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

September 29, 2016

UNITED STATES OF AMERICA, Complainant, v. SOLUTIONS GROUP INTERNATIONAL, LLC, Respondent.	)	8 U.S.C. § 1324a Proceeding OCAHO Case No. 15A00069

FINAL DECISION AND ORDER

Appearances:

Hye Chon
For Complainant

Ramon Trujillo
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 two-count complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against Solutions Group International, LLC (Solutions Group, Respondent, or the company). Respondent filed an answer, and the parties completed prehearing procedures.

Presently pending are the government's Motion to Amend Complaint, Motion for Summary Decision, and Motion to Strike Respondent's Affirmative Defenses. Respondent has filed responses opposing the Motion for Summary Decision and Motion to Strike Respondent's Affirmative Defenses. As discussed in detail below, the government's Motion to Amend Complaint, removing one violation from Count I, is **GRANTED**. Further, the government's

Motion for Summary Decision is **GRANTED, IN PART**, because the government established that there is no genuine issue of material fact with respect to Solutions Group's liability for all charged violations. The government's proposed penalty, however, has been adjusted pursuant to a *de novo* review of the totality of the evidence. Lastly, as a result of this decision, the government's Motion to Strike Respondent's Affirmative Defenses is **DISMISSED,** as moot.

II. BACKGROUND INFORMATION AND POSITIONS OF THE PARTIES

Solutions Group is a private security and investigations firm incorporated in the State of California. The company is located in Beverly Hills, California, and has approximately ninety employees.

On August 29, 2013, the government served Solutions Group with a Notice of Inspection (NOI). In the NOI, the government requested that the company present its Employment Eligibility Verification Forms (Forms I-9) no later than September 5, 2013. Respondent presented Forms I-9 for inspection on October 22, 2013.

On September 18, 2014, the government served a Notice of Intent to Fine (NIF) on Respondent. The NIF contained two counts, both involving violations of 8 U.S.C. § 1324a(a)(1)(B). Count I alleged that Respondent failed to prepare and/or present Forms I-9 for the following thirty two employees: (1) James A. Alvarez; (2) Maynard C. Amat; (3) Reynaldo Amaya; (4) Eduardo Arias; (5) Dazaeth Bahena; (6) Mauricio C. Baustista; (7) Edward Corrington; (8) Daniel F. Cortez, Jr.; (9) Mariano Diaz; (10) Michael Duffy; (11) Hecor R. Feliciano; (12) Giovanni F. Gorgue; (13) Jason M. Grace; (14) Jon C. Gray; (15) Alesha Hawkins; (16) Martin A. Higuera; (17) Derick C. Hockaday; (18) Mark S. Hubert; (19) Arthur V. Juliano Jr.; (20) Humberto R. Magallanes; (21) Miek A. Martinez; (22) Julio A. Molina; (23) Paul D. Pine; (24) Brendy Ponce; (25) Grant W. Reynolds; (26) Humberto M. Robles; (27) Mauro Ruacho; (28) Glenn P. Sabey; (29) David A. Sevesind; (30) Richard A. Suviate; (31) Christopher Uthoff; and (32) Julio E. Vargas. For these Count I violations, ICE proposed a civil money penalty of $32,912, which includes an enhancement adjustment of $2992.

Count II alleged that Respondent failed to ensure that the following fifty three employees properly completed section 2 of their Forms I-9: (1) Jerry A. Almario; (2) Joseph J. Androwski; (3) Dwight A. Bendigo; (4) Brandon Bittorf; (5) Tony Brown; (6) Joshua R. Byrd; (7) Stanley L. Campbell; (8) Warner Carias; (9) Sean R. Caro; (10) John M. Collard; (11) Anton Diefert; (12) Gilbert Dominguez; (13) John Foresty; (14) Murrell D. Garr Jr.; (15) Robert E. Gilman; (16) Omar A. Gomez; (17) Ivan Gourgue; (18) Paul A. Grimes; (19) Kristopher R. Guerrero; (20) John J. Haag; (21) Harry D. Hampton; (22) Richard J. Higgins; (23) Steven L. Hoffman; (24) George Holt, aka George H. Holt IV; (25) Mohamed Ibrahim; (26) Gary R. Koba; (27) Franjo G. Liebscher; (28) Francisco J. Lopez; (29) Stefano Lucifora; (30) Mervin J. Manlangit; (31) Omar E. Martinez; (32) Arthur R. Miranda; (33) Ernesto Morales; (34) Jeffrey L. Nettleton; (35)

