Published 9/8/15 11 OCAHO no. 1258

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

September 1, 2015

UNITED STATES OF AMERICA, Complainant, v. HOLTSVILLE 811 INC. D/B/A 7-ELEVEN (STORE #39167), Respondent.	)	8 U.S.C. § 1324a Proceeding OCAHO Case No. 14A00069

Appearances:

Michael Horowitz
For complainant

Ganesh Nadi Viswanathan
For respondent

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY AND BACKGROUND INFORMATION

This is an action pursuant to the employer sanction provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C § 1324a (2012). On June 12, 2014, the United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a Complaint, alleging that Holtsville 811 Inc. (Holtsville or the company), violated 8 U.S.C. § 1324a(a)(1)(B). Count I of the Complaint alleges that the company hired twenty-seven individuals for whom it failed to prepare and/or present Employment Eligibility Verification Forms (Forms I-9) and assesses a fine of $26,554. Count II of the Complaint alleges that the company failed to ensure proper completion of the Forms I-9 for eight individuals and assesses a fine of $7,854. In total, the government's assessed fine is $34,408.

Holtsville filed its Answer to the Complaint September 15, 2014, in which it denied willfully committing any violations. Holtsville's Answer also set forth nineteen affirmative defenses, including the arguments that the maximum penalties assessed are unwarranted, that any violations resulted from Holtsville being "a single owner-small business and without the benefit of professional help," and that its "national-franchise . . . nation-wide database was independently complying with the legal provisions of all applicable laws." Holtsville concluded its Answer by requesting that the Complaint be dismissed, or, in the alternative, discovery or an evidentiary hearing be undertaken.

On October 16, 2014, complainant filed a Prehearing Statement, which sets forth numerous proposed stipulations that ICE contends are not in dispute. In paragraph 2(c) of its Prehearing Statement, ICE contends that respondent failed to provide Forms I-9 for two of its employees, Khagashwor Kapri and Chudamani Niroula. ICE also claims that twenty-seven of the thirty-three Forms I-9 presented for inspection were not completed in a timely manner.

Specifically, ICE states in paragraph 2(d) of its Prehearing Statement that five Forms I-9 (for Nicholas Bazoge, Manishkumar Patel, Sweta Patel, Subhadra Patel, and Roseanne Rappa) were backdated because the forms were allegedly completed by the employees in 2011 and 2012, but the actual Form I-9 used was not created by the Agency until March 8, 2013 (as noted at the bottom of the Form). ICE also includes a footnote in paragraph 2(d), explaining that Manishkumar Patel "was found to not have authorization to work in the United States in that the social security card he presented was determined to contain a number relating to another individual."

In addition, ICE explains in paragraph 2(e) that eleven Forms I-9 were not timely completed by employees, as evidenced by the disparity between the hire dates (2010, 2011, 2012, and February 2013) and the date of issuance of the Form I-9 used because the hire dates predate the Agency's issuance of the Form I-9 (on March 8, 2013). Moreover, these eleven forms lack an employee signature in "Section 1" and are missing page 2, which contains "Section 2" and "Section 3." Complainant also identifies in paragraph 2(f) that nine other Forms I-9 were untimely prepared and contain substantive paperwork violations. Moreover, complainant alleges in paragraph 2(g) of its Prehearing Statement that eight Forms I-9 contain a variety of other substantive paperwork violations, such as missing signatures, missing dates, missing names, and missing document numbers.

Respondent filed an untimely Prehearing Statement on February 12, 2015. In its Prehearing Statement, respondent repeats its arguments and affirmative defenses previously set forth in its Answer, and respondent "denies" all other proposed stipulations setting forth the alleged paperwork violations. Respondent also states that it "proposes to rely upon the documents referred to . . . by the Government." Respondent's Prehearing Statement at 6.

On July 14, 2015, the government filed its Motion for Summary Judgment. Complainant government argues that it is entitled to summary decision "as there are no genuine issues of material fact with respect to Respondent's having violated section 274A(a)(1)(B) of the Act as set forth in the Complaint." Complainant's Motion for Summary Judgment para. 14. Moreover, complainant argues that respondent "has provided no specific facts or evidence showing that the I-9s listed in [paragraphs 2(d)-(g)]" were not backdated, were not timely completed, were not completed at the time of hire, and/or do not contain the "specific substantive violations" set forth in the Complaint. Complainant's Motion for Summary Judgment paras. 9-14.

