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

June 2, 2016

UNITED STATES OF AMERICA, Complainant, v. CAWOODS PRODUCE, INC. Respondent.	))))))))	8 U.S.C. § 1324a Proceeding OCAHO Case No. 15A00039

FINAL DECISION AND ORDER

APPEARANCES:

Lacy L. McAndrew
Clay N. Martin
Nancy K. Vande Walle
for complainant

Daniel M. Kowalski
for respondent

I. PROCEDURAL HISTORY

This is an action pursuant to the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a (2012). Complainant United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a complaint consisting of three counts against Cawoods Produce, Inc. (Cawoods, respondent, or the company). The company filed an answer and the parties completed prehearing procedures.

Presently pending is the government's Motion for Summary Decision, to which respondent filed a response. As discussed in detail below, the government's Motion for Summary Decision will be granted in part and denied in part.

II. BACKGROUND INFORMATION AND POSITIONS OF THE PARTIES

Cawoods is a domestic wholesaler of fruits and vegetables doing business in the State of Texas. On March 27, 2013,[1] the government personally served Cawoods with a Notice of Inspection, attached to which was a list of "Documentation Requested." The Notice of Inspection informed Cawoods that a review of its Employment Eligibility Verification Forms I-9 was scheduled for April 3, 2013. The documents requested included the following: Forms I-9 for all current and terminated employees; copies of any documents used to verify the employment eligibility of these employees; an employee roster; and federal quarterly tax statements for all current and terminated employees for the period of October 1, 2012, to the date of the Notice of Inspection. ICE indicated that it received the documentation requested from Cawoods on April 3, 2013.

According to ICE, it served respondent with a Notice of Suspect Documents, a Notice of Discrepancies, a Notice of Technical and Procedural Failures, and Employee Discrepancy Notices on April 29, 2013. In response to these notices, respondent submitted corrected Forms I-9 to ICE on May 4, 2013. The government served respondent with a second Notice of Discrepancies on May 23, 2013.[2]

On May 20, 2014, ICE personally served a Notice of Intent to Fine on respondent. In an attachment to the Notice of Intent to Fine, ICE set forth three "Counts." In Count I, ICE alleged that respondent failed to properly correct technical or procedural failures present in the Forms I-9 for two employees. In Count II, ICE alleged that respondent failed to prepare and/or present Forms I-9 for nine employees. In Count III, ICE alleged that respondent failed to properly complete Forms I-9 for twenty-eight employees, noting that these are "substantive paperwork violations." ICE assessed a total fine of $36,465 for all three Counts. In a letter dated May 28, 2014, Cawoods requested a hearing before an Administrative Law Judge.

On March 17, 2015, ICE filed a three-count complaint with the Office of the Chief Administrative Hearing Officer (OCAHO), which incorporated the Notice of Intent to Fine. Specifically, Count I alleged that respondent was provided notice and a ten-day period to correct technical or procedural violations contained in the Forms I-9 for two employees, Jeronimo Franco and Juan Perez, but that Cawoods failed to correct such failures in violation of 8 U.S.C. §

[1] The date of the Notice of Inspection is March 28, 2013. The certificate of service indicates that the notice was served on Cawoods on March 27, 2013. In their prehearing statements, the parties stipulated to the fact that the Notice of Inspection was served on March 27, 2013.

[2] ICE did not submit to OCAHO a copy of any of the notices issued on April 29, 2013, or May 21, 2013. However, the parties stipulated that these notices were served, and that respondent provided corrected Forms I-9 in return. *See Government's Prehearing Statement* at 3; *Respondent's Prehearing Statement* at 2.

1324a(a)(1)(B). Count II alleged that respondent failed to prepare and/or present Forms I-9 for the following nine employees in violation of 8 U.S.C. § 1324a(a)(1)(B): Arturo Benitez, B Cawood, J Cawood, K Cawood, Juan Maranon, Richard Patterson, James Smith, G A Torres, and Juan Velaquez.[3]

Count III alleged that respondent failed to ensure that the following twenty-eight employees properly completed section 1 of their Forms I-9 or that respondent itself failed to properly complete sections 2 or 3 of their Forms I-9s in violation of 8 U.S.C. § 1324a(a)(1)(B): Juan Aguilar, Todd Avila, Jose Aviles, Domingo Barrientos, S Wesley Barrick, Ivan Castillo, Ignacio Dominguez, Miguel Eguizabal, Jason Green, Javier Gutierrez, Jose Gutierrez, Leonardo Hernandez, Mohammad Khan, John Lennon, Joseph Lopez, Jose Loza, Elevid Manjarrez, Isrel Martinez, Mario Martinez, Ricardo Martinez, Martin Miller, Julio Monterroza, Alexander Perez, Rigoberto Renderos, Antonio Rosello, Jose Santos, Jose Uribe Jaim,[4] and Rigoberto Valdes. The complaint also set forth that respondent hired all these thirty-nine individuals listed in the Complaint after November 1986. ICE's complaint requested that OCAHO order Cawoods to pay the assessed penalty of $36,465.

Cawoods filed its answer on April 1, 2015. In its answer, Cawoods denied the "allegations and charges in Counts I, II and III" of the complaint, raised the affirmative defense of "good faith compliance" under INA § 274A(b)(6)(A), 8 U.S.C. §1324a(b)(6)(A), and asserted that the assessed penalty is excessive. Cawoods also contended that the penalty should be reduced in consideration of the public policy of leniency to small businesses pursuant to the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq. (2006), amended by § 223(a) of the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, Pub. L. No. 104-121, 110 Stat. 864 (1996). Moreover, Cawoods claimed that it has been a member of E-Verify since May 2013, and that it will continue to engage in settlement negotiations with ICE.

ICE filed its prehearing statement on May 5, 2015, in which it proposed, inter alia, nine factual stipulations. The first proposed factual stipulation is that Cawoods was incorporated in Texas on September 27, 2005. Proposed factual stipulations two through eight relate to the procedural history of the case. The ninth proposed factual stipulation states that Cawoods hired the individuals listed in the complaint after 1986. Cawoods filed its prehearing statement, accompanied by a Motion for Late Filing, on June 15, 2015. Cawoods agreed to ICE's nine

[3] According to Cawoods' employee roster, the correct spelling of Juan's last name is "Velasquez." *Government's Motion*, Exh. G-2 at 2.

[4] According to the "Quarterly Taxable Wage Report for TX," the correct spelling of Jose's last name is Uribe-Jaimes. *Government's Motion*, Exh. G-4 at 10. In his Form I-9, Mr. Uribe did not include "Jaimes" in his last name. *Id.*, Exh. G-5-C at 29.

proposed stipulations.[5] The company also provided a statement of good cause for its late filing of the prehearing statement. *Respondent's Prehearing Statement* at 2-3. Both parties stated that they did not plan to seek additional discovery.

On August 26, 2015, a telephonic prehearing conference was held. The parties were encouraged to continue settlement negotiations. Also, because Cawoods alleged that it failed to retain copies of its Forms I-9 prior to serving them on ICE, Cawoods asked ICE to send it the original Forms I-9 for the two individuals listed in Count I and any "corrected Forms I-9 for the individuals listed in Count I . . . that respondent presented to complainant in response to the Notices served on April 29, 2013." Therefore, on September 14, 2015, ICE filed with OCAHO and served on Cawoods copies of the Forms I-9 relating to the two individuals named in Count I, Jeronimo Franco and Juan Perez. Attached to Mr. Franco's Form I-9 are copies of his Texas driver's license, his lawful permanent resident card, and his Social Security card.

