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

December 22, 2016

UNITED STATES OF AMERICA, Complainant, v. PEGASUS FAMILY RESTAURANT, INC. Respondent.	))))))))	8 U.S.C. § 1324a Proceeding OCAHO Case No. 16A00039

FINAL DECISION AND ORDER

Appearances

Marvin J. Muller III, Esq.
for the complainant

James W. Grable
for the respondent

I. PROCEDURAL HISTORY

The Department of Homeland Security, Immigration and Customs Enforcement (DHS, ICE or the government) filed a two-count complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on May 3, 2016, alleging that Pegasus Family Restaurant, Inc. (Pegasus or the company) engaged in 111 violations of the employment eligibility verification requirements 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). Specifically, Count I of the complaint alleges thirty-one violations involving failure to prepare and/or present Forms I-9, and Count II alleges eighty violations involving failure to properly complete Forms I-9.

Respondent filed an answer on June 2, 2016, admitting the material allegations in the complaint, except as to four named employees for which it raised affirmative defenses.

Following the receipt of each party's prehearing statement and a telephonic prehearing conference, the parties filed a Joint Motion Stipulating to Liability on September 8, 2016. In the motion, the parties agreed to the following eleven stipulations verbatim:

1. Pegasus Family Restaurant, Inc. is a domestic business incorporated, registered, and directed by Themis Koutsandreas.

2. A Notice of Inspection was served on the Respondent on December 13, 2013.

3. The Respondent was requested to present all documentation to DHS no later than December 18, 2013.

4. The Notice of Intent to Fine ("NIF") was served on the Respondent on December 22, 2015 alleging 111 violations of INA § 274A(a)(1)(B), and seeking a total of $100,045.00 in civil money penalties.

5. The Respondent filed a timely request for hearing on January 15, 2016.

6. The Complaint was filed with the Office of the Chief Administrative Hearing Officer and served on the Respondent on May 3, 2016.

7. The Respondent filed a timely Answer to the Complaint on June 2, 2016.

8. The Respondent hired all employees listed in the Complaint after November 6, 1986.

9. In the Answer to the Complaint the Respondent raised affirmative defenses to 4 of the 111 violations for: Themis Koutsandreas, Jabbar Saif, Robert Bengert, and Steven Lawrence.

10. Complainant accepts the affirmative defenses raised by Respondent for these 4 violations and hereby withdraws those 4 violations from the Complaint.

11. The Complainant and Respondent agree that the Respondent is liable for remaining 107 violations of the INA § 274A(a)(1)(B) as noted in the NIF and Complaint.

Following a review of the record, the parties' Joint Motion Stipulating to Liability is hereby **GRANTED**. The violations alleged against Themis Koutsandreas and Jabbar Saif in Count I of the complaint and against Robert Bengert and Steven Lawrence in Count II of the complaint are hereby dismissed. Pegasus is found liable for the remaining twenty-nine violations alleged in

Count I and the remaining seventy-eight violations in Count II, for a total of 107 violations.[1] *See* Appendix.

On November 9, 2016, the government filed a Motion for Summary Decision (Motion) regarding the issue of penalties; on November 21, 2016, Pegasus filed a Response to Complainant's Motion for Summary Decision (Response). With the issue of liability having been resolved, the penalty issue is accordingly ripe for resolution. For the reasons stated below, the government's Motion regarding penalties will be **GRANTED, IN PART**, and pursuant to a *de novo* review of the totality of the evidence, the penalty assessment against Pegasus will be reduced in the exercise of discretion.

II. STANDARDS APPLIED

A. Summary Decision

OCAHO regulation 28 C.F.R. § 68.38(c)[2] establishes that an Administrative Law Judge (ALJ) "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 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

[1] Regarding Count II, the particular violations alleged in the complaint do not always coincide with the substantive violations actually apparent on the corresponding Forms I-9, and Complainant has not filed a motion to amend the pleadings to conform to the evidence. *See* 28 C.F.R. § 68.9(e). For example, Count II alleges a violation for the Form I-9 for Samantha Rosario-Pitts based on a failure of the employer to sign the attestation in Section 2; however, a visual inspection of that Form I-9 shows that the employer did, in fact, sign Section 2 of Ms. Rosario-Pitts's Form I-9, though such an inspection also shows at least one other substantive violation of 8 U.S.C. § 1324a(a)(1)(B) as well. *Compare* Complaint at 9, *with* Ex. G-4. Nevertheless, a visual examination of the Forms I-9 in the record related to the remaining violations alleged in Count II indicates that each of them does contain a substantive violation of 8 U.S.C. § 1324a(a)(1)(B), even if that violation does not always specifically conform to the language of the complaint. Thus, the undersigned finds no basis to reject Respondent's admission of liability for the seventy-eight violations contained in Count II in its answer or the parties' subsequent stipulation of liability regarding those violations, and Respondent is appropriately found liable for 107 violations of 8 U.S.C. § 1324a(a)(1)(B) as discussed herein.