Additionally, complainant sets forth the factors it considered when assessing the penalties. Complainant states that because respondent failed to submit any Forms I-9 that were in compliance, such that one-hundred-percent (100%) of the Forms I-9 contained substantive violations, complainant assessed a base fine of $935 per violation. Complainant's Motion for Summary Judgment paras. 17, 19. The government then enhanced the penalties by five-percent for a fine of $981 per violation "based on lack of good faith by the employer. This was determined because Respondent was found to have backdated I-9s . . . ." Complainant's Motion for Summary Judgment paras. 17-18. In a footnote, the government also explains that it further enhanced the fine for the Form I-9 submitted for Manishkumar Patel by an additional five-percent to $1,028.58 in light of the government's contention that this individual is not authorized to work. Complainant's Motion for Summary Judgment n.3. The total fine assessed by the government for all violations is $34,408.

Respondent Holtsville filed its Motion for Summary Judgment on July 15, 2015. In its Motion, respondent reiterates numerous arguments previously addressed. Additionally, respondent claims that it "cannot be said to have indulged in (a) deliberate, (ii) intentional, (iii) willful manner *so as to subvert* the *employment verification process*." Respondent's Motion for Summary Judgment at para. 14. Moreover, respondent argues that "the imposition of any penalty here would be a serious imposition upon his small business and would seriously affect the very existence of its business." Importantly, respondent attempts to rebut the allegation that it employed an unauthorized worker, claiming that the worker presented a valid "social security card showing no restriction of employment."

On August 7, 2015, respondent filed its "Respondent's Response in Opposition to Motion for Summary Judgment by the Complainant, United States of America" ("Respondent's Response"), including four attached exhibits. The first exhibit is an Affidavit from Deven Patel, President of Holtsville ("Aff. Patel"). Mr. Patel explains that Holtsville is a small business in Holtsville, Long Island, New York, employing "nine employees, of which, four at any time are students from the local community." Aff. Patel para. 2. Additionally, Mr. Patel states that he has been running the business for twenty-years, and that "[t]he business is solely being operated by me, alone, as a family business." Aff. Patel para. 26(d). Mr. Patel also requests that any fine that is assessed be "a very nominal civil penalty, considering the small size, community nature of the Respondent's business . . . as well as the severe financial difficulties that this small business may

be put to." Aff. Patel para. 23. Mr. Patel further stated, "I take home as profits at the end of the year very little." Aff. Patel para. 24.

Moreover, Mr. Patel explains that he has not employed any "undocumented or unauthorized" workers, explaining that the government erred when alleging that Manishkumar Patel is an unauthorized worker because he "produced at the time of hire . . . a social security card that was unrestricted." A copy of Manishkumar Patel's social security card, 2010 New York State Department of Labor paperwork, and "7-Eleven" employment application from October 2010 are attached as Exhibit Four. Exhibit Three lists employees by name and identifies the documents employees presented to show work authorization and/or identity, which includes a statement that Manishkumar Patel provided a valid social security card without any restriction at the time of employment.

Further supporting his claim of not hiring any unauthorized workers, Mr. Patel argued that he is required "as part of the nationwide franchisee of Seven-Eleven, to input all information in advance, prior to engaging anyone, all information about a prospective employee on the Central online Seven-Eleven data processing system and obtain Seven-Eleven's approval before employing such new employee, even for a short duration." Aff. Patel para. 16. Mr. Patel also explained that "Seven-Eleven modified its Central Online Information System to include complete information and data and documentary proof, as required under the law, and more particularly as contained under I-9. Now, . . . a franchisee store like ours, has to input all information and data, as contained in an I-9 form . . . ." Aff. Patel para. 17.

Complainant filed a Reply to Respondent's Motion for Summary Judgment on August 10, 2015. Respondent filed an objection to complainant's reply on August 11, 2015. On August 11, 2015, complainant filed a letter via email, requesting that the court convene a conference call with the parties should the undersigned wish to have the parties discuss the issues raised in the reply and objection.