On December 10, 2015, ICE filed a Motion for Summary Decision (Government's Motion), to which it attached the following exhibits: the Notice of Inspection and "Documentation Requested," served March 27, 2013 (Exh. G-1); Cawoods' employee roster (Exh. G-2); the Texas Workforce Commission (TWC) 2012 Fourth Quarter Benefits-Wage Reports (TWC Fourth Quarter Report) (Exh. G-3); IRS Form 941 for 2012, Employer's Quarterly Federal Tax Return for the Fourth Quarter (Federal Fourth Quarter Tax Return), which includes a TWC 2012 Fourth Quarter Employer's Quarterly Report Continuation Sheet and a 2012 Fourth Quarter Quarterly Taxable Wage Report for TX (Exh. G-4); a list of the three counts charged against Cawoods (Exh. G-5); Forms I-9 for thirty of the employees at issue and the Counts charged (G-5-A–G-5-C); and the Notice of Intent to Fine, served May 20, 2014 (Exh. G-6). ICE contends that through documentary evidence, it has met its burden of demonstrating that no genuine issue of material fact exists as to respondent's liability, and that Cawoods has not presented any evidence to rebut the violations alleged in Counts I, II, and III.

ICE claims that Cawoods "failed to show it ensured that the two employees named in Count I of the Complaint properly completed section 1 and/or failed to properly complete section 2 or 3 of the Form I-9 . . . Uncorrected Technical Paperwork Violations." *Government's Motion* at 3-4. ICE asserts that Cawoods failed to prepare and/or present Forms I-9 "at the time of hire or in a timely manner" for each of the nine employees identified in Count II. *Id.* at 4. In addition, ICE contends that a simple visual examination reveals that Cawoods failed to ensure that the twenty-eight individuals listed in Count III properly completed section 1 of their Forms I-9 and/or that the company failed to properly complete sections 2 or 3 of their Forms I-9, violations which are all substantive. *Id.*

[5] Cawoods inadvertently stated that it agrees with "DHS stipulations 1-19," instead of "1-9."

ICE also asserts that respondent is not entitled to either of IRCA's good faith affirmative defenses. The good faith defense under 8 U.S.C. § 1324a(a)(3) is only applicable to a knowing hire charge in violation of 8 U.S.C. § 1324a(a)(1)(A), and good faith under 8 U.S.C. § 1324a(b)(6)(A) is only applicable to charges of technical or procedural paperwork violations. ICE did not charge respondent with either of these violations.

ICE also argues that there is no genuine issue of material fact with respect to the proposed fine. Pursuant to its agency guidelines, ICE set a base fine amount of $935 per violation because it found Cawoods to have a seventy-five percent violation rate, which ICE calculated based on thirty-nine out of fifty-two current employees possessing Form I-9 violations.[6] In assessing the penalty, ICE treated each of the penalty factors required by 8 U.S.C. § 1324a(e)(5) as neutral, neither aggravating nor mitigating the $935 baseline penalty amount. Regarding the size of the employer's business, ICE determined that Cawoods employs "approximately 34 people," and that its "personal business property" has a value of $637,213. *Government's Motion* at 5.

Discussing the factor of good faith, ICE indicates that respondent cooperated with the government during the investigation, timely corrected and submitted the requested documents, with the exception of two Forms I-9, and is an E-Verify program participant. *Id.* Regarding the seriousness of the violations, ICE assessed thirty-nine substantive violations, concluded that one substantive violation led to the hiring of an unauthorized alien, and found one suspect document. *Id.* at 6. Concerning the factor of the presence of unauthorized aliens, ICE explained that on May 24, 2013, respondent informed the government it terminated one employee in response to the Notice of Suspect Documents. *Id.* at 6-7. In addition, the government stated that respondent terminated eleven employees in response to two Notices of Discrepancies. Finally, the government acknowledged that Cawoods does not have a history of previous violations. For all three Counts, ICE assessed a total penalty in the amount of $36,465.

Cawoods filed a response to the government's motion on December 11, 2015 (Respondent's Response). Respondent "continue[d] to deny all liability" and reasserted that ICE's penalty should be mitigated. *Respondent's Response* at 1. The company also avers it is a small business and acknowledges that it joined E-Verify. *Id.* at 2. Cawoods also requests in the alternative that this case "be held in abeyance" instead of the Administrative Law Judge issuing a decision so that ICE can perform a compliance evaluation of Cawoods, permit Cawoods to "demonstrate[] sufficient compliance," and allow ICE to withdraw its complaint if Cawoods is found compliant. *Id.* at 2. Finally, Cawoods posits that ICE should adopt a "better approach" than worksite enforcement actions to ensure compliance, such as working with "employers proactively . . . to educate . . . and help employers reach and maintain compliance with INA Sec. 274A." *Id.*

[6] *See* ICE, *Form I-9 Inspection Overview: Fact Sheet* (Jun. 26, 2013), http://www.ice.gov/news/library/factsheets/i9-inspection.htm.

Cawoods also attaches Congressional Research Service Report R40002, authored by Andorra Bruno, "Immigration-Related Worksite Enforcement: Performance Measures" (2015).

III. DISCUSSION

A. Applicable Legal Standards

1. Summary Decision

OCAHO rule 28 C.F.R. § 68.38(c)[7] establishes that an Administrative Law Judge "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." Relying on United States Supreme Court precedent, OCAHO case law has held, "An issue of material fact is genuine only if it has a real basis in the record. A genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit." *Sepahpour v. Unisys, Inc.*, 3 OCAHO no. 500, 1012, 1014 (1993)[8] (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986)).

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

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

[8] 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.

United States v. Primera Enters., Inc., 4 OCAHO no. 615, 259, 261 (1994) (citing *Matsushita*, 475 U.S. at 587; *Egal v. Sears Roebuck & Co.*, 3 OCAHO no. 442, 486, 495 (1992)).[9]

2. Burdens of Proof and Production

In cases arising under 8 U.S.C. § 1324a, the government has the burden of proving by a preponderance of the evidence that respondent is liable for committing a violation of the employment eligibility verification requirements. *See United States v. Nebeker, Inc.*, 10 OCAHO no. 1165, 4 (2013) (citing *United States v. Am. Terrazzo Corp.*, 6 OCAHO no. 877, 577, 581 (1996)). In addition to proving liability, "[t]he government has the burden of proof with respect to the penalty, *United States v. March Construction, Inc.*, 10 OCAHO no. 1158, 4 (2012), and must prove the existence of any aggravating factor by a preponderance of the evidence, *United States v. Carter*, 7 OCAHO no. 931, 121, 159 (1997)." *United States v. Niche, Inc.*, 11 OCAHO no. 1250, 6 (2015).

However, after the government has introduced evidence to meet its burden of proof, "the burden of *production* shifts to the respondent to introduce evidence . . . to controvert the government's evidence. If the respondent fails to introduce any such evidence, the unrebutted evidence introduced by the government may be sufficient to satisfy its burden . . . ." *United States v. Durable, Inc.*, 11 OCAHO no. 1231, 5 (2014) (referencing *United States v. Alvand, Inc.*, 2 OCAHO no. 352, 378, 382 (1991) (modification by the Chief Administrative Hearing Officer (CAHO)); *United States v. Kumar*, 6 OCAHO no. 833, 112, 120-21 (1996); *Breda v. Kindred Braintree Hosp., LLC*, 10 OCAHO no. 1202, 8 (2013)).

The government has set forth arguments and submitted documentary evidence in an attempt to meet its burden of proving by a preponderance of the evidence the allegations in Counts I, II, and III of the complaint, its penalty assessment, and its entitlement to summary decision. Currently, respondent has the burden of producing arguments and evidence to rebut the government. In its response to ICE's motion, Cawoods asserted a general denial of liability and argued that the penalty should be reduced because of the business' size and because of leniency to small businesses. As supporting evidence for leniency, Cawoods attached a Congressional Research Service article, which gives an overview of ICE's worksite enforcement as it relates to 8 U.S.C. § 1324a.