Andrew A. Paredes; (36) Raymond R. Perez; (37) Tony R. Perez; (38) Freddie G. Piro; (39) Roxley O. Pratt; (40) Valentin Reyes; (41) Mark A. Ricks; (42) Joshua R. Rivera; (43) Marco Sanchez, aka Marco Antonio Sanchez Jr.; (44) Regina A. Smith; (45) William Smith; (46) Stephanie Sutherland; (47) Claro C. Tiglao; (48) Edwin Torres; (49) Edwin E. Tuazon; (50) Richard Vasquez; (51) Lorenzo A. Villa; (52) Oscar Villareal; and (53) Ryan Paul Saez Yambao. For these Count II violations, ICE proposed a civil money penalty of $54,510.50, which includes an enhancement adjustment of $4,995.50.

As a result of these eighty five violations, ICE assessed a fine of $87,422.50. On July 28, 2015, ICE filed a complaint against Solutions Group. The complaint fully incorporated the two counts contained in the NIF, including the proposed civil money penalty.

Solutions Group filed an answer to the complaint on October 7, 2015. The company denied the government's allegations and raised six affirmative defenses. Respondent argued that (1) the government failed to state a claim upon which relief can be granted; (2) Respondent provided all of the required information to ICE; (3) the doctrine of good-faith compliance is applicable; (4) ICE violated its Fourth Amendment rights because it targeted Respondent's industry; (5) ICE violated its Fifth Amendment rights because it targeted Respondent's industry; and (6) the penalty proposed by ICE is excessive or inappropriate.

On November 12, 2015, ICE filed its prehearing statement, proposing five factual stipulations. The first proposed factual stipulation provides that Solutions Group was incorporated in California. Proposed factual stipulations two through four relate to the procedural history of the case. The fifth proposed factual stipulation states that all eighty five individuals listed on the Notice of Intent to Fine were employees of Solutions Group during some or all of the period for which Respondent was required to produce Forms I-9. Solutions Group filed its prehearing statement on December 12, 2015, and agreed to all of ICE's proposed stipulations.

On March 23, 2016, ICE filed a Motion to Amend Complaint, pursuant to 28 C.F.R. § 68.9(e). The amended complaint removes one violation from Count I (Employee #10, Michael Duffy), resulting in thirty one violations, for a total Count I penalty of $38,709, and a total penalty for both counts of $86,394. The government's motion to amend the complaint is hereby **GRANTED**.

That same day, the government also filed a Motion to Strike Respondent's Affirmative Defenses and a Motion for Summary Decision, pursuant to 28 C.F.R. § 68.38.

The Motion for Summary Decision (Motion) contains twelve proposed exhibits: (G-1) Notice of Inspection (pp. 1-2); (G-2) Forms I-9 (pp. 3-71); (G-3) Employee Personal Data Listing (pp. 72-74); (G-4) Payroll Journal (pp. 75-81); (G-5) Quarterly Wage and Withholding Report (pp. 82-91); (G-6) Certificate of Status, LLC Articles of Organization, and Statement of Information from the California Secretary of State (pp. 92-94); (G-7) Business Entity Detail, California

Secretary of State (p. 95); (G-8) Business Entity Questionnaire (pp. 96-98); (G-9) Fact Sheet, Solutions Group International (p. 99); (G-10) Notice of Intent to Fine (pp.100-06); (G-11) Request for a Hearing (pp. 107-08); and (G-12) Declaration of Michael Enright, ICE Special Agent (pp.109-13).

In its Motion, ICE contends that it has met its burden of demonstrating the absence of a genuine issue of material fact as to Respondent's liability for the eighty four violations charged in Counts I and II of the amended complaint. With regard to the civil money penalty, ICE argues that there is no genuine issue of material fact concerning its fine assessment. The Motion provides analysis of the five statutory factors set forth at 8 U.S.C. § 1324a(e)(5): (1) size of the business; (2) good faith of the employer; (3) seriousness of the violations; (4) whether the individual was an unauthorized alien; and (5) history of prior violations.