As set forth in detail below, summary judgment is granted in part for both parties. Respondent has successfully rebutted the allegation of hiring an unauthorized worker and has rebutted the associated allegation of bad faith. The government has successfully demonstrated that respondent is liable for thirty-five violations as alleged. Because liability has been established, as set forth in detail below, the motion is ripe for resolution as to the penalties to be imposed.

II. DISCUSSION

A. Liability Assessment

Employers must complete Forms I-9 for each new employee hired after November 6, 1986, in order to document that the employer verified the employee's identity and employment

authorization status. *United States v. Keegan Variety, LLC*, 11 OCAHO no. 1238, 2 (2014). [1] Pertinent regulations at 8 C.F.R. § 274a.2(b) establish that employers "must ensure" that Forms I-9 are completed by employees at the time of hire and completed by the employers within three business days of hire for those employees who are employed a duration of three business days or more. 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.

1. Holtsville's Request for an Evidentiary Hearing Is Denied Because Summary Decision Is Appropriate

Summary decision is appropriate where the pleadings and other materials show that there is no genuine issue as to any material fact. 28 C.F.R. § 68.38(c) (2012). This rule is similar to and based upon Federal Rule of Civil Procedure 56(c), which provides for summary judgment in federal cases. *See United States v. New China Buffet Rest.*, 10 OCAHO no. 1132, 2 (2010). OCAHO jurisprudence looks to federal case law for guidance in determining when summary decision is appropriate. *Id.*

A party seeking summary decision bears the initial burden of demonstrating the absence of a genuine issue of material fact. *United States v. DJ Drywall, Inc.*, 10 OCAHO no. 1136, 2 (2010) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). The party opposing the motion must set forth specific facts showing that there is a genuine issue of fact for a hearing. 28 C.F.R. § 68.38(b). All facts and reasonable inferences therefrom are viewed in the light most favorable to the non-moving party. *United States v. Primera Enters.*, 4 OCAHO no. 615, 259, 261 (1994).

Although Holtsville, through counsel, requests a hearing, an evidentiary hearing is not appropriate in this case as there is no genuine issue of material fact in dispute. Specifically, the evidence of substantive paperwork violations clearly demonstrates that Holtsville violated 8 U.S.C. § 1324a(a)(1)(B). The documentary evidence together with the government's proposed stipulations set forth in its Prehearing Statement are sufficient to establish Holtsville's liability for most of the violations. *See United States v. Metro. Warehouse, Inc.*, 10 OCAHO no. 1207, 1 (2013). As discussed in detail below, Holtsville is liable for thirty-five violations as

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

alleged by the government. However, the government failed to meet its burden of proving that Holtsville hired any unauthorized workers or that Holtsville acted in bad faith because Holtsville successfully rebutted the government's allegations related to Manishkumar Patel.

Because there are no genuine issues of material fact in this case, both parties are entitled to summary judgment in part, and only penalty assessment remains. "Parties should not be put to the burden and expense of a hearing in the absence of any genuine issue of material fact." *United States v. Nebeker*, 10 OCAHO no. 1165, 2 (2013) (referencing *United States v. Aid Maint. Co.*, 7 OCAHO no. 951, 475, 478 (1997)).

2. Two Forms I-9 Were Not Provided to ICE

The government contends in its Prehearing Statement that respondent failed to present, prepare and/or provide two Forms I-9, for employees Khagashwor Kapri and Chudamani Niroula. Based on the evidence presented, respondent has failed to rebut these allegations and has failed to provide a copy of Forms I-9 prepared for these two individuals. Although respondent has noted in Exhibit Three of Respondent's Response that these two individuals are permanent residents, this does not meet respondent's burden of proof to show that Forms I-9 were prepared and/or presented to ICE pursuant to the requirements of 8 U.S.C. § 1324a(a)(1)(B) with respect to these two individuals. Therefore, the government has met its burden of proving that respondent is liable for these two violations, which are serious violations. The failure to prepare a Form I-9 is among the most serious of paperwork violations because it "completely subverts the purpose of the employment verification requirements." *United States v. Golf Int'l*, 11 OCAHO no. 1222, 4 (2014).