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

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)).[3]

"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 regulation 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).

B. Civil Money Penalties

Civil money penalties are assessed for paperwork violations according to the parameters set forth at 8 C.F.R. § 274a.10(b)(2): the minimum penalty for each individual with respect to whom a violation occurred after September 29, 1999, and before November 2, 2015, is $110, and the maximum is $1100. *See also* 28 C.F.R. §§ 85.1, 85.5. Because the government has the burden of proof with respect to the penalty, *United States v. March Construction, Inc.*, 10 OCAHO no. 1158, 4 (2012), ICE 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).

In assessing an appropriate penalty, the following statutory factors must be considered: 1) the size of the employer's business, 2) the employer's good faith, 3) the seriousness of the violations, 4) whether or not the individual was an unauthorized alien, and 5) the employer's history of previous violations. 8 U.S.C. § 1324a(e)(5). The weight to be given each of these factors will depend upon the facts and circumstances of the individual case. *United States v. Raygoza*, 5

[3] 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.

OCAHO no. 729, 48, 51 (1995) (each factor's significance is based on the specific facts in the case). Although 8 U.S.C. § 1324a(e)(5) "requires due consideration of the enumerated factors, it does not mandate any particular outcome of such consideration, and nothing in the statute or the regulations requires in OCAHO proceedings either that the same weight be given to each of the factors in every case . . . or that the weight given to any one factor is limited to any particular percentage of the total." *United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6-7 (2011) (internal citations omitted). Indeed, nothing in the statute suggests that equal weight must be given to each factor, nor does the enumeration of these factors rule out consideration of such additional factors as may be appropriate in a specific case. *See United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000). Although the statutory factors must be considered in every case, there is otherwise no single method mandated for calculating civil money penalties for violations of 8 U.S.C. § 1324a(a)(1)(B). *United States v. Senox Corp.*, 11 OCAHO no. 1219, 4 (2014); *see also United States v. Red Coach Rest., Inc.*, 10 OCAHO no. 1200, 3 (2013) (affirmance by the Chief Administrative Hearing Officer (CAHO) noting decisions using varied approaches to calculating penalties); *United States v. Int'l Packaging, Inc.*, 12 OCAHO no. 1275a, 6 (2016) (noting that nothing in 8 U.S.C. § 1324a(e)(5) requires the five statutory factors to be considered exclusively on a binary scale). ICE's penalty calculations are not binding in OCAHO proceedings, and penalties may be examined *de novo* by the Administrative Law Judge if appropriate. *See Ice Castles Daycare Too*, 10 OCAHO no. 1142 at 6.

III. THE POSITIONS OF THE PARTIES

A. The Government's Motion

In its Motion, the government asserts that baseline penalties of $935 for each violation are appropriate because Pegasus has a violation rate of over 90% and that, pursuant to internal guidelines, such a baseline fine is warranted whenever a company has a violation rate over 50%.[4] The government then analyzes the five statutory factors, finding that Pegasus's size is a mitigating factor and that the seriousness of the violations is an aggravating factor. Further, regarding the factor of whether an individual is an unauthorized alien, the government contends that mitigation is warranted for the Count II violations "as those employees were discovered to be eligible for employment"; however, the government treats this factor as neutral regarding the individuals in Count I because "Complainant remains unable to determine whether any of these employees are undocumented workers." Motion at 9. The government treats the remaining statutory factors as neutral.

[4] The government initially calculated a violation rate of 99% based on 111 alleged violations out of 112 required Forms I-9. *See* Motion at 8-9, Exs. G-3, G-4. Although the government later conceded that four alleged violations out of the 111 charged could not be sustained, the violation rate remained over 90%.