At the outset, ICE assessed a baseline fine rate of $935 for each of the eighty four violations. ICE then considered the statutory factors to determine whether they would have an aggravating, mitigating, or neutral impact on the baseline fine. *See* Motion at 9-13. ICE noted that Respondent is a small business with no history of previous violations and no presence of unauthorized aliens in its workforce. Therefore, ICE treated these three statutory factors as neutral in its fine analysis. *Id.*

ICE found that aggravation of the fine was warranted based on the two remaining statutory factors—lack of good faith and seriousness of the violations—thus, it enhanced the proposed baseline fine by $2,992.00 for Count I and $4,995.50 for Count II. *See id.*, Ex. G-10 at 102-04. ICE found that Respondent lacked good faith because Solutions Group "has been operating since November 2003 but has failed to be in substantial compliance with verifying employment eligibility for the entirety of its workforce as of the time of the inspection in this case." *Id.* at 10. ICE also pointed to the egregiousness of the errors with the Forms I-9 as evidence evincing a lack of good faith. Additionally, ICE aggravated the penalty because all of the violations were serious in nature. *Id.*

ICE also assessed whether the penalty should be mitigated based on the non-statutory factor of Respondent's ability to pay. After reviewing Respondent's tax returns from 2012 through 2014, ICE determined that although Respondent claims net business losses for these years, its gross receipts have increased each year. Therefore, ICE contends that Respondent has not provided sufficient evidence to demonstrate an inability to pay the assessed fine. *Id.* at 12-13. After considering the above-mentioned factors, ICE proposed a total penalty of $86,394.00. *See id.* at 1, fn 1.

On April 27, 2016, Solutions Group filed responses to the government's Motion for Summary Decision (Response) and Motion to Strike Respondent's Affirmative Defenses. Solutions Group's Response contains three proposed exhibits, consisting of the company's tax returns from 2012 through 2014.

In its Response, Solutions Group states that it "does not contest the violations alleged in Counts I and II." Response at 2. Respondent contends that it performs a thorough interview process and background search, thereby verifying an individual's ability to work legally in the United States, and that most of its employees are former U.S. military or police officers. Accordingly, "[f]or those reasons, and the reasons described in its Answer and Affirmative Defenses, Respondent asks this court to find that it has complied with the law, despite paperwork violations and dismiss any penalty assessments." *Id.* at 3.

Respondent then asserts that mitigation of the proposed penalty is warranted because four out of the five statutory factors—excluding seriousness of the violations—weigh in its favor. Respondent also requests that its ability to pay be taken into consideration, as it is operating at a net loss and "does not have the ability to pay the proposed penalty." *Id.* at 6.

III. DISCUSSION AND ANALYSIS

A. Applicable Legal Standards

1. Summary Decision

OCAHO rule 28 C.F.R. § 68.38(c)[1] establishes that an Administrative Law Judge "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." Relying on United States Supreme Court precedent, OCAHO case law has held, "[a]n issue of material fact is genuine only if it has a real basis in the record. A genuine issue of fact is 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)).[2]

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

[2] 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.

"Once the moving party satisfies its initial burden of demonstrating both the absence of a material factual issue and that the party is entitled to judgment as a matter of law, the nonmoving party must come forward with contravening evidence to avoid summary resolution." *United States v. Four Seasons Earthworks, Inc.*, 10 OCAHO no. 1150, 3 (2012) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)); *see generally* FED. R. CIV. P. 56(e). OCAHO rule 28 C.F.R. § 68.38(b) provides that the party opposing the motion for summary decision "may not rest upon the mere allegations or denials" of its pleadings, but must "set forth specific facts showing that there is a genuine issue of fact for the hearing." Moreover, "all facts and reasonable inferences to be derived therefrom are to be viewed in the light most favorable to the non-moving party." *United States v. Primera Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994).

2. The Employment Verification Requirements

Employers must prepare and retain Forms I-9 for employees hired after November 6, 1986, and are required to produce the Forms I-9 for inspection by the government upon three days' notice. 8 C.F.R. § 274a.2(b)(2)(ii); *United States v. Keegan Variety, LLC*, 11 OCAHO no. 1238, 2 (2014). Employers must ensure that an employee complete 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 section 2 of the Form I-9. *See* U.S. Citizenship and Immigration Services (USCIS), Form I-9 Instructions at 3 (Mar. 8, 2013).

Failures to meet these statutory obligations are known as "paperwork violations," which are either substantive violations or technical or procedural failures. *See* Paul W. Virtue, INS Acting Exec. Comm. of Programs, *Interim Guidelines: Section 274A(b)(6) of the Immigration & Nationality Act Added by Section 411 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (Mar. 6, 1997), *available at* 74 No. 16 Interpreter Releases 706 (Apr. 28, 1997) (Virtue Memorandum). Violations that the Virtue Memorandum characterizes as substantive include, but are not limited to: failing to review and verify a proper List A document or proper List B and List C documents in section 2 of the Form I-9; and failing to sign the attestation in section 2 of the Form. Virtue Memorandum at 3.