3. Paperwork Violations: Failure to Prepare Timely Forms I-9 and Non-Compliant Forms

ICE also claims that twenty-seven of the thirty-three Forms I-9 presented for inspection were not completed in a timely manner. The failures of employees to complete Forms I-9 on the dates of hire and the employer's failure to complete Forms I-9 within three days of hire are also serious violations "because an employee could potentially be unauthorized for employment during the entire time his or her eligibility remains unverified." *United States v. Anodizing Indus., Inc.*, 10 OCAHO no. 1184, 4 (2013). "The longer the delay in preparing an I-9 form, the more serious is the violation." *United States v. Platinum Builders of Cent. Fla., Inc.*, 10 OCAHO 1199, 8 (2013). After examining the paperwork filed with OCAHO, it is clear that respondent failed to timely complete Forms I-9 and failed to make certain that employees timely completed Section 1 of their Forms I-9.

Paragraph 2(d) of complainant's Prehearing Statement alleges that five employees did not timely complete their Forms I-9 and that they "backdated" their Forms I-9 to dates in 2011 and 2012, which are dates predating the issuance of the Form I-9 (on March 8, 2013). In paragraph 2(e) of

complainant's Prehearing Statement, complainant identifies that eleven employees hired in 2010, 2011, 2012, and February 2013 completed Forms I-9 that were issued by the Agency on March 8, 2013. Because all sixteen of the employees identified in paragraphs 2(d) and 2(e) of the Prehearing Statement were hired well before the March 8, 2013, date the form was issued, it is clear that the employees did not complete Section 1 on the day of hire and/or that the employer did not complete Section 2 within three days of an employee's date of hire. Accordingly, the evidence demonstrates that these sixteen Forms I-9 were not timely completed. *See* 8 C.F.R. §§ 274a.2(b)(1)(i)(A), (ii)(B).

Moreover, complainant identified nine employees in paragraph 2(f) of the Prehearing Statement who failed to complete timely Forms I-9 for the following variety of reasons: two have dates of hire in 2012 that significantly predate the date upon which they signed the Forms I-9 in 2013; and many of these forms could not have been timely completed as demonstrated by missing pages, missing signatures, missing names, and/or missing document numbers. The government also identified in paragraph 2(g) of the Prehearing Statement that eight employees' Forms I-9 contained other substantive paperwork violations, including missing pages, missing signatures, missing dates, missing documents, missing numbers, and missing names. Respondent has failed to rebut any of these allegations and has failed to provide any explanation to rebut the documentary evidence, which is clear upon examination of the forms.

Therefore, complainant has met its burden of proving by a preponderance of the evidence that respondent violated 8 U.S.C. § 1324a(a)(1)(B) as follows: (1) respondent failed to prepare and/or present two forms I-9 as alleged in paragraph 2(c) of complainant's Prehearing Statement; (2) respondent failed to ensure timely preparation of twenty-five Forms I-9, as alleged in complainant's Prehearing Statement at paragraphs 2(d) (five untimely Forms I-9), 2(e) (eleven untimely Forms I-9), and 2(f) (nine untimely Forms I-9); and (3) respondent failed to prevent other substantive paperwork violations in eight Forms I-9 as alleged in paragraph 2(g) of complainant's Prehearing Statement. Accordingly, respondent is liable for thirty-five violations in total.

4. Backdating Forms and "Bad Faith"

The government also alleges in its Motion For Summary Judgment that Holtsville has presented sixteen Forms I-9 deemed "fraudulent, to wit: the form presented for inspection contains an issuance date that *postdates* the alleged date it was completed by either the employee or Respondent. In other words, the I-9 presented *did not exist* at the time either the employee or Respondent claims to have completed it." Complainant's Motion for Summary Judgment para. 19; Complainant's Prehearing Statement paras. 2(d), 2(e). Examination of the five Forms I-9 identified in section 2(d) of complainant's Prehearing Statement shows that the employees backdated the forms to 2011 and 2012, presumably their dates of hire. However, the employer attestation/certification portions of these five forms are incomplete. Although paragraph 2(e) of complainant's Prehearing Statement also identifies eleven Forms I-9 as untimely prepared and

allegedly backdated, these eleven Forms I-9 are significantly incomplete in that they all lack employee signatures in Section 1 and are missing page two of the Forms I-9, which contain the employer attestation/certification Section 2.