3. The Employment Verification Requirements

a. Form I-9 Obligations

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

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

b. Substantive Violations v. Technical or Procedural Violations

Failures to satisfy the requirements of the employment verification system are known as "paperwork violations," which are either substantive or technical and procedural. *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) (the Virtue Memorandum) *available at* 74 No. 16 Interpreter Releases 706 (Apr. 28, 1997). IRCA provides that an entity will not be penalized for a "technical or procedural" failure of the employment verification system, unless the government first explained the basis for the failure and provided the employer a period of not less than ten business days after the explanation within which to correct the violations, and the employer did not correct the failure voluntarily within such period. 8 U.S.C. § 1324a(b)(6); *see United States v. DJ Drywall, Inc.*, 10 OCAHO no. 1136, 3 (2010). If the employer does not receive notice and the ten-day correction period for technical and procedural violations, the employer cannot be held liable for the violations and such violations are not properly included in the Notice of Intent to Fine. *DJ Drywall*, 10 OCAHO no. 1136 at 3-4 (citing *United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1071, 12-15 (2001)).

Relevant to the instant case, the Virtue Memorandum characterizes as "substantive violations" an employee's failure to sign the attestation in section 1 of the Form I-9, an employee's failure to check one of the boxes in section 1 attesting to his or her citizenship or immigration status in the United States, or an employee's failure to provide his or her A number (or Admission number) in section 1 next to the box identifying his or her immigration status, unless the A number is provided in sections 2 or 3 of the form (or on a legible copy of a document retained with the Form I-9 and presented at the I-9 inspection). Virtue Memorandum at 3. In addition, the Virtue Memorandum deems an employer to have committed a substantive violation when 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 when failing to sign the employer attestation in section 2. *Id.* at 3-4.

c. Penalty Assessment

Civil money penalties are assessed when an employer fails to properly prepare, retain, or produce upon request the Forms I-9, according to the following parameters established at 8 C.F.R. § 274a.10(b)(2): the minimum penalty is $110 and the maximum penalty is $1100 for each individual with respect to whom a paperwork violation occurred after September 29, 1999. Pertinent regulations and OCAHO case law set forth that if a paperwork violation is proven, then a fine must be assessed. 8 C.F.R. § 274a.10(b)(2) ("A respondent determined . . . to have failed to comply with the employment verification requirements as set forth in § 274a.2(b), shall be subject to a civil penalty . . . ."); *Keegan Variety*, 11 OCAHO no. 1238 at 7 (discussing that there is no fine waiver and a penalty must be assessed).

Title 8 U.S.C. § 1324a(e)(5) requires consideration of the following factors when assessing civil money penalties for paperwork violations: (1) the size of the employer's business; (2) the employer's good faith; (3) the seriousness of the violations; (4) whether the employee is an unauthorized alien; and (5) the employer's history of previous violations. "The statute does not require that equal weight necessarily be given to each factor, nor does it rule out consideration of other factors." *United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000). Although not an exhaustive list, additional factors may be considered, including a company's ability to pay the proposed penalty and policies of leniency established by statute. *See Niche*, 11 OCAHO no. 1250 at 6-7. ICE has broad discretion in setting the penalties; however, OCAHO is not bound by the government's penalty methodology and the Administrative Law Judge may conduct a *de novo* review of the penalty assessment. *United States v. Holtsville 811 Inc.*, 11 OCAHO no. 1258, 10 (2015) (citing *United States v. Aid Maint. Co.*, 8 OCAHO no. 1023, 321, 343 (1999); *United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6 (2011)).

B. Respondent's Liability

1. Count I: Uncorrected Technical or Procedural Violations

The parties agreed to stipulate to the fact that the government served Cawoods with a Notice of Technical and Procedural Failures on April 29, 2013, and that the company delivered corrected Forms I-9 to ICE on May 4, 2013, in response to this Notice and other notices served. *See Government's Prehearing Statement* at 3; *Respondent's Prehearing Statement* at 2. In the complaint, ICE avers in Count I that: (1) Cawoods was provided ten days to correct the Form I-9 technical or procedural failures set forth in the Notice of Technical and Procedural Failures; (2) Cawoods failed to correct such failures in two Forms I-9 belonging to Jeronimo Franco and Juan Perez; and (3) the company is liable for two substantive violations of 8 U.S.C. § 1324a(a)(1)(B), for failure to correct technical or procedural failures.

The government does not specify in the complaint, its prehearing statement, or in its motion what uncorrected technical or procedural violations are contained in the two Forms I-9 for Jeronimo Franco and Juan Perez. However, on September 14, 2015, ICE filed copies of the two Forms I-9 pertaining to Jeronimo Franco and Juan Perez. Attached to Mr. Franco's Form I-9 are copies of his Texas driver's license, his lawful permanent resident card, and his Social Security card. The Form I-9 belonging to Jeronimo Franco has the following sections on the form highlighted: the "Date (*month/date/year*)" in section 1 and "List A," "List B," and "List C" in section 2. On Juan Perez's Form I-9, the "City, State, Zip Code" portion of the employer attestation in section 2 is highlighted. DHS filed these submissions in response to an OCAHO order issued August 26, 2015.

The above-mentioned highlighted portions of the Forms I-9 for Mr. Perez and Mr. Franco appear to constitute technical or procedural paperwork failures. *See* Virtue Memorandum at 4-5. Nevertheless, I find that the government has failed to meet its burden of proving that it gave Cawoods specific notice of the technical or procedural failures in the Forms I-9 for Mr. Franco and Mr. Perez, and/or that Cawoods was given a ten-day correction period for these two Forms I-9. *See* 8 U.S.C. § 1324a(b)(6). ICE did not submit a copy of the Notice of Technical and Procedural Failures, so there is no evidence showing that Cawoods in fact received the requisite notice and correction period with respect to these two Forms I-9.

Although the parties stipulated to the fact that ICE served a Notice of Technical or Procedural Failures on Cawoods, this fact alone does not establish ICE's burden of proving Count I with respect to the Forms I-9 for Mr. Franco and Mr. Perez, especially in light of the additional stipulated fact that Cawoods provided ICE corrected Forms I-9 in response to the Notice of Technical or Procedural Failures. "This showing is essential because failure to follow the notice and correction procedures precludes alleging those violations in a complaint." *United States v. Stanford Sign and Awning, Inc.*, 10 OCAHO no. 1145, 9 (2012) (citing *DJ Drywall*, 10 OCAHO no. 1136 at 3-4). Because ICE failed to prove through specific evidence that it provided Cawoods actual notice of the technical or procedural failures in the two Forms I-9 for Mr. Franco and Mr. Perez and because ICE failed to prove that it provided Cawoods the requisite opportunity to correct these two Forms I-9, the government has failed to meet its burden of proof with respect to Count I. Accordingly, Count I is dismissed because ICE failed to prove by a preponderance of the evidence Cawoods' liability as charged for uncorrected paperwork violations.

2. Count II: Failure to Prepare and/or Present Forms I-9

The government's inspection covered the period from October 1, 2012, to the date of the Notice of Inspection. While the parties stipulated to the fact that all of the individuals listed in the complaint were hired after 1986, this concession does not necessarily prove that the listed individuals were employees during the government's inspection period and were employees for

whom the company was required to prepare and/or present Forms I-9 pursuant to the Notice of Inspection. The company's federal and state 2012 Fourth Quarter wage reports establish that the individuals identified on these reports received wages at some point between October 1, 2012, and December 31, 2012. *Government's Motion*, Exhs. G-2–G-4. This evidence is crucial to the government's case because 8 C.F.R. § 274a.1(f) defines "employee" as an "individual who provides services or labor for an employer for wages or other remuneration."