Overall, the government proposes a fine of $935 per Count I violation (totaling $27,115) and a fine of $888.25 per Count II violation (totaling $69,283.50), for a total civil monetary penalty of $96,398.50 for the 107 violations stipulated to in the parties' Joint Motion Stipulating to Liability. Motion at 10.[5] In support of its position, the Government previously filed four exhibits: (G-1) Notice of Inspection; (G-2) Employee Earnings Record 01/01/12-12/20/2013; (G-3) Quarterly Combined Withholding, Wage Report 2013; and, (G-4) Forms I-9.[6]

B. Respondent's Position

On November 17, 2016, Pegasus filed a Response to the government's Motion for Summary Decision. The Response contains six proposed exhibits: (R-1) Pegasus 2014 Form 1120 Corporate Tax Return; (R-2) Pegasus 2015 Form 1120 Corporate Tax Return; (R-3) Pegasus Balance Sheets for 2014-2015; (R-4) PAYCHEX Employee Personal Data Listing; (R-5) New York State Department of Labor Fact Sheet; and, (R-6) E-Verify Enrollment Acknowledgment.

In its Response, Pegasus contends that mitigation is warranted based on its small size, the lack of involvement of unauthorized aliens, and its lack of history of violations. Response at 4-6. It further argues that aggravation for a lack of good faith is not appropriate. *Id*. at 4-5. Pegasus concedes that all 107 of the violations are serious. *Id*. at 5. It also argues that non-statutory factors warrant mitigation, including a general public policy of leniency toward small businesses, the company's high turnover rate, its cooperation with ICE during the investigation and

[5] The government initially proposed a total civil monetary penalty of $100,045 for the 111 violations alleged in the complaint but reduced that figure in light of the four unsubstantiated violations discussed above.

[6] The government did not file any evidence regarding how it calculated the proposed fine against Pegasus. Thus, although the undersigned has no reason to doubt the assertions made in the government's Motion regarding the calculation of the proposed penalty, assertions of counsel and unsupported allegations made in a brief or motion are not evidence and may not be considered as such. *Cormia v. Home Care Giver Servs., Inc.*, 10 OCAHO no. 1160, 5 (2012*)*; *see also United States v. Hotel Martha Washington, Corp*., 6 OCAHO no. 846, 216, 225 n.5 (1996) (noting that allegations in a brief are not evidence and are not to be treated as such). Consequently, the only evidence submitted by the government to be considered in assessing the civil money penalty are the four exhibits noted.

subsequent self-audit and enrollment in the E-Verify program,[7] and its ability to pay the proposed fine. *Id*. at 6-7.

Respondent also cites to OCAHO precedent to support a reduction in the proposed penalty. Specifically, Respondent contends that its situation is similar to that of the respondent in *United States v. Pegasus Restaurant, Inc.*, 10 OCAHO no. 1143 (2012) (hereinafter *Pegasus Colorado*),[8] in which the respondent's penalty was reduced by over 60% from the amount initially sought by ICE. *Id*. at 7. Respondent asserts that if it were treated the same way as the respondent in *Pegasus Colorado*, then its total penalty would be $37,450.[9] *Id*. Further, "Respondent recognizes that prior OCAHO decisions do not necessarily bind a different judge in a future case," but argues that the proposed penalty is unreasonable and does not take into account several significant factors including the company's ability to pay based on its size, resources, and the current business climate. *Id*.

IV. DISCUSSION

[7] In arguing for mitigation based on non-statutory factors, Pegasus labels some of its post-investigation review and compliance efforts as indicative of "good faith," which is actually a statutory factor. *See* 8 U.S.C. § 1324a(e)(5); Response at 6. As a statutory factor, however, "the 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) (emphasis in original) (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)); *see also United States v. Hartmann Studios, Inc.*, 11 OCAHO no. 1255, 14 (2015) ("OCAHO case law assessing good faith looks primarily to the steps an employer took before issuance of the [Notice of Inspection], not what it did afterward."). Thus, Respondent's post-investigation efforts are also considered as non-statutory factors, rather than being considered solely under the statutory rubric of good faith.

[8] Despite their similar names, Respondent in the instant case is located in Hamburg, New York, and does not appear to be connected to the respondent in *Pegasus Colorado* which is located in Castle Rock, Colorado.