"Nothing in the rule alters . . . the necessity of completing I-9s for new employees at the time they are hired . . . . Waiting for months or years . . . to prepare their I-9s and then backdating them is not a technical or procedural violation nor does it reflect a good faith attempt to comply . . . ." *United States v. Occupational Res. Mgmt. Staffing, Inc.*, 10 OCAHO no. 1166, 12 (2013). However, "OCAHO case law has long held . . . that in order to support a finding of bad faith, there must be evidence of culpable conduct that goes beyond the mere failure of compliance with verification requirements. . . . The government[] points to no evidence of bad faith beyond the fact that the violation occurred . . . ." *United States v. Platinum Builders of Cent. Fla., Inc.*, 10 OCAHO no. 1199, 8 (2013) (citing *United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 737, 116, 123 (1995) (internal citation omitted)).

In *United States v. Occupational Resource Management Staffing, Inc.*, 10 OCAHO no. 1166, 12, 24 (2013), an employer deliberately backdated sixty Forms I-9 in an attempt to show compliance and deceive the government, which was deemed "clear evidence of culpable conduct beyond the mere failure of compliance." This "culpable conduct" supported penalty enhancement in that case because an employer does "not act in good faith when its agents enter false information in its I-9 forms in order to make the records look correct." *Occupational Res. Mgmt. Staffing, Inc.*, 10 OCAHO no. 1166 at 24.

OCAHO case law establishes that absent an indication of the instructions given by the government to the company at the time of the Notice of Inspection ("NOI"), backdating Forms I-9 alone is insufficient to meet the government's burden of proving by a preponderance of the evidence that an employer lacked good faith. *United States v. Metro. Warehouse, Inc.*, 10 OCAHO no. 1207, 5 (2013); *United States v. Kobe Sapporo Japanese, Inc.*, 10 OCAHO no. 1204, 4 (2013). "In the absence of some evidence of culpable conduct or intent to deceive that goes beyond failure to comply with the verification requirements, the government does not meet its burden of aggravating the penalty based on bad faith." *Metro. Warehouse, Inc.*, 10 OCAHO no. 1207 at 5. *See also United States v. Monadnock Mountain Spring Water, Inc.*, 10 OCAHO no. 1193, 2 (2013) (setting forth that the government eventually "elected not to pursue the enhancement for lack of good faith, observing upon reevaluation that although Monadnock prepared the I-9s after the NOI, the company did not backdate the forms or try to feign compliance.") "[T]he mere fact of having a dismal record of I-9 compliance is not sufficient, standing alone, to support a finding of bad faith." *Occupational Res. Mgmt. Staffing, Inc.*, 10 OCAHO no. 1166 at 24.

The sixteen Forms I-9 identified in paragraphs 2(d) and 2(e) of complainant's Prehearing Statement contain substantial and serious paperwork violations, including untimely preparation

of all of these forms with some forms containing backdating. Some forms are missing pages and Section 2 of the forms. Most forms are missing signatures, many are missing dates, and some are missing names. However, there is no evidence that respondent employer deliberately attempted to "try to feign compliance" or engaged in "culpable conduct" tantamount to bad faith with respect to these sixteen Forms I-9. Therefore, the instant case is distinguished from *Occupational Resource Management Staffing, Inc.*, because the government has failed to demonstrate any scheme or pattern with respect to respondent's Form I-9 compliance, let alone a scheme to deceive the government by feigning compliance. Accordingly, the government has failed to meet its burden of proving that respondent acted in bad faith due to backdating and/or untimely Form I-9 preparation. As a result, the government's penalty enhancement by five percent for bad faith, or lack of good faith, is unwarranted.

5. There Is No Substitute for Completing Forms I-9

Respondent has alleged through the Affidavit of Holtsville President Deven Patel that it complied with the Form I-9 requirements when Mr. Patel input employee data into Seven-Eleven's pre-employment authorization "Computer Information System." Mr. Patel stated that he is required to "input all information in advance, prior to engaging anyone, . . . to include complete information and data and documentary proof, as required under the law, and more particularly as contained under I-9. Now, . . . a franchisee store like ours, has to input all information and data, as contained in an I-9 form . . . . " Aff. Patel paras. 15-19.

Respondent contends that it basically complied with the Form I-9 requirements by satisfying a corporate pre-employment hiring computer system that requires examination of employment authorization and identity documents, which are similar to those considered in the Form I-9 verification process. Despite respondent's arguments, the requirements of inputting information into a corporate database does not satisfy the statutory requirements established by Congress at 8 U.S.C. § 1324a(a)(1)(B).