Based on the evidence of record, ICE failed to prove by a preponderance of the evidence that Arturo Benitez was employed by Cawoods during the inspection period, which would have triggered the company's duty to prepare and/or present a Form I-9 on his behalf. Mr. Benitez is not listed on the employee roster, the TWC Fourth Quarter Report, or the Federal Fourth Quarter Tax Return, but his name is handwritten on the TWC Fourth Quarter Report under the notation "I-9s missing." *Government's Motion*, Exhs. G-2–G-4. Construing the facts in the light most favorable to respondent, the handwritten notations on the TWC Fourth Quarter Report appear to have been made by ICE. Nevertheless, the fact that Mr. Benitez's name is handwritten on a list, without more, is not evidence of his status as an "employee" of Cawoods during ICE's inspection period. *See* 8 C.F.R. § 274a.1(f). As an Administrative Law Judge explained in *United States v. Dr. Robert Schaus, D.D.S.*, 11 OCAHO no. 1239, 6 (2014),

> The mere presence of an individual's name on a list, or even on an I-9 form, without a scintilla of evidence that the individual actually provided any services or labor to an employer or ever actually received any wages or other forms of remuneration from the employer during the period at issue, is insufficient to make a prima facie showing that the person was an employee.

The assertion that Arturo Benitez is a Cawoods employee is unsubstantiated by the record as there is no indication that Mr. Benitez provided services to Cawoods or received "wages or other remuneration" during the relevant period. As ICE has not met its burden of proving that Arturo Benitez was an employee within the statutory definition, the company will not be held liable for any alleged violations pertaining to him.

However, the evidence of record establishes that the remaining eight individuals identified in Count II of the complaint are employees of Cawoods for whom the company was required to prepare and/or present Forms I-9. These eight individuals—B Cawood, J Cawood, K Cawood, Juan Maranon, Richard Patterson, James Smith, G A Torres,[10] and Juan Velasquez—are listed on Cawoods' employee roster and the company's TWC Fourth Quarter Report and Federal

[10] In the complaint, ICE identified the last four digits of G A Torres' Social Security number as "1719." According to the company's federal and state Fourth Quarter reports, the last four digits of G A Torres' Social Security number are "1709."

Fourth Quarter Tax Return. Therefore, it is evident they received wages from the company at the latest on October 1, 2012, which falls properly within the inspection period. *See* 8 C.F.R. § 274a.1(f). The record does not contain Forms I-9 for these eight employees. Although the company denies all liability, it did not present any evidence to show that it prepared and/or presented I-9s for these individuals, nor did it assert any viable defense to this charge. Cawoods is therefore liable for eight violations of 8 U.S.C. § 1324a(a)(1)(B), for failing to prepare and/or present Forms I-9, which is a substantive violation. *Keegan Variety*, 11 OCAHO no. 1238 at 2; *see also* Virtue Memorandum at 3.

3. Count III: Improper Completion of Form I-9 Sections 1 and/or 2

ICE has also established Cawoods' liability for most, but not all, of the alleged violations charged in Count III. First, ICE failed to establish by a preponderance of the evidence that the following nine individuals are employees of Cawoods for whom the company was required to prepare Forms I-9: S Wesley Barrick, Javier Gutierrez, Leonardo Hernandez, John Lennon, Isrel Martinez, Mario Martinez, Julio Monterroza, Antonio Rosello, and Rigoberto Valdes. None of these individuals are listed on Cawoods' employee roster, the TWC Fourth Quarter Report, or the Federal Fourth Quarter Tax Return.

Rather, the names of these nine individuals were handwritten on the TWC Fourth Quarter Report. *Government's Motion*, Exhs. G-2–G-4. Construing the facts in the light most favorable to respondent, it appears that these handwritten notations were made by ICE. Nevertheless, the fact that the names of these individuals are handwritten on a list does not constitute sufficient evidence of their status as employees of Cawoods. *Dr. Robert Schaus, D.D.S.*, 11 OCAHO no. 1239 at 6. The fact that these individuals' names are not printed on the company's quarterly reports raises reasonable doubt about their status as employees. Moreover, ICE failed to present actual evidence of their status as employees and failed to show that S Wesley Barrick, Javier Gutierrez, Leonardo Hernandez, John Lennon, Isrel Martinez, Mario Martinez, Julio Monterroza, Antonio Rosello,[11] or Rigoberto Valdes received wages or remuneration from Cawoods in exchange for labor during the relevant period of the government's inspection. 8 C.F.R. § 274a.1(f).

In addition, the fact that the names of these nine individuals appear on Forms I-9 does not alone establish that they provided services to the company in exchange for some form of remuneration. *Dr. Robert Schaus, D.D.S.*, 11 OCAHO no. 1239 at 6. The Forms I-9 pertaining to S Wesley Barrick, Javier Gutierrez, John Lennon, Isrel Martinez, Julio Monterroza, Antonio Rosello, and

[11] At the top of the Form I-9 pertaining to Antonio Rosello is the following handwritten notation: "Antonio Gomez on employee roster Terminated 2-13-13." *Government's Motion*, Exh. G-5-C at 27. There is no "Antonio Gomez" listed on the employee roster that Cawoods provided to ICE, which the government in turn submitted with its motion. The TWC Fourth Quarter Return and the Federal Fourth Quarter Tax Return also do not list any such individual.

Rigoberto Valdes do not contain a dated employee attestation in section 1 or a completed and signed employer attestation in section 2, so there is no way of determining when these individuals were hired, which could explain why they are not listed on the company's federal and state 2012 Fourth Quarter reports.[12] *See Government's Motion*, Exh. G-5-C at 6, 12, 16, 20, 24, 27, 30. Section 1 of Mario Martinez's Form I-9 is dated March 21, 2013. *Id.* at 21. Section 1 of Leonardo Hernandez's Form I-9 is dated March 7, 2013. *Id.* at 14. Both dates fall within the government's inspection period, suggesting that Cawoods hired them on these dates. However, these inferences do not establish by a preponderance of the evidence that Mario Martinez and Leonardo Hernandez provided labor to Cawoods and received wages in return.

In addition, ICE failed to meet its burden of proving that Cawoods is liable for a Form I-9 violation for "Jose Gutierrez," who is also referenced in the record as "J. Nicholas Gutierrez" and "Nicholas J. Guiterrez."[13] According to the Quarterly Taxable Wage Report for TX, J. Nicolas Gutierrez did not receive wages during the Fourth Quarter 2012, but he had received wages during 2012 in the amount of $12,255.61. *Government's Motion*, Exh. G-5-C at 13. Thus, the record shows that Mr. Gutierrez did not earn wages at Cawoods between October 1, 2012, and December 31, 2012, but that he earned wages at some other point in 2012.

The record does not identify Mr. Gutierrez's hire, termination, or possible rehire date. Although the record shows that he was receiving wages from Cawoods at some point in 2012, it is not discernible from the evidence of record whether Cawoods was required to retain his Form I-9 as late as March 27, 2013, which is the date ICE served Cawoods with a Notice of Inspection. Conceivably, Cawoods could have terminated Mr. Gutierrez prior to March 27, 2012, and Cawoods could have properly disposed of Mr. Guitierrez's Form I-9 prior to ICE serving its Notice of Inspection because Cawoods might not have been obligated to retain the Form I-9 as

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[12] The government's list of "Documentation Requested," which accompanied the Notice of Inspection, specified October 1, 2012, to March 27, 2013, as the relevant inspection period. Cawoods' state and federal Fourth Quarter reports only pertain to the period between October 1, 2012, and December 31, 2012.