B. Respondent's Liability

Based on the parties' prehearing statements, Solutions Group stipulated to the fact that all eighty four employees listed in Counts I and II were employed by Solutions Group during some or all of the period from which it was required to produce Forms I-9. Further, in its response to the government's Motion for Summary Decision, Solutions Group stated that it "does not contest the violations alleged in Counts I and II," and acknowledged the presence of paperwork violations. Response at 2-3.

With regard to Count I, ICE asserts that no Forms I-9 were prepared and/or produced for the thirty one named individuals. Despite acknowledging that these individuals were employees of the company for whom it was required to prepare and present Forms I-9, Solutions Group has provided no evidence demonstrating that Forms I-9 were completed for these individuals, let alone provided to ICE, and its own statements indicate an acknowledgment of liability. Accordingly, Respondent is liable for all thirty one violations in Count I. All thirty one violations are considered to be substantive in nature.

With regard to Count II, a visual examination of the Forms I-9 for the fifty three individuals named therein reveals the presence of substantive violations. Specifically, thirteen of the Forms I-9 only contain the first page of the Form I-9, but no second page providing section 2 information.[3] Thirty nine of the Forms I-9 do not contain a completed employer attestation under section 2.[4] Lastly, the Form I-9 for Andrew A. Paredes contains a Driver's License as a

[3] The thirteen individuals, whose Forms I-9 did not contain a second page with a section 2, are listed below: (1) Jerry A. Almario; (2) Dwight A. Bendigo; (3) Joshua R. Byrd; (4) Omar A. Gomez; (5) Ivan Gourgue; (6) John J. Haag; (7) George Holt, aka George H. Holt IV; (8) Franjo G. Liebscher; (9) Francisco J. Lopez; (10) Ernesto Morales; (11) Jeffrey L. Nettleton; (12) Oscar Villareal; and (13) Ryan Paul Saez Yambao.

[4] The thirty nine individuals, whose Forms I-9 did not contain a section 2 employer attestation are listed below: (1) Joseph J. Androwski; (2) Brandon Bittorf; (3) Tony Brown; (4) Stanley L. Campbell; (5) Warner Carias; (6) Sean R. Caro; (7) John M. Collard; (8) Anton Diefert; (9) Gilbert Dominguez; (10) John Foresty; (11) Murrell D. Garr Jr.; (12) Robert E. Gilman; (13) Paul A. Grimes; (14) Kristopher R. Guerrero; (15) Harry D. Hampton; (16) Richard J. Higgins; (17) Steven L. Hoffman; (18) Mohamed Ibrahim; (19) Gary R. Koba; (20) Stefano Lucifora; (21) Mervin J. Manlangit; (22) Omar E. Martinez; (23) Arthur R. Miranda; (24) Raymond R. Perez; (25) Tony R. Perez; (26) Freddie G. Piro; (27) Roxley O. Pratt; (28) Valentin Reyes; (29) Mark A. Ricks; (30) Joshua R. Rivera; (31) Marco Sanchez, aka Marco Antonio Sanchez Jr.; (32) Regina A. Smith; (33) William Smith; (34) Stephanie Sutherland; (35) Claro C. Tiglao; (36) Edwin Torres; (37) Edwin E. Tuazon; (38) Richard Vasquez; and (39) Lorenzo A. Villa. The government's motion erroneously included George Holt, a/k/a George H. Holt, IV in this group when he should only have been listed as one of the aforementioned thirteen employees whose Form I-9 did not contain a second page with a section 2. Further, the government did not include

List B document, but no List C document. Respondent has provided no evidence demonstrating that the Forms I-9 for these individuals were properly completed and, as noted above, its own statements indicate an acknowledgment of liability. Therefore, Respondent is liable for all fifty three violations in Count II.

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

C. Respondent's Affirmative Defenses

Respondent's first affirmative defense, that Complainant failed to state a claim upon which a relief can be granted, is entirely without merit. Count I states that Respondent failed to prepare and/or present thirty one Forms I-9 for individuals employed at the company. This allegation is not a "generic claim," as Respondent alleges, *see* Answer at 2, and further clarification was not required for Respondent to properly defend itself. *See* 28 C.F.R. § 68.7(b).