Although numerous entities have devised mechanisms for assisting employers with completion of Forms I-9 and the public and private sectors provide assistance to employers attempting to verify an employee's employment authorization and identity, Congress has not permitted any substitute for proper completion of the Form I-9 by those employers required to retain completed Forms I-9. 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). Any other system can only add to an employer's duties and legal responsibilities to verify employment eligibility via Form I-9 completion and retention. 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.

B. Penalty Assessment

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. Nebeker, Inc.*, 10 OCAHO no. 1165 (2013), *cited in U.S. v. Platinum Builders of Cent. Fla., Inc.*, 10 OCAHO 1199, 10 (2013). While the statute gives the government broad discretion in setting penalties for violations, *United States v. Aid Maint. Co., Inc.*, 8 OCAHO no. 1023, 321, 343 (1999), ICE's penalty methodology has no binding effect in this forum and the penalty assessment may be examined de novo. *United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6 (2011).

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 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 individual was an unauthorized alien; and (5) the employer's history of previous violations. 8 U.S.C. § 1324a(e)(5). The statute does not require that equal weight be given to each factor, and it does not rule out consideration of other factors as may be appropriate in particular circumstances. *See United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000). Although not an exhaustive list, additional factors that may be considered include economic information, such as a company's ability to pay the proposed penalty and policies of leniency established by statute. *See United States v. Keegan Variety, LLC*, 11 OCAHO no. 1238, 6-7 (2015).

1. Seriousness of the Violations

"Paperwork violations are always potentially serious." *United States v. Skydive Acad. of Haw. Corp.*, 6 OCAHO no. 848, 235, 245 (1996). "[T]he seriousness of the violations should be determined by examining the specific failure in each case." *Id*. at 246. Therefore, the seriousness of violations is "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). Although respondent has argued that the violations are technical and minor in nature, respondent has failed to provide any evidence to support its contentions that the violations should be considered "technical or procedural" instead of substantive. *See* Aff. Patel para. 22. In fact, a thorough review of the documentation reveals that all violations in this case are serious and substantive in nature.

The failure to prepare a Form I-9 is among the most serious of paperwork violations because it "completely subverts the purpose of the employment verification requirements." *United States v. Golf Int'l*, 11 OCAHO no. 1222, 4 (2014). As discussed above, respondent failed to prepare two

Forms I-9. Respondent's failure to complete Forms I-9 for two employees is considered the most serious of paperwork violations, to which the highest penalty will be assessed.

Similarly, failures to prepare timely Forms I-9 within three days of hire are also serious violations "because an employee could potentially be unauthorized for employment during the entire time his or her eligibility remains unverified." *United States v. Anodizing Indus., Inc.*, 10 OCAHO no. 1184, 4 (2013). Therefore, the twenty-five violations set forth in paragraphs 2(d), 2(e), and 2(f) of complainant's Prehearing Statement related to untimely preparation of Forms I-9 are more serious than the eight substantive paperwork violations identified in paragraph 2(g) of complainant's Prehearing Statement. The difference in severity of these categories of violations "may be reflected in the final penalty." *United States v. Two for Seven, LLC*, 10 OCAHO no. 1208, 9 (2014). Accordingly, the government has met its burden of proving by a preponderance of the evidence the existence of 35 serious and substantive violations for which penalties will be assessed.

2. Government Failed to Prove Hiring of Unauthorized Worker and Lack of Good Faith

Regarding the issue of whether respondent hired one unauthorized worker, the government has failed to meet its burden of proving by a preponderance of the evidence that respondent's employee Manishkumar Patel was an unauthorized worker. The government asserts in a footnote to paragraph 2(d) of its Prehearing Statement that the social security card presented by Manishkumar Patel was "determined to contain a number relating to another individual," and that this worker is unauthorized. *See also* Complainant's Motion for Summary Judgment n.3. Complainant's assertion in a footnote lacks any supporting documentary evidence or argument. Importantly, respondent successfully rebuts complainant's assertion by filing with OCAHO copies of the following documents attached to Manishkumar Patel's non-compliant Form I-9: a social security card, and an Illinois Driver's License. Without further explanation from the government to rebut the valid-appearing documentary evidence provided to respondent and the respondent's attestation in his affidavit stating that he must receive employment authorization for every employee from Seven-Eleven after submitting pre-employment authorization information to Seven-Eleven, the government has failed to meet its burden of proving by a preponderance of the evidence that respondent knowingly hired an unauthorized worker.