[13] An individual named "Nicholas J. Guiterrez" is listed on the 2012 Fourth Quarter Quarterly Taxable Wage Report for TX, which is part of Cawoods' Federal Fourth Quarter Tax Return. *Government's Motion*, Exh. G-4 at 8. The record also contains a Form I-9 for "J. Nicholas Gutierrez." *Id.*, Exh. G-5-C at 13. The last four digits of Jose Gutierrez's Social Security number identified in the complaint match the last four digits provided in the Form I-9 for J. Nicolas Gutierrez. The Quarterly Taxable Wage Report for TX also lists the same last four digits, although this form spells Mr. Gutierrez's first name as "Nicholas J." The evidence of record supports a finding that ICE met its burden of proving that "Jose Gutierrez" listed in the complaint is "J. Nicolas Gutierrez," whose Form I-9 is present in the record and who is named in the Federal Fourth Quarter Tax Return.

late as March 27, 2013. The Form I-9 retention rules require an employer to retain Forms I-9 three years after the date employment began or one-year after employment was terminated, whichever date is later. 8 U.S.C. § 1324a(b)(3) ("Retention of verification form"); *see* https://www.uscis.gov/i-9-central/retain-store-form-i-9/retaining-i-9. Therefore, because all evidence is to be viewed in the light most favorable to respondent and the evidence of record does not contain information regarding the hire date, termination date, or possible rehire date of Mr. Gutierrez, ICE has failed to meet its burden of proving that Cawoods needed to retain and present a Form I-9 for Mr. Gutierrez as of the date it served its Notice of Inspection in 2013.

Accordingly, because ICE failed to prove by a preponderance of the evidence that Cawoods did not properly complete and/or retain Forms I-9 for S Wesley Barrick, Javier Gutierrez, Leonardo Hernandez, John Lennon, Isrel Martinez, Mario Martinez, Julio Monterroza, Antonio Rosello, Rigoberto Valdes, and Jose Gutierrez, the alleged violations charged in Count III pertaining to these ten individuals are dismissed.

Cawoods' federal and state quarterly reports shows that the remaining eighteen individuals listed in Count III received wages in the Fourth Quarter of 2012: Juan Aguilar, Todd Avila, Jose Aviles, Domingo Barrientos, Ivan Castillo, Ignacio Dominguez, Miguel Eguizabal, Jason Green, Mohammad Khan, Joseph Lopez, Jose Loza, Elevid Manjarrez, Ricardo Martinez, Martin Miller, Alexander Perez, Rigoberto Renderos, Jose Santos, and Jose Uribe. *See Government's Motion*, Exhs. G-2–G-4. Accordingly, as they received wages at some point during the Fourth Quarter on or after October 1, 2012, ICE demonstrated that these individuals are employees for whom Cawoods was required to prepare Forms I-9 and present the forms to the government during its inspection. A visual examination of the Forms I-9 for these eighteen employees reveals that each form contains at least one substantive violation, for which the company is liable. [14]

The Forms I-9 for the nine following employees contain an entirely blank Form I-9 section 2, demonstrating that Cawoods failed to review and record document-specific information for List A or Lists B and C documents and that Cawoods failed to sign the employer attestation: Juan Aguilar, Ignacio Dominguez, Miguel Eguizabal, Jason Green, Mohammad Khan, Joseph Lopez, Martin Miller, Alexander Perez, and Jose Uribe. *Government's Motion*, Exh. G-5-C at 3, 9-11, 15, 17, 23, 25, 29. An employer's failure to attest under penalty of perjury that it reviewed and recorded proper identity and employment authorization documents for each employee and its failure to sign the employer attestation are substantive violations. 8 C.F.R. § 274a.2(a)(3), (b)(1)(ii); Virtue Memorandum at 3-4.

The Forms I-9 for the following four individuals reflect that each of these employees did not list his respective Alien or Admission number in section 1 next to the box checked for lawful

[14] Cawoods will be held liable for only one substantive violation per Form I-9. *United States v. Occupational Res. Mgmt., Inc.*, 10 OCAHO no. 1166, 16 n.13 (2013).

permanent resident or alien authorized to work: Juan Aguilar, Jose Aviles, Ivan Castillo, and Ricardo Martinez. *Government's Motion*, Exh. G-5-C at 3, 5, 8, 22. The Alien or Admission numbers of these four employees were not provided in sections 2 or 3 of their respective Forms I-9 or on legible copies of their documents retained with the Forms I-9 and presented to ICE at the inspection. Accordingly, Cawoods' failure to ensure that its employees provided Alien or Admission numbers in section 1 of their Forms I-9 constitutes a substantive violation. Virtue Memorandum at 3.

Todd Avila's Form I-9 shows that he did not sign the employee attestation in section 1 and that Cawoods did not sign the employer attestation in section 2. *Government's Motion*, Exh. G-5-C at 4. Cawoods' failure to ensure that Mr. Avila attested and signed section 1 and its failure to attest and sign section 2 are substantive violations. Virtue Memorandum at 3-4. It is also evident this form was not completed within three days of Mr. Avila's first day of employment. While the employee attestation in section 1 is not dated, section 2 identifies Mr. Avila's first day of employment as October 14, 2003, but the employer attestation was dated December 28, 2005.

The following five employees did not identify in section 1 whether they are United States citizens or nationals, Lawful Permanent Residents, or Aliens Authorized to Work in the United States: Domingo Barrientos,[15] Jose Loza, Elevid Manjarrez, Rigoberto Renderos, and Jose Santos. *Government's Motion*, Exh. G-5-C at 7, 18-19, 26, 28. Cawoods' failure to ensure that each employee checked a box in section 1 attesting to his citizenship or immigration status is a substantive violation. Virtue Memorandum at 3. The Forms I-9 pertaining to Ricardo Martinez and Rigoberto Renderos do not identify any List A or Lists B and C documents in section 2. *Government's Motion* at 22, 26. Jose Santos's Form I-9 is also lacking a completed and signed employer attestation in section 2. *Id.* at 28. Both of these omissions are substantive. Virtue Memorandum at 3-4.

For all these reasons, ICE has met its burden of showing that Cawoods is liable for eighteen substantive violations under 8 U.S.C. § 1324a(a)(1)(B) as charged in Count III. As previously noted, Cawoods will be held liable for only one substantive violation per Form I-9. *Occupational Res. Mgmt.*, 10 OCAHO no. 1166 at 16 n.13

As the moving party has met its initial burden, the burden of production now shifts to Cawoods to show there is a material factual dispute and that ICE is not entitled to summary decision. Cawoods has failed to satisfy this burden. Although the company asserted in its prehearing statement that it "reserve[d] the right to argue the affirmative defense of good faith compliance,"

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[15] The last four digits provided for Mr. Barrientos Social Security number on his I-9 are "4657." The Federal Fourth Quarter Tax Return and the TWC Fourth Quarter Report identify the last four digits of Domingo Barrientos's Social Security number as "4756."

under 8 U.S.C. § 1324a(b)(6)(A), Cawoods did not address this argument in its response to ICE's Motion for Summary Decision. Nevertheless, this good faith defense is unavailable to Cawoods at this point because this good faith defense pursuant to 8 U.S.C. § 1324a(b)(6)(A) is a defense to certain technical and procedural violations. *Ice Castles Daycare Too*, 10 OCAHO no. 1142 at 4. ICE established Cawoods' liability for substantive violations, not technical or procedural violations.

Moreover, Cawoods did not present any other argument or evidence to counter the government's showing of its failure to comply with the employment verification requirements of 8 U.S.C. § 1324a(b). The company's blanket denial of liability simply does not suffice to show that genuine issues of material fact exist in order to preclude a grant of summary judgment to the government. Accordingly, ICE is entitled to summary decision for eight of the violations alleged in Count II and for eighteen of the violations alleged in Count III. Because Count I is dismissed, the government's request for summary decision is denied as moot.