Respondent's second affirmative defense states that it "met its obligations in preparing and supplying the necessary Employment Eligibility Verification Forms (Form I-9) to the ICE agents when requested." Answer at 2-3. As demonstrated above in the prior section, Respondent failed to provide thirty one Forms I-9 that were required to be presented to the government. Further, fifty three of the Forms I-9 that it did provide contained substantive violations.

Respondent's third affirmative defense "alleges that the doctrine of good-faith compliance [is applicable], as set forth in 8 U.S.C. § 1324a(b)(6)." Answer at 3. However, the good-faith defense, found at 8 U.S.C. § 1324a(b)(6)(A), provides a narrow but complete defense where an entity is charged with technical or procedural failures in connection with completion of the Form I-9. *See United States v. LFW Dairy Corp.*, 10 OCAHO no. 1129, 5 (2009). ICE established that Solutions Group's paperwork violations, as charged in the complaint, are all substantive violations, not technical or procedural failures. This provision is therefore inapplicable to Respondent's liability for substantive paperwork violations.

Respondent's fourth and fifth defenses allege that the company's Fourth and Fifth Amendment rights were violated by the selective enforcement of employer sanctions. Respondent contends that because it was specifically targeted by ICE and not selected at random, its equal protection rights were violated. However, Respondent has provided no evidence to support its assertions, nor case law to support its argument.

Valentin Reyes in this group; however, upon examination his Form I-9 did not contain a section 2 employer attestation.

Lastly, Respondent's sixth affirmative defense alleges that the proposed penalty is excessive or inappropriate. Because this pertains to the assessment of penalties rather than the issue of liability, it will be discussed below.

For the above reasons, Respondent's six affirmative defenses are not persuasive and lack merit.

D. Penalty Assessment

When an employer fails to properly prepare, retain, or produce Forms I-9 upon request, civil money penalties are assessed according to the following parameters established at 8 C.F.R. § 274a.10(b)(2): the minimum penalty is $110 and the maximum penalty is $1100 for each individual with respect to whom a paperwork violation occurred after September 29, 1999. For the eighty four violations in this case, potential penalties range from $9240 to $92,400. Penalties assessed in the upper range of penalty amounts should be reserved for the most serious and egregious violations. *See United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013). A penalty needs to be sufficiently meaningful to accomplish the purpose of deterring future violations, *United States v. Jonel, Inc.*, 8 OCAHO no. 1008, 175, 201 (1998), while at the same time not being unduly punitive in light of the particular respondent's resources, *United States v. Minaco Fashions, Inc.*, 3 OCAHO no. 587, 1900, 1909 (1993).

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

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

1. Size of Employer's Business

In its Motion for Summary Decision, ICE stated that there is no issue regarding the size of Solutions Group, as it is a small business in terms of the size of its workforce. *See* Motion at 10.

The record indicates that Solutions Group has less than 100 employees. *See id.*, Exs. G-4 at 75; G-8 at 96; *see also United States v. Carter*, 7 OCAHO no. 931, 121, 162 (1997) (noting that OCAHO case law generally considers businesses with fewer than 100 employees to be small businesses). However, the government did not state that it was mitigating its proposed penalty based on the small size of the company and provided no explanation for not doing so. Given that there is no dispute as to whether Respondent is a small business, mitigation of the penalty assessment is appropriate for this factor.

2. Good Faith

The government asserts that the penalty should be enhanced based on Respondent's lack of good faith. Specifically, ICE's Motion states that Respondent "has been operating since November 2003 but has failed to be in substantial compliance with verifying employment eligibility for the entirety of its workforce as of the time of the inspection in this case." Motion at 10. ICE also pointed to the egregiousness of the errors with the Forms I-9 as evidence evincing a lack of good faith.

"[T]he primary focus of a good faith analysis is on the respondent's compliance *before* the investigation." *United States v. New China Buffet Rest.*, 10 OCAHO no. 1133, 5 (2010) (citing *United States v. Great Bend Packing Co.*, 6 OCAHO no. 835, 136 (1996)); *United States v. Chef Rayko, Inc.*, 5 OCAHO no. 794, 582, 592 (1995) (modification by the CAHO)). In determining good faith, the government cannot merely point to a company's poor rate of compliance in order to demonstrate a lack of good faith; rather, the government must present some evidence of "culpable behavior beyond mere failure of compliance." *United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 477, 480 (1995) (modification by the CAHO)).