[9] In conjunction with this argument, Respondent reports that it offered to settle this case for approximately the same percentage reduction of the proposed penalty as the Administrative Law Judge imposed in *Pegasus Colorado*. Response at 7. Subject to exceptions not relevant in the instant case, reports of unaccepted settlement offers are generally not admissible, Fed. R. Civ. P. 68(b) and Fed. R. Evid. 408, and assertions made by counsel in filings are not evidence. *See supra* note 6. Thus, the undersigned has not considered Respondent's reported settlement offer in assessing an appropriate civil monetary penalty.

Pegasus is a family restaurant incorporated in the State of New York. The company has been found liable for twenty-nine violations involving failure to prepare and/or present Forms I-9 and seventy-eight violations of failure to properly complete Forms I-9, for a total of 107 violations. The permissible penalties for these violations range from a minimum of $11,770 to a maximum of $117,700. The goal in calculating civil penalties is to set a sufficiently meaningful fine to promote future compliance without being unduly punitive. *See United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013).

A. Five Statutory Factors

I have considered the five statutory factors in evaluating the appropriateness of ICE's proposed penalty against Pegasus: 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).

As both ICE and Pegasus have noted, mitigation of the penalty is warranted given that Pegasus is a small, family-owned business. *See 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).

The government did not assert that aggravation of the penalty is warranted based on the company's lack of good faith, and Respondent agreed that no aggravation is warranted. Although Respondent's violation rate exceeds 90%, "[a] dismal rate of compliance with employment verification requirements cannot alone be used to increase a penalty based on the good faith criterion." *United States v. Two for Seven, LLC*, 10 OCAHO no. 1208, 8 (2014); *see also United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 477 (1995) (modification by the CAHO); *but see United States v. Williams Produce, Inc.*, 5 OCAHO no. 730, 54, 62 (1995) (noting that lack of reasonable care and diligence in acting in accordance with 8 U.S.C. § 1324a(a)(1)(B) as manifested by a large magnitude of paperwork violations warrants penalty aggravation for a lack of good faith), *aff'd sub nom. Williams Produce, Inc. v. INS*, 73 F.3d 1108 (11th Cir. 1995) (Table).

Respondent's violation percentage is disconcerting, but it is insufficient by itself to warrant aggravation for a lack of good faith. Beyond the simple percentage rate of violations, however, the underlying nature of some of the violations is also troubling. Of the seventy-eight Forms I-9 related to the sustained violations in Count II, ten do not include a document at all in section 2, and one reflects the presentation of a United States passport for that section. The remaining sixty-seven Forms I-9 all reflect in section 2 that only either a state driver's license or state identification card was presented and reviewed; furthermore, these documents were erroneously

categorized as List A documents on all sixty-seven Forms I-9.[10] Ex. G-4. In other words, Respondent's Forms I-9 indicate that it generally reviewed *only* a state driver's license or state identification card, if it reviewed anything at all, when completing Forms I-9 for its employees, that it uniformly recorded information from those documents in the wrong column under section 2, and that it generally did not verify the employment authorization status for any of its employees. *Id*. Such repeated, patternlike errors provide little evidence that Respondent took steps "to ascertain what the law requires and to conform its conduct to the law," which is a critical focus of a good faith analysis. *United States v. SKZ Harvesting, Inc.*, 11 OCAHO no. 1266, 15 (2016). Respondent did not specifically assert that its actions prior to ICE's investigation warranted mitigation due to a showing of good faith. Response at 4-5. Moreover, nothing in 8 U.S.C. § 1324a(e)(5) requires good faith to be considered solely on a binary scale. *See Int'l Packaging*, 12 OCAHO no. 1275a at 6; *see also United States v. Romans Racing Stables, Inc.*, 11 OCAHO no. 1232, 5 (2014) (noting that a failure to affirmatively establish a statutory factor as aggravating does not require that the factor necessarily be treated as mitigating). Overall, the record as a whole supports finding this factor to be neutral.