Accordingly, because ICE failed to meet its burden of proof with respect to the two violations alleged in Count I, one violation alleged in Count II, and ten violations alleged in Count III, these thirteen alleged violations are dismissed. However, the government met its burden of proving by a preponderance of the documentary evidence that there is no genuine issue of material fact with respect to Cawoods' liability for the remaining eight violations alleged in Count II and eighteen violations alleged in Count III. Therefore, ICE is entitled to summary decision regarding Cawoods' liability for the remaining twenty-six violations of 8 U.S.C. § 1324a(a)(1)(B).

C. Penalty Assessment

1. Statutory and Non-Statutory Factors

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 does not require that equal weight necessarily be given to each factor, nor does it rule out consideration of other factors." *Hernandez*, 8 OCAHO no. 1043 at 664.

The government appropriately assessed the absence of a history of previous violations as a neutral factor. As OCAHO case law instructs, "[N]ever having violated the law before does not necessarily warrant additional leniency, and it is still appropriate to treat this factor as a neutral one." *United States v. New China Buffet Rest.*, 10 OCAHO no. 1133, 6 (2010). Good faith of the employer should also be treated as a neutral factor in this case. "[T]he primary focus of a good faith analysis is on the respondent's compliance *before* the investigation." *Id.* at 5 (citing *United States v. Great Bend Packing Co.*, 6 OCAHO no. 835, 129, 136 (1996); *United States v. Chef Rayko, Inc.*, 5 OCAHO no. 794, 582, 592 (1995) (modification by the CAHO)). Prior to

the investigation, it is evident that Cawoods had a significantly poor rate of compliance. This alone, however, does not justify a finding of bad faith on behalf of the employer. *Id.* at 6 (citing *Hernandez*, 8 OCAHO no. 1043 at 670). Equities favoring respondent are its cooperation with ICE during the inspection and joining E-Verify. A consideration of the totality of these factors supports the conclusion that good faith should neither enhance nor mitigate the fine amount.

In addition, ICE appropriately treated the presence of unauthorized workers as a neutral factor. While the government did not seek aggravation on account of the presence of unauthorized workers, it alleged that one of the "39 substantive violations found on the Forms I-9 . . . was found to be related to unauthorized aliens." *Government's Motion* at 7. The government also explained that a Notice of Suspect Documents and two Notices of Discrepancies, which listed eighteen employees in total, were served on respondent and that Cawoods terminated twelve of the identified employees. *Id.* at 6-7. Neither of the parties submitted these notices. ICE's unsubstantiated assertion in its motion that one unauthorized alien was discovered is not evidence of this unknown individual's status. *See United States v. Speedy Gonzalez Constr., Inc.*, 11 OCAHO no. 1228, 8 (2014) (citing *United States v. Ronning Landscaping, Inc.*, 10 OCAHO no. 1149, 14-15 (2012)). Moreover, respondent did not deny this allegation, nor did it present any countervailing evidence. Companies are expected to hire only individuals authorized for employment in the United States, and Cawoods did not present any facts or make any argument that would warrant leniency on account of this factor. Therefore, neither aggravation nor mitigation of the fine is warranted with respect to the presence of unauthorized workers.

However, the violations at issue in this case are serious and call for aggravation of the fine. "[P]aperwork violations are always *potentially* serious." *United States v. Skydive Acad. of Haw. Corp.*, 6 OCAHO no. 848, 235, 245 (1996). The seriousness of a violation must nevertheless be evaluated on a continuum because not all violations are necessarily equal. *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 8 (2010). "A violation is serious if it renders the congressional prohibition of hiring unauthorized aliens ineffective." *United States v. Sunshine Bldg. Maint., Inc.*, 7 OCAHO no. 997, 1122, 1180 (1998) (citing *United States v. Task Force Sec., Inc.*, 4 OCAHO no. 625, 333, 340 (1994)). "Errors in completing an I-9 are ordinarily viewed as less serious than the failure to prepare or present the form at all," and it is well-established in OCAHO case law that "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." *See United States v. Century Hotels Corp.*, 11 OCAHO no. 1218, 7 (2014) (citing *United States v. Super 8 Motel & Villella Italian Rest.*, 10 OCAHO no. 1191, 14 (2013)).

The differing degrees of seriousness "'may be reflected in the final penalty.'" *Niche*, 11 OCAHO no. 1250 at 10 (quoting *United States v. Two For Seven, LLC*, 10 OCAHO no. 1208, 9 (2014)). Therefore, "[a]n Administrative Law Judge's *de novo* review of the government's fine assessment can lead to a determination that differing degrees of seriousness exist amongst the paperwork violations, which can result in different fine assessments for each count." *United*

States v. Wave Green, Inc., 11 OCAHO no. 1267, 13 (2016) (citing *Holtsville 811*, 11 OCAHO no. 1258 at 10; *Niche*, 11 OCAHO no. 1250 at 10).

In this case, Cawoods failed to prepare and/or present Forms I-9 for eight employees, which is considered the most serious of paperwork violations. For one violation in Count III (Todd Avila), there is neither a signed employee attestation nor a signed employer attestation and it is evident that the form was not completed at the time of the employee's hire. In *Wave Green*, 11 OCAHO no. 1267 at 15, the Administrative Law Judge held that the "failure of both the employee and the employer to attest to the accuracy of data on the Forms I-9, in conjunction with failing to complete the forms contemporaneously with hiring is tantamount to a failure to prepare a Form I-9 at all," which is the most serious of pa paperwork violations under 8 U.S.C. § 1324a(b). Following these principles, this violation related to Mr. Avila will be considered as serious as a failure to prepare a Form I-9 at all.

Section 2 of the Form I-9 has been described as "the very heart" of the employment verification system. *United States v. Emp'r Solutions Staffing Group II, LLC*, 11 OCAHO no. 1242, 11 (2015) (quoting *United States v. Acevedo*, 1 OCAHO no. 95, 647, 651 (1989)). Cawoods failed to attest to its examination of the required identity and employment authorization documents and failed to attest and sign section 2 of the Forms I-9 for nine employees, which constitute very serious substantive violations. That nine of the I-9s contain an entirely blank section 2 are also very serious violations.

Another "exceedingly" serious substantive violation is Cawoods' failure to ensure that employees attested to their immigration status in section 1 of the Form I-9. *Sunshine Bldg. Maint.*, 7 OCAHO no. 997 at 1181-82 (citing *United States v. Fortune E. Fashion, Inc.*, 7 OCAHO no. 992, 1075, 1080 (1998)). A less serious violation is the company's failure to ensure that an employee who attests to his status as a lawful permanent resident or an alien authorized to work in section 1 enters his Alien number or Admission number. *United States v. Horno MSJ, Ltd.*, 11 OCAHO no. 1247, 11 (2015) (citations omitted). Therefore, aggravation of the fine on account of differing degrees of seriousness is warranted.

Although ICE treated Cawoods' business size as a neutral factor, fine mitigation due to the small size of Cawoods' business is appropriate. OCAHO case law considers businesses with 100 employees or less as small businesses. *Niche*, 11 OCAHO no. 1250 at 10 (citing *Carter*, 7 OCAHO no. 931 at 162). OCAHO cases have also looked to the United States Small Business Administration's definitions of whether a business is considered "small." *Id.* at 10-11 (citing *United States v. Pegasus Rest., Inc.*, 10 OCAHO no. 1143, 6 (2012)).