This statutory factor will remain neutral in the penalty analysis and no adjustment will be made to the fine based only on ICE's perception concerning Respondent's lack of good faith.

3. 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. Additionally, the seriousness of the 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). The complete failure to prepare a Form I-9 for an employee is among the most serious of paperwork violations, *United States v. MEMF LLC*, 10 OCAHO no. 1170, 5 (2013), and generally warrants a higher penalty than do errors or omissions in completing the form. *See United States v. Speedy Gonzalez Constr., Inc.*, 11 OCAHO no. 1243, 5-6 (2015) ("Failure to prepare or present an I-9 is one of the most serious violations because it completely subverts the purpose of the employment verification requirements.").

As discussed above, ICE has shown that Respondent failed to prepare and/or present Forms I-9 for the thirty one individuals named in Count I. As this is the most serious of paperwork violations, aggravation is warranted and the highest penalty will be assessed for these thirty one violations.

The fifty three violations in Count II, involving failures to properly complete section 2 of the Form I-9, are only slightly less serious than the complete failure to prepare Forms I-9. OCAHO case law states that failure to sign the employer attestation in section 2 is "among the most serious of possible violations." *United States v. Hartmann Studios, Inc.*, 11 OCAHO no. 1255, 14 (2015); *see also United States v. Employer Solutions Staffing Grp. II, LLC*, 11 OCAHO no. 1242, 11 (2015), *vacated on other grounds*, 2016 WL 4254370 (5th Cir. 2016) (describing section 2 as "the very heart" of the verification process).

Accordingly, ICE has met its burden of proving that fine aggravation is warranted due to the seriousness of the violations in both counts. As noted, based on seriousness of the violations, the penalty for the violations in Count I will be aggravated to a greater degree than those in Count II.

4. Whether the Employee is Unauthorized

There is no genuine issue of material fact regarding the involvement of unauthorized aliens. Accordingly, the government appropriately treated this factor as neutral.

5. History of Previous Violations

The government appropriately determined the absence of a history of previous violations was a neutral factor. As OCAHO case law instructs, "never having violated the law before does not necessarily warrant additional leniency, and it is still appropriate to treat this factor as a neutral one." *New China Buffet Rest.*, 10 OCAHO no. 1133 at 6.

6. Additional Non-Statutory Factors

A party seeking consideration of a non-statutory factor, such as ability to pay the penalty, bears the burden of proof in showing that the factor should be considered as a matter of equity, and that the facts support a favorable exercise of discretion. *See United States v. Buffalo Transp., Inc.*, 11 OCAHO no. 1263, 11 (2015) (citing *United States v. Century Hotels Corp.*, 11 OCAHO no. 1218, 4 (2014)).

Respondent argued in its Answer and its Response to the government's Motion for Summary Decision that imposition of the fine will cause the company financial hardship, which is an appropriate factor to consider. *See United States v. Niche, Inc.*, 11 OCAHO no. 1250, 11 (2015). Additionally, Respondent provided evidence, in the form of tax returns from 2012 through 2014,

indicating that it operated at a net loss during that time period. Based on Respondent's arguments and the evidence provided, it is appropriate to consider its financial allegations with the statutory factors.

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

7. Recalculation of the Penalty

Before addressing the various mitigating and aggravating statutory factors, ICE assessed a base fine amount of $935 per violation, which represents a fine in the upper-range of assessments for first-time offenses. As noted above, OCAHO case law makes clear that penalties approaching the maximum permissible fine amount should be reserved for the most egregious violations. *See Fowler Equipment*, 10 OCAHO no. 1169 at 6. Considering the record as a whole, the five statutory factors, the company's ability to pay, and the general public policy of leniency toward small entities as set out in the Small Business Regulatory Enforcement Fairness Act, the penalties in this case will be adjusted as a matter of discretion to an amount closer to the mid-range of permissible penalties.

The penalty for the thirty one violations in Count I, involving the failure to prepare and/or present Forms I-9, is assessed at $700 per violation, for a total penalty amount of $21,700. For the fifty three violations in Count II, the penalty is assessed at $650 per violation, for a total penalty amount of $34,450. The total civil money penalty for all eighty four violations for which Respondent is liable is assessed at $56,150.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Solutions Group International, LLC, is an entity incorporated in the State of California.

2. On August 29, 2013, the Department of Homeland Security, Immigration and Customs Enforcement, served Solutions Group International, LLC, with a Notice of Inspection.