Moreover, as discussed in detail above, the government failed to prove by a preponderance of the evidence that respondent lacks good faith related to the backdating of certain Forms I-9. Because the government failed to provide any evidence regarding instructions given at the time the Notice of Inspection was served and because the evidence fails to show culpable conduct or intent to deceive the government, the government has failed to demonstrate that any backdating of Forms I-9 supports a finding that respondent lacks good faith for purposes of penalty assessment. *See Metro. Warehouse, Inc.*, 10 OCAHO no. 1207 at 5.

3. Four Enumerated Factors Considered Favorable for Respondent

As discussed above, the government failed to meet its burden of proving that respondent lacks good faith, and that respondent hired an unauthorized worker. In addition, the evidence shows that respondent has no prior history of violations. Moreover, the evidence shows that respondent is a small business, which is a favorable factor for respondent.

As set forth in relevant OCAHO precedent, the "size of the business" is determined based on the current business size at the time the Administrative Law Judge assesses the penalty. *United States v. Niche, Inc.*, 11 OCAHO no. 1250, 10 (2015) (citing *United States v. Ketchikan Drywall Servs., Inc.*, 10 OCAHO no. 1139, 26 (2011); *United States v. Occupational Res. Mgmt., Inc.*, 10 OCAHO no. 1166, 26-27 (2013); *United States v. Carter*, 7 OCAHO no. 931, 160-61 (1997)). OCAHO case law generally considers businesses with fewer than 100 employees to be small businesses. *See Carter*, 7 OCAHO no. 931 at 162. In addition, OCAHO case precedent has relied on the United States Small Business Administration's definitions of whether a business is considered "small." *United States v. Niche, Inc.*, 11 OCAHO no. 1250, 11 (2015) (citing *United States v. Tom & Yu, Inc.*, 3 OCAHO no. 445, 521, 524 (1992); *United States v. Widow Brown's Inn, Inc.*, 3 OCAHO no. 399, 1, 44 (1992)).

4. Non-Statutory Factors: Holtsville's Ability to Pay and Leniency under the SBREFA

Holtsville's President Deven Patel filed an affidavit dated August 7, 2015, which was attached to respondent's Motion for Summary Judgment. In the affidavit, Mr. Patel requests in paragraphs twenty-three and twenty-four that any penalty levied be "a very nominal civil penalty, considering the small size, community nature of the Respondent's business here as well as the severe financial difficulties that this small business may be put to . . . . [T]he profit margins in the last few years have taken a hit."

OCAHO case law establishes that a "respondent's ability to pay a proposed fine may be an appropriate factor to be weighed in assessing the amount of the penalty." *United States v. Mr. Mike's Pizza, Inc.*, 10 OCAHO no. 1196, 3 (2013) (referencing *United States v. Pegasus Rest. Inc.*, 10 OCAHO 1143, 7 (2012)). In *United States v. Red Bowl of Cary, LLC, Inc., d/b/a Red Bowl Asian Bistro*, 10 OCAHO no. 1206, 4-5 (2013), the Administrative Law Judge exercised discretion and found it appropriate to reduce the penalties for the Form I-9 violations to the "midrange of permissible penalties" in light of the "general public policy of leniency toward small entities, as set out in the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq. (2006), amended by § 223(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, 110 Stat. 864 (1996)."

Similar to the analysis in *Red Bowl* and *Metropolitan Warehouse, Inc*., and consistent with the SBREFA, I find that the penalty in the instant case should be reduced in the exercise of discretion. Penalty adjustment to the midrange of permissible penalties is warranted due to the number of favorable factors considered, including the small size of the business, the good faith of the employer, the fact that no unauthorized aliens were found to have been hired, the fact that there is no history of prior violations, the general public policy toward leniency to small business entities, and Holtsville's alleged reduced ability to pay the proposed fine.