According to ICE, respondent employs "approximately 34 people." *Government's Motion* at 5. The government did not explain why it treated respondent's small business size as a neutral factor rather than a mitigating factor. ICE also submits that Cawoods' personal business property is valued at $637,213. *Id.* While this is not an insignificant amount, without additional

context or information about the company's finances, it is not readily apparent that this value undercuts mitigating the fine.[16] Cawoods also avers it is a small business under the Small Business Administration's industry classification system. *Respondent's Response* at 1-2. For these reasons, Cawoods will be considered a small business, and mitigation of the fine on account of Cawoods' small business size is warranted.

Moreover, Cawoods requests reduction of the penalty in consideration of the public policy of leniency to small entities. Leniency toward small businesses is a non-statutory factor appropriate for consideration in the penalty assessment. *See Keegan Variety*, 11 OCAHO no. 1238 at 6 (citing the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq. (2006), amended by § 223(a) of the SBREFA). Cawoods has not identified any other non-statutory factor that should be considered.

2. Recalculation of the Penalty

In the instant matter, the total penalty range for the twenty-six paperwork violations is between $2860 and $28,600. *See* 8 C.F.R. § 274a.10(b)(2). ICE assessed a base fine amount of $935 per violation, which represents a fine in the upper-range of assessments for first-time offenses. Penalties assessed in the upper-range of penalty amounts should be reserved for the most serious and egregious violations. *See United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013).

Considering a totality of the circumstances as set forth in the evidence of record and pleadings, ICE's proposed penalty is disproportionate to the Form I-9 violations and mitigating factors present in this case. First, as discussed above, the degree of seriousness among the violations varies, and this variation in seriousness should be reflected in the penalty. Here, the most serious of the violations consist of eight failures to prepare and/or present Forms I-9s and one failure to fully complete and sign both attestations in sections 1 and 2, while not completing the Form I-9 contemporaneously at the time of hire. Cawoods' failure to complete section 2 of a Form I-9 in its entirety is also very serious. Second, the penalty will be reduced to reflect the small size of the business and the public policy of leniency to small entities.

Therefore, after considering the totality of all relevant circumstances, the penalty will be adjusted as follows: (1) $600 per violation for the most serious of the violations, which are the eight failures to prepare and/or present Forms I-9 (Count II) and one failure to complete both the employee and employer attestations of a Form I-9 that was not timely prepared (Count III), for a

[16] The record does not contain any evidence of the company's financial information, such as annual sales or income. Under the Small Business Administration's guidelines, a "small business" is expressed in either "average annual receipts" in millions of dollars or "average employment" in the number of employees. *See* U.S. Small Business Administration, *Table of Small Business Size Standards Matched to North American Industry Classification System Codes* (Feb. 26, 2016), https://www.sba.gov/sites/default/files/files/Size_Standards_Table.pdf.

total penalty of $5400 for the most serious nine violations; (2) $575 per violation for the nine very serious violations of failure to complete section 2 (Count III), for a total penalty of $5175 for these nine very serious violations; and (3) $500 per violation for the remaining eight serious violations in Count III for failing to ensure that the employees properly completed section 1, for a total of penalty of $4000. Accordingly, the total civil money penalty assessed for all twenty-six violations is adjusted to $14,575.

The government's Motion for Summary Decision is granted in part, pursuant to 28 C.F.R. § 68.38, and denied in part because ICE failed to meet its burden of proof with respect to thirteen of the individuals listed in the complaint. Respondent's penalty is reduced to a fine in the mid-range of penalty amounts based on the presence of the differing degrees of seriousness of the violations and the mitigating factors of the small size of respondent's business and the policy of leniency toward small businesses. Accordingly, Cawoods is liable for twenty-six violations of 8 U.S.C. § 1324a(a)(1)(B), for which the fine assessed is $14,575.

D. Cawoods' Abeyance Request Is Denied

Finally, although Cawoods suggests that the interests of judicial economy and government resources would be best served by removing this case from OCAHO's docket and holding the case in abeyance while allowing Cawoods and the government to work out a compliance program or settlement of the dispute, this course of action is not a viable option at this stage of adjudication. During a telephonic prehearing conference call, the parties discussed settlement options and were encouraged to continue in settlement negotiations. In addition, it was made clear to the parties in a post-conference call order that the parties should inform OCAHO immediately if they decide to pursue settlement negotiations so that no decision would be issued that could hinder the settlement process. On November 10, 2015, the parties submitted a Joint Status Report stating that they had concluded settlement negotiations and were unable to reach a settlement agreement.

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

Because the parties in this case did not negotiate a settlement agreement or other compliance program, the case is properly before OCAHO for adjudication of both liability and penalty. As

previously discussed, once liability has been established, OCAHO must assess a penalty. 8 C.F.R. § 274a.10(b)(2) ("A respondent determined . . . to have failed to comply with the employment verification requirements . . . *shall* be subject to a civil penalty . . . .") (emphasis added); *Keegan*, 11 OCAHO no. 1238 at 7.

Additionally, contrary to Cawoods' assertions, ICE retains prosecutorial discretion as to how it performs worksite enforcement actions and whether it decides to issue a Notice of Intent to Fine instead of a Warning Notice. *See generally Texas v. United States*, 86 F. Supp. 3d 591, 645 (S.D. Tex.) ("The Judiciary has generally refrained from injecting itself into decisions involving the exercise of prosecutorial discretion or agency non-enforcement . . . . This is true whether the suit is brought under common law or the APA."), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *cert. granted*, 136 S. Ct. 906 (2016); *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. . . . ") (citations omitted).

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

IV. CONCLUSION

ICE met its burden of proving by a preponderance of the evidence that Cawoods is liable for twenty-six violations of 8 U.S.C. § 1324a(a)(1)(B), in that it failed to prepare and/or present Forms I-9 for eight employees and it failed to properly complete Forms I-9 for eighteen employees. However, ICE failed to meet its burden of proof as to the two violations alleged in Count I with respect to Jeronimo Franco and Juan Perez, because the government did not present any objective evidence to show that it provided Cawoods with the required notice and corrections period for the alleged technical and procedural violations in these individuals' Forms I-9. Moreover, the alleged violation charged in Count II concerning Arturo Benitez is dismissed because ICE did not show by a preponderance of the evidence that Mr. Benitez was an "employee" of Cawoods. Similarly, the ten violations alleged in Count III related to S Wesley Barrick, Javier Gutierrez, Jose Gutierrez, Leonardo Hernandez, John Lennon, Isrel Martinez, Mario Martinez, Julio Monterroza, Antonio Rosello, and Rigoberto Valdes are dismissed because ICE did not prove by a preponderance of the evidence that these individuals were employees of the company during the relevant inspection period and/or their Forms I-9 needed to be retained for inspection during the inspection period.

Cawoods' response to ICE's Motion consisted of a general denial of all liability, a Congressional Research article about ICE's worksite enforcement, and a request for the case to be held in

abeyance as a matter of policy and in the exercise of prosecutorial discretion. Respondent's arguments and evidence failed to satisfy its burden of production to rebut the government's evidence showing the company's liability for the twenty-six violations found. Through uncontroverted proof, ICE demonstrated that no genuine issue of material fact exists with respect to Cawoods' liability for twenty-six violations, and ICE is entitled to summary decision related to twenty-six violations as alleged in the Complaint.

However, ICE is not entitled to summary decision as to its penalty assessment. Pursuant to well-established OCAHO case law, all of Cawoods' substantive violations are considered serious and should aggravate the fine amount. Nevertheless, the violations are not all of equal seriousness and the differing degrees of seriousness for the twenty-six violations are reflected in the final penalty assessment. Moreover, significant mitigating factors have been considered in assessing the penalty, such as Cawoods' status as a small business and its request that the policy of leniency toward small businesses be employed in assessing the penalty. After conducting a *de novo* review of the fine amount, the appropriate penalty for the twenty-six paperwork violations is $14,575.