3. On October 22, 2013, Solutions Group International, LLC, presented Forms I-9 to the Department of Homeland Security, Immigration and Customs Enforcement.

4. The Department of Homeland Security, Immigration and Customs Enforcement, served Solutions Group International, LLC, with a Notice of Intent to Fine on September 18, 2014.

5. The Department of Homeland Security, Immigration and Customs Enforcement, filed a complaint with the Office of the Chief Administrative Hearing Officer on July 28, 2015.

6. On March 23, 2016, the Department of Homeland Security, Immigration and Customs Enforcement, filed an amended complaint.

7. Solutions Group International, LLC, hired and employed the 84 individuals identified in the amended complaint after November 6, 1986.

8. Solutions Group International, LLC, failed to prepare and/or present Forms I-9 for the following thirty one employees: (1) James A. Alvarez; (2) Maynard C. Amat; (3) Reynaldo Amaya; (4) Eduardo Arias; (5) Dazaeth Bahena; (6) Mauricio C. Baustista; (7) Edward Corrington; (8) Daniel F. Cortez, Jr.; (9) Mariano Diaz; (10) Hecor R. Feliciano; (11) Giovanni F. Gorgue; (12) Jason M. Grace; (13) Jon C. Gray; (14) Alesha Hawkins; (15) Martin A. Higuera; (16) Derick C. Hockaday; (17) Mark S. Hubert; (18) Arthur V. Juliano Jr.; (19) Humberto R. Magallanes; (20) Miek A. Martinez; (21) Julio A. Molina; (22) Paul D. Pine; (23) Brendy Ponce; (24) Grant W. Reynolds; (25) Humberto M. Robles; (26) Mauro Ruacho; (27) Glenn P. Sabey; (28) David A. Sevesind; (29) Richard A. Suviate; (30) Christopher Uthoff; and (31) Julio E. Vargas.

9. Solutions Group International, LLC, failed to ensure that the following fifty three employees properly completed section 2 of their Forms I-9: (1) Jerry A. Almario; (2) Joseph J. Androwski; (3) Dwight A. Bendigo; (4) Brandon Bittorf; (5) Tony Brown; (6) Joshua R. Byrd; (7) Stanley L. Campbell; (8) Warner Carias; (9) Sean R. Caro; (10) John M. Collard; (11) Anton Diefert; (12) Gilbert Dominguez; (13) John Foresty; (14) Murrell D. Garr Jr.; (15) Robert E. Gilman; (16) Omar A. Gomez; (17) Ivan Gourgue; (18) Paul A. Grimes; (19) Kristopher R. Guerrero; (20) John J. Haag; (21) Harry D. Hampton; (22) Richard J. Higgins; (23) Steven L. Hoffman; (24) George Holt, aka George H. Holt IV; (25) Mohamed Ibrahim; (26) Gary R. Koba; (27) Franjo G. Liebscher; (28) Francisco J. Lopez; (29) Stefano Lucifora; (30) Mervin J. Manlangit; (31) Omar E. Martinez; (32) Arthur R. Miranda; (33) Ernesto Morales; (34) Jeffrey L. Nettleton; (35) Andrew A. Paredes; (36) Raymond R. Perez; (37) Tony R. Perez; (38) Freddie G. Piro; (39) Roxley O. Pratt; (40) Valentin Reyes; (41) Mark A. Ricks; (42) Joshua R. Rivera; (43) Marco Sanchez, aka Marco Antonio Sanchez Jr.; (44) Regina A. Smith; (45) William Smith; (46) Stephanie Sutherland; (47) Claro C. Tiglao; (48) Edwin Torres; (49) Edwin E. Tuazon; (50) Richard Vasquez; (51) Lorenzo A. Villa; (52) Oscar Villareal; and (53) Ryan Paul Saez Yambao.

10. Solutions Group International, LLC, a small business with no history of previous violations and no presence of unauthorized aliens in its workforce.

11. Solutions Group International, LLC, was not shown to have acted in bad faith.

B. Conclusions of Law

1. Solutions Group International, LLC, 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. Solutions Group International, LLC, is liable for eighty four violations of 8 U.S.C. § 1324a(a)(1)(B).

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

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

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

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

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

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

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

10. Employers must ensure that an employee complete 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).

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. The good-faith defense, found at 8 U.S.C. § 1324a(b)(6)(A), provides a narrow but complete defense where an entity is charged with technical or procedural failures in connection with completion of the Form I-9. *See United States v. LFW Dairy Corp.*, 10 OCAHO no. 1129, 5 (2009).

