing the NIF and filing the complaint against Respondent based on the violations alleged.

Finally, Complainant argues that the ALJ abused her discretion by reducing the penalty to the minimum permissible amount based on incorrect findings of fact and conclusions of law. ICE reaffirms its request for the original proposed penalty amount as appropriate, and asks the CAHO to review the record *de novo* and enter an appropriate penalty.

B. Inclusion of Employees Hired Before November 6, 1986, in Notice of Intent to Fine and OCAHO Complaint

Because the penalties for violation of the employment eligibility verification requirements apply only to employees hired on or after November 7, 1986, *see* 8 C.F.R. § 274a.7(a)(1), an employer is not obliged to prepare and retain a Form I-9 for an employee hired prior to that date. *See United States v. Anodizing Indus., Inc.*, 10 OCAHO no. 1184, 5 (2013). Accordingly, in both the NIF and the complaint filed with OCAHO, ICE specifically averred that each individual who was the subject of an alleged employment eligibility verification violation was hired by Respondent after November 6, 1986. In its written answer to the complaint, Respondent expressly affirmed that the allegation that it hired each of the fifteen listed individuals after November 6, 1986, was "true and accurate." After a telephonic prehearing conference among the ALJ and the parties, the ALJ noted in her Memorandum of Case Management Conference that "[t]he parties agreed that based on initial filings, there is no dispute regarding the facts of the case that establish respondent's liability for the fifteen violations at issue." Since no issue regarding liability was raised by the parties or by the ALJ at that time, both parties' subsequent filings only addressed the appropriate amount of the penalty to be assessed for the fifteen violations of 8 U.S.C. § 1324a(a)(1)(B).

Despite this apparent lack of dispute as to Respondent's liability for the fifteen violations alleged, the ALJ's final decision and order raised the possibility that the NIF and complaint filed by ICE contained "allegations that the government actually knows to be false" (i.e., that all fifteen employees for whom violations were alleged were hired by the company after the effective date of the employer sanctions provision). Final Decision and Order, at 4. The final decision implied that ICE may have included alleged violations relating to two current employees who were hired prior to November 6, 1986. On this basis, the final decision concluded that the government overreached in its NIF and complaint. Accordingly, the ALJ

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because he was also an employee. Because this particular question of law is not essential to the outcome of this review, I do not reach the issue here of whether an "owner-employee" is required to complete an I-9 Form for him- or herself.

reduced the civil penalties to the absolute minimum amount allowed under the statute for the fifteen violations alleged.

In particular, the ALJ's final decision cited ICE's Memorandum to Case File, pointing out that the memorandum acknowledged that Respondent expressly told the government that two of its nine current employees were hired before the effective date of the statute. Indeed, the memorandum stated as follows:

> The company provided a list of approximately fifty (50) employees. The President, Gerard B. Ha[n]ford, went through the employee list and noted the nine current employees (two of which were hired prior to November 1986). Mr. Ha[n]ford also noted eight employees who were employed by the company within the previous year.

As Complainant explained more fully in its request for review, it did not fine or attempt to fine Respondent for violations relating to the two current employees who were hired prior to November 1986. In fact, rather than undermining the company's admissions of liability, as the final decision stated, ICE's memorandum supports the number of violations it alleged in the NIF and complaint. That is, Crescent City identified *seventeen* employees who were employed within the previous year – nine current employees and eight former employees. Of those employees, Crescent City identified two as having been hired before November 1986. Consequently, ICE's NIF and complaint charged Respondent with only *fifteen* violations. Although it did not name the two grandfathered employees whom it excluded from the NIF and complaint, ICE did name the fifteen employees who were the subject of the alleged violations of 8 U.S.C. § 1324a(a)(1)(B). Moreover, Respondent expressly admitted in its answer to having hired each of those fifteen named employees after November 6, 1986. Based on these facts, ICE does not appear to have overreached in issuing the NIF and filing the complaint in this case.[5]

C. Penalty Reduction Based on Incorrect Finding of Fact and Conclusion of Law

Penalties are assessed for employment eligibility verification violations according to the framework and range established by 8 U.S.C. § 1324a(e)(5) and 8 C.F.R. § 274a.10(b)(2). The minimum penalty for each violation in this case is $110, and the maximum penalty for each violation is $1,100. In assessing the penalty, the statute mandates that five factors be given "due consideration": (1) the size of the business of the employer being charged; (2) the good faith of the employer; (3) the seriousness of the violation; (4) whether the individual involved was an unauthorized alien; and (5) the history of previous violations. 8 U.S.C. § 1324a(e)(5). However, the statute does not require that each factor be given equal weight; nor does it rule out consideration of other factors. *See United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000).

This broad potential range of penalties affords the ALJ a good deal of discretion in setting the ultimate penalty. However, since the CAHO is authorized to review final decisions by an ALJ *de novo*, the CAHO may substitute his or her judgment for that of the ALJ. *See Karnival Fashion, Inc.*, 5 OCAHO no. 783, at 478. Although the ALJ has the discretion to reduce the civil penalties

[5] ICE's failure to explicitly state in its NIF or complaint that it excluded the grandfathered employees, and its failure to identify these employees by name, may have led to the ALJ's assumption that these two employees had been included by ICE in the alleged violations.

to the statutory minimum after due consideration of the required statutory factors, in this case the reduction to the minimum amount was based at least in part on a finding of apparent overreach by the government in the form of including violations for grandfathered employees in its penalty assessment. That finding is not substantiated by the record below (i.e., after considering the total number of employees within the relevant time period (17), as cited in ICE's Memorandum to Case File, and deducting the 2 grandfathered employees, the record supports the final number of violations (15), as alleged in ICE's NIF and Complaint, and admitted to in Respondent's Answer). Because, in my view, ICE did not attempt to charge Respondent with violations for any individuals hired before November 6, 1986, I find no overreach in ICE's NIF or Complaint in this case.

IV. CONCLUSION

Accordingly, because the ALJ's penalty assessment was based at least in part on a finding of fact and a conclusion of law that are not supported by the record, the Final Decision and Order of April 22, 2014, is hereby VACATED, and the case is REMANDED for reconsideration of the penalty assessment.[6]

It is SO ORDERED, dated and entered this 22nd day of May, 2014.

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Robin M. Stutman
Chief Administrative Hearing Officer

[6] Although Complainant requested the CAHO to reassess the appropriate penalty amount in this case, I instead chose to remand the case to the ALJ to reassess the appropriate penalty amount in light of this decision and its findings because the ALJ is best suited to exercise this authority in the first instance.