Cawoods is ordered to pay a total civil money penalty of $14,575.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Cawoods Produce, Inc. is an entity incorporated in the State of Texas.

2. On March 27, 2013, the Department of Homeland Security, Immigration and Customs Enforcement served Cawoods Produce, Inc. with a Notice of Inspection.

3. On April 29, 2013, the Department of Homeland Security, Immigration and Customs Enforcement delivered a Notice of Suspect Documents, a Notice of Discrepancies, a Notice of Technical and Procedural Failures, and Employee Discrepancy Notices to Cawoods Produce, Inc.

4. On May 4, 2013, Cawoods Produce, Inc. delivered corrected Forms I-9 to the Department of Homeland Security, Immigration and Customs Enforcement, in response to the notices served on April 29, 2013.

5. On May 23, 2013, the Department of Homeland Security, Immigration and Customs Enforcement delivered a second Notice of Discrepancies to Cawoods Produce, Inc.

6. The Department of Homeland Security, Immigration and Customs Enforcement did not submit copies of the two Notices of Discrepancies, the Notice of Suspect Documents, the Notice of Technical and Procedural Failures, the Employee Discrepancy Notices, or the corrected Forms I-9 that Cawoods Produce, Inc. returned to it.

7. The Department of Homeland Security, Immigration and Customs Enforcement served Cawoods Produce, Inc. with a Notice of Intent to Fine on May 20, 2014.

8. Cawoods Produce, Inc. filed a request for hearing on or about May 28, 2014.

9. Cawoods Produce, Inc. hired all thirty-nine individuals identified in the complaint after 1986.

10. The Department of Homeland Security, Immigration and Customs Enforcement did not submit evidence to support its allegation that Cawoods Produce, Inc. received notice of and a period of not less than ten days to correct the alleged technical and procedural violations in the Forms I-9 pertaining to Jeronimo Franco and Juan Perez.

11. The Department of Homeland Security, Immigration and Customs Enforcement did not demonstrate by a preponderance of the evidence that Arturo Benitez, S Wesley Barrick, Javier Gutierrez, Jose Gutierrez, Leonardo Hernandez, John Lennon, Isrel Martinez, Mario Martinez, Julio Monterroza, Antonio Rosello, and Rigoberto Valdes were employees of Cawoods Produce, Inc. during the relevant government inspection period.

12. Cawoods Produce, Inc. failed to present Forms I-9 for B Cawood, J Cawood, K Cawood, Juan Maranon, Richard Patterson, James Smith, G A Torres, and Juan Velasquez.

13. Cawoods Produce, Inc. failed to ensure that Juan Aguilar, Todd Avila, Jose Aviles, Domingo Barrientos, Ivan Castillo, Ignacio Dominguez, Miguel Eguizabal, Jason Green, Mohammad Khan, Joseph Lopez, Jose Loza, Elevid Manjarrez, Ricardo Martinez, Martin Miller, Alexander Perez, Rigoberto Renderos, Jose Santos, and Jose Uribe Jaime properly completed section 1 of their Forms I-9, or the company itself did not properly complete section 2 of these employees' Forms I-9.

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

15. Cawoods Produce, Inc. is a small business with no history of previous Form I-9 violations.

16. Cawoods Produce, Inc. was not shown to have acted in bad faith nor to have hired unauthorized workers.

B. Conclusions of Law

1. Cawoods Produce, Inc. is an entity within the meaning of 8 U.S.C. § 1324a(a)(1) (2012).

2. All conditions precedent to the institution of this proceeding have been satisfied.

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

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

5. "[A]ll facts and reasonable inferences to be derived therefrom are to be viewed in the light most favorable to the non-moving party." *United States v. Primera Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Egal v. Sears Roebuck & Co.*, 3 OCAHO no. 442, 486, 495 (1992)).
6. In cases arising under 8 U.S.C. § 1324a, the government has the burden of proving by a preponderance of the evidence that respondent is liable for committing a violation of the employment eligibility verification requirements. *See United States v. Nebeker, Inc.*, 10 OCAHO no. 1165, 4 (2013) (citing *United States v. Am. Terrazzo Corp.*, 6 OCAHO no. 877, 577, 581 (1996)).

7. "The government has the burden of proof with respect to the penalty, *United States v. March Construction, Inc.*, 10 OCAHO no. 1158, 4 (2012), and must prove the existence of any aggravating factor by a preponderance of the evidence, *United States v. Carter*, 7 OCAHO no. 931, 121, 159 (1997)." *United States v. Niche, Inc.*, 11 OCAHO no. 1250, 6 (2015).

8. After the government has introduced evidence to meet its burden of proof, "the burden of *production* shifts to the respondent to introduce evidence . . . to controvert the government's evidence. If the respondent fails to introduce any such evidence, the unrebutted evidence introduced by the government may be sufficient to satisfy its burden . . . ." *United States v. Durable, Inc.*, 11 OCAHO no. 1231, 5 (2014) (referencing *United States v. Alvand, Inc*., 2 OCAHO no. 352, 378, 382 (1991) (modification by the Chief Administrative Hearing Officer); *United States v. Kumar*, 6 OCAHO no. 833, 112, 120-21 (1996); *Breda v. Kindred Braintree Hosp., LLC*, 10 OCAHO no. 1202, 8 (2013)).

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

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

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

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

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

13. Cawoods Produce, Inc. is liable for twenty-six violations of 8 U.S.C. § 1324a(a)(1)(B), for failing to prepare and/or present eight Forms I-9 and failing to properly complete eighteen Forms I-9.

14. 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 does not require that equal weight necessarily be given to each factor, nor does it rule out consideration of other factors." *United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000).

15. Cawoods Produce, Inc. is a small business warranting penalty mitigation.

16. Cawoods Produce, Inc. is a small business and warrants penalty mitigation pursuant to the Small Business Act's policy of leniency toward small businesses.

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

18. An Administrative Law Judge's *de novo* review of the government's fine assessment can lead to a determination that differing degrees of seriousness exist among the paperwork violations, which can result in different fine assessments for each count. *United States v. Wave Green, Inc.*, 11 OCAHO no. 1267, 13 (2016) (citing *United States v. Holtsville 811 Inc.*, 11 OCAHO no. 1258, 10 (2015); *United States v. Niche, Inc.*, 11 OCAHO no. 1250, 10 (2015)).

19. The "failure of both the employee and the employer to attest to the accuracy of data on the Forms I-9, in conjunction with failing to complete the forms contemporaneously with hiring is tantamount to a failure to prepare a Form I-9 at all," the most serious of paperwork violations under 8 U.S.C. § 1324a(b). *United States v. Wave Green, Inc.*, 11 OCAHO no. 1267, 15 (2016).

20. The Department of Homeland Security, Immigration and Customs Enforcement has prosecutorial discretion to determine how to perform worksite enforcement audits and whether to issue a Notice of Intent to Fine. *See generally Texas v. United States*, 86 F. Supp. 3d 591, 645 (S.D. Tex.) ("The Judiciary has generally refrained from injecting itself into decisions involving the exercise of prosecutorial discretion or agency non-enforcement . . . . This is true whether the suit is brought under common law or the APA."), *aff'd*, 809 F.3d 134 (5th Cir. 2015), *cert. granted*, 136 S. Ct. 906 (2016); *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. . . . ") (citations omitted).

ORDER

ICE's Motion for Summary Decision is granted in part. Cawoods is liable for twenty-six violations of 8 U.S.C. § 1324a(a)(1)(B) and is directed to pay civil penalties in the total amount of $14,575. 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 June 2, 2016.

_____

Stacy S. Paddack
Administrative Law Judge

Appeal Information

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

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

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.