13. 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.

14. 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).

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

16. As set forth at 8 U.S.C. § 1324a(e)(5), the following factors must be considered when assessing civil money penalties for paperwork violations: (1) the size of the employer's business; (2) the employer's good faith; (3) the seriousness of the violations; (4) whether the employee is an unauthorized alien; and (5) the employer's history of previous violations.

17. "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).

18. The government has the burden of proving both liability and an appropriate penalty. In addition, the government must prove the existence of aggravating factors by a preponderance of

the evidence. *See United States v. Platinum Builders of Cent. Fla., Inc.*, 10 OCAHO no. 1199, 8 (2013) (citing *United States v. Nebeker, Inc.*, 10 OCAHO no. 1165 (2013)).

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

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

21. "[T]he primary focus of a good faith analysis is on the respondent's compliance *before* the investigation." *United States v. New China Buffet Rest.*, 10 OCAHO no. 1133, 5 (2010) (citing *United States v. Great Bend Packing Co.*, 6 OCAHO no. 835, 136 (1996)); *United States v. Chef Rayko, Inc.*, 5 OCAHO no. 794, 582, 592 (1995) (modification by the CAHO)).

22. The government cannot merely point to a company's poor rate of compliance in order to demonstrate a lack of good faith. Rather, the government must present some evidence of "culpable behavior beyond mere failure [to comply]." *United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 477, 480 (1995) (modification by the CAHO).

23. "Paperwork violations are always potentially serious." *United States v. Skydive Acad. of Haw. Corp.*, 6 OCAHO no. 848, 235, 245 (1996).

24. "[T]he seriousness of the violations should be determined by examining the specific failure in each case." *United States v. Skydive Acad. of Haw. Corp.*, 6 OCAHO no. 848, 235, 246 (1996).

25. The seriousness of the 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).

26. The complete failure to prepare a Form I-9 for an employee is among the most serious of paperwork violations, *United States v. MEMF LLC*, 10 OCAHO no. 1170, 5 (2013), and generally warrants a higher penalty than do errors or omissions in completing the form. *See United States v. Speedy Gonzalez Construction, Inc.*, 11 OCAHO no. 1243, 5-6 (2015) ("Failure to prepare or present an I-9 is one of the most serious violations because it completely subverts the purpose of the employment verification requirements.").

27. Failure to sign the employer attestation in section 2 is "among the most serious of possible violations." *United States v. Hartmann Studios, Inc.*, 11 OCAHO no. 1255, 14 (2015); *see also*

United States v. Employer Solutions Staffing Grp. II, LLC, 11 OCAHO no. 1242, 11 (2015), *vacated on other grounds*, 2016 WL 4254370 (5th Cir. 2016) (describing section 2 as "the very heart" of the verification process).

28. "[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).

29. A party seeking consideration of a non-statutory factor, such as ability to pay the penalty, bears the burden of proof in showing that the factor should be considered as a matter of equity, and that the facts support a favorable exercise of discretion. *See United States v. Buffalo Transp., Inc.*, 11 OCAHO no. 1263, 11 (2015) (citing *United States v. Century Hotels Corp.*, 11 OCAHO no. 1218, 4 (2014)).

30. A company's ability to pay the proposed fine is an appropriate factor to consider. *See United States v. Niche, Inc.*, 11 OCAHO no. 1250, 11 (2015).

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

ORDER

ICE's March 23, 2016, Motion to Amend Complaint is hereby **GRANTED**. Further, ICE's Motion for Summary Decision is **GRANTED, IN PART**. The government met its burden of proving that Solutions Group International, LLC, is liable for eighty four violations of 8 U.S.C. § 1324a(a)(1)(B). Respondent is directed to pay civil money penalties in the total amount of $56,150. The parties are free to establish a payment schedule in order to minimize the impact of the penalty on the operations of the company. Lastly, the government's Motion to Strike Respondent's Affirmative Defenses is **DISMISSED,** as moot.

SO ORDERED.

Dated and entered this 29th day of September, 2016.

_____

Thomas P. McCarthy
Administrative Law Judge

Appeal Information

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

Provisions governing administrative reviews by the CAHO are set forth at 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. pt. 68. Note in particular that a request for administrative review must be filed with the CAHO within ten (10) days of the date of this order, pursuant to 28 C.F.R. § 68.54(a)(1) (2012).

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

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