Accordingly, I find that in the exercise of discretion, the proposed penalty in this case should be reduced to the midrange of permissible penalties from a total penalty originally assessed at $34,408 to a total penalty of $15,450, based on the following calculation: (1) $500 per violation for failing to prepare and/or present two Forms I-9 as set forth in paragraphs 2(c) of complainant's Prehearing Statement; (2) $450 per violation for failing to timely prepare twenty-five Forms I-9 as set forth in paragraphs 2(d), 2(e), and 2(f) of complainant's Prehearing Statement; and (3) $400 per violation for substantive paperwork violations for eight employee's Forms I-9 as set forth in paragraph 2(g) of complainant's Prehearing Statement. Consistent with the findings in *Keegan Variety, LLC, Red Bowl* and *Mr. Mike's Pizza*, Holtsville's small business is the type of business that should benefit from penalty mitigation and the general public policy of leniency to small entities set out in the SBREFA.

III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Holtsville is a business operated as a Seven-Eleven convenience store in Holtsville, Long Island, New York, which is run by President Deven Patel.

2. The Department of Homeland Security, Immigration and Customs Enforcement, served Holtsville with a Notice of Intent to Fine on December 19, 2013.

3. Holtsville filed a request for hearing on or about January 16, 2014.

4. Holtsville is a small business with no history of previous violations.

5. No specific individual employed by Holtsville was shown to be an alien not authorized for employment in the United States.

6. Holtsville was not shown to have acted in bad faith.

B. Conclusions of Law

1. Holtsville 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. "Parties should not be put to the burden and expense of a hearing in the absence of any genuine issue of material fact." *United States v. Nebeker*, 10 OCAHO no. 1165, 2 (2013) (referencing *United States v. Aid Maint. Co.*, 7 OCAHO no. 951, 475, 478 (1997)).

4. Holtsville is liable for thirty-five violations of 8 U.S.C. § 1324a(a)(1)(B), all of which are serious and substantive violations.

5. While the statute gives the government broad discretion in setting penalties for violations, *United States v. Aid Maint. Co., Inc.*, 8 OCAHO no. 1023, 321, 343 (1999), ICE's penalty methodology has no binding effect in this forum and the penalty assessment may be examined de novo. *United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6 (2011).

6. The failure to prepare timely Forms I-9 within three days of hire is a serious violation "because an employee could potentially be unauthorized for employment during the entire time his or her eligibility remains unverified." *United States v. Anodizing Indus., Inc.*, 10 OCAHO no. 1184, 4 (2013).

7. The difference in severity of categories of violations "may be reflected in the final penalty." *United States v. Two for Seven, LLC*, 10 OCAHO no. 1208, 9 (2014).

8. Failure to prepare a Form I-9 is one of the most serious violations because it completely subverts the purpose of the employment verification requirements. *United States v. Clean Sweep Janitor Serv.*, 11 OCAHO no. 1226, 4 (2014).

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

10. A respondent's ability to pay a proposed fine may be an appropriate factor to be weighed in assessing the amount of the penalty. *United States v. Mr. Mike's Pizza, Inc.*, 10 OCAHO no. 1196, 3 (2013).

11. When weighing factors to assesses the penalty amount, an Administrative Law Judge may exercise discretion and consider the "general public policy of leniency toward small entities, as set out in the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq. (2006), amended by § 223(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, 110 Stat. 864 (1996)." *United States v. Red Bowl of Cary, LLC, Inc.*, 10 OCAHO no. 1206, 4-5 (2013).

ORDER

Holtsville's Motion for Summary Decision is granted in part, with respect to finding that it did not employ an unauthorized worker or act in bad faith. ICE's Motion for Summary Decision is granted in part. Holtsville is liable for thirty-five violations of 8 U.S.C. § 1324a(a)(1)(B) and is directed to pay civil penalties in the total amount of $15,450. The parties are free to establish a payment schedule in order to minimize the impact of the penalty on the operations of the company.

SO ORDERED.

Dated and entered on September 1, 2015.

_____

Stacy S. Paddack
Administrative Law Judge

Appeal Information

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

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

Provisions governing the Attorney General's review of this order, or any CAHO order modifying or vacating this order, are set forth at 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. pt. 68. Within thirty

(30) days of the entry of a final order by the CAHO, or within sixty (60) days of the entry of an Administrative Law Judge's final order if the CAHO does not modify or vacate such order, the Attorney General may direct the CAHO to refer any final order to the Attorney General for review, pursuant to 28 C.F.R. § 68.55.

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