Regarding the seriousness of the violations, Respondent stipulated that all 107 violations for which it is liable are serious. Response at 5. Furthermore, concerning Count I, the failure to prepare an I-9 at all is among the most serious of possible violations because it frustrates the national policy intended to ensure that unauthorized aliens are excluded from the workplace. *See United States v. Super 8 Motel*, 10 OCAHO no. 1191, 14 (2013). With regard to the violations in Count II, they broadly fall into three categories—*i.e.* failure to ensure that the employee checks a box attesting to his or her status, failure to ensure that the employee signs section 1, and failure of the employer to sign the attestation in section 2—each of which is also serious. Failure to ensure that an employee checks the box attesting to his or her status in section 1 is serious because if the employee fails to provide information sufficient to disclose his or her immigration status on the face of the form, the employee's signature attests to nothing at all. *United States v. Durable, Inc.*, 11 OCAHO no. 1229, 15 (2014) (citing *United States v. Ketchikan Drywall Services, Inc.*, 10 OCAHO no. 1139, 15 (2011)), *aff'd by CAHO*, 11 OCAHO no. 1231 (2014). Likewise, failure to ensure that the employee signs section 1 is a serious violation because the employee has not attested to being authorized to work in the United States. *See id. (citing United States v. Task Force Sec., Inc*., 4 OCAHO no. 625, 333, 341 (1994)). Additionally, "[a]n employer's failure to sign the section 2 attestation is also serious because this is the section that proves the employer reviewed documents sufficient to demonstrate the employee's eligibility to work in the United States." *Id*. (citing *United States v. New Outlook Homecare, LLC*, 10 OCAHO no. 1210, 5 (2014)). Indeed, "[f]ailing to sign section 2 could also be interpreted as an employer's avoidance of liability for perjury." *Id*. (citing *Ketchikan*, 10 OCAHO no. 1139 at 10)); *see also United States v. Frimmel Mgmt., LLC*, 12 OCAHO no. 1271c, 19 (2016) ("Section 2 of the Form I-9 has been described as 'the very heart' of the employment verification

[10] A state driver's license or identification card is a List B document and establishes only identity, not work authorization. *See* 8 C.F.R. § 274a.2(b)(1)(v)(B)(*1*)(*i*).

system."). Although seriousness of violations is evaluated along a continuum and other categories of violations may be marginally less serious, *Durable*, 11 OCAHO no. 1229 at 15, the violations for which Respondent is liable in both Counts are sufficiently serious to warrant aggravation of the penalty amount.

Regarding the presence of unauthorized aliens, the government alleges that it mitigated the penalty for Count II because it determined that those employees were authorized for employment. Motion at 9. It did not mitigate the proposed penalty for Count I because it was unable to determine whether the employees named in Count I were authorized for employment. *Id*. This distinction is untenable, however, since "suspicion alone" is insufficient to aggravate the penalty amount due to the presence of unauthorized aliens. *United States v. Platinum Builders of Cent. Fla., Inc.*, 10 OCAHO no. 1199, 9 (2013). Moreover, the government has the burden of proof with respect to the penalty, *March Construction*, 10 OCAHO no. 1158 at 4, and it must prove the existence of any aggravating factor by a preponderance of the evidence, *Carter*, 7 OCAHO no. 931 at 159. As discussed above, the government has provided no evidence regarding the issue of unauthorized aliens. *See supra* note 6. Thus, it has certainly not established by a preponderance of the evidence that any aggravation is warranted for the violations in Count I related to the presence of unauthorized aliens. Although it does not always follow that a factor found not to be aggravating must necessarily and automatically be found to be mitigating, *International Packaging*, 12 OCAHO no. 1275a at 6, the record as a whole in this case supports some mitigation for this factor for both Counts.

The record does not reveal any history of previous violations by Respondent; however, "a finding that respondent does not have a history of previous violations does not automatically entitle the respondent to mitigation of the civil penalty based on this factor." *Red Coach Rest.*, 10 OCAHO no. 1200 at 4. 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, 6 (2010). Consequently, I find that this factor is properly treated as neutral.

B. 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 argues that additional non-statutory mitigation is warranted based on the size of its business due to a general public policy of leniency toward small businesses. Response at 6. Federal law and prior OCAHO decisions do generally reflect such a policy as a basis for mitigation of penalties in cases involving violations of 8 U.S.C. § 1324a(a)(1)(B). *See United*

States v. Keegan Variety, 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 (SBREFA), Pub. L. No. 104-121, 110 Stat. 864 (1996)); *see also United States v. Red Bowl of Cary, LLC, Inc.*, 10 OCAHO no. 1206, 4-5 (2013); *Ice Castles Daycare Too*, 10 OCAHO no. 1142 at 7. Thus, consistent with OCAHO case law, the general public policy of leniency toward small businesses is an appropriate non-statutory factor warranting some, modest mitigation of the penalty assessment in Respondent's case.[11]

Respondent also asserts that its financial circumstances and ability to pay should be considered, and ability to pay is an appropriate non-statutory consideration, particularly for a small business. *See* SBREFA § 223(a) ("Under appropriate circumstances, an agency may consider ability to pay in determining penalty assessments on small entities."); *Romans Racing Stables*, 11 OCAHO no. 1232 at 4 (noting that "numerous OCAHO cases have considered the ability to pay as a matter of equity" in assessing a penalty for violations of 8 U.S.C. § 1324a(a)(1)(B)). Respondent argues that the proposed fine is "clearly excessive and unreasonable," in light of the company's size and resources. Response at 6. It also notes that it "is seeking to survive in a geographical area that is severely depressed economically" and notes that "Hamburg, New York is a blue collar community located in the rust belt, with many low income residents." *Id.* at 7. It further asserts that "[i]ncreased operating costs make it difficult . . . to survive" and cites a Fact Sheet from the New York State Department of Labor (NYDOL) indicating that as of December 31, 2015, the state minimum wage for hospitality workers was $9.00 per hour which could be met by a cash

[11] Although the SBREFA was enacted in 1996, its policy statement of leniency toward small businesses, which has become a fixture of recent OCAHO jurisprudence, was rarely, if at all, noted in OCAHO case law prior to May 2013. *See United States v. Siwan & Brothers, Inc.*, 10 OCAHO no. 1178, 6 (2013). Section 223(a) of the SBREFA required each agency regulating the activities of small entities to establish a policy or program to provide for the reduction—and under appropriate circumstances for the waiver—of civil penalties for violations of a statutory or regulatory requirement by a small entity. Neither IRCA itself nor OCAHO case law allows for a waiver of a civil money penalty for violations of 8 U.S.C. § 1324a, however. *United States v. Ideal Transp. Co., Inc.*, 12 OCAHO no. 1290, 7-8 (2016). Furthermore, 8 U.S.C. § 1324a(e)(5), which was enacted as part of IRCA in 1986 and, thus, predates the SBREFA, already mandates that due consideration should be given to "the size of the business of the employer being charged" for violations of 8 U.S.C. § 1324a(a)(1)(B). No published OCAHO decision has fully addressed the interplay between section 223(a) of the SBREFA and 8 U.S.C. § 1324a(e)(5) or whether an employer's small size is appropriately double-counted for mitigation of a civil money penalty under both provisions. *See* SBREFA § 223(b) (noting that policies or programs established under section 223(a) are "[s]ubject to the requirements or limitations of other statutes"); *cf. United States v. Stanford Sign and Awning, Inc.*, 10 OCAHO no. 1152, 6 (2012) (noting that when one factor is used to set a high proposed baseline penalty, it should not also be double counted as an aggravating factor used to increase the penalty further). Nevertheless, the instant case does not provide a need or occasion to address these issues more definitively.

wage of $7.50 and a tip credit of $1.50. *Id.*, Ex. R-5. Related to this argument, Respondent also argues that its situation is similar to the one of the respondent in *Pegasus Colorado* and that it should be treated similarly, though it acknowledges that prior OCAHO decisions do not necessarily bind a different Administrative Law Judge in a different case. *Id*. at 7.

As an initial point, the ALJ in *Pegasus Colorado* made a specific conclusion of law that the evidence in that case failed to establish that the respondent could not pay a reasonable penalty, which she ultimately determined to be $49,427.00. *Pegasus Colorado*, 10 OCAHO no. 1143 at 10. Thus, that decision's support for Respondent's overall argument is somewhat tenuous. Moreover, although the ALJ considered the respondent's ability to pay as a mitigating factor in general, the financial situation of the restaurant in that case is different than the situation of Respondent in the instant case. *Id*. at 7. The ALJ in *Pegasus Colorado* noted that the respondent's taxable income ranged from $4976 to $7528 to $10,195, its gross sales ranged from $1,667,433 to $1,604,804 to $1,586,165, and its owner's compensation declined from $78,000 to $59,308 over the course of three years. *Id*. at 6. In contrast, Respondent's gross sales in 2014 were over $2,000,000, and its gross sales in 2015 were $1,988,920. Exs. R-1, R-2. Its taxable income in 2014 was over $29,000, and its taxable income in 2015 was over $22,000; it also established an identical overpayment of taxes in both years, though it elected to credit the overpayment toward the ensuing year's taxes rather than receive a refund. *Id*. Its owner's salary actually increased from $91,800 in 2014 to $93,600 in 2015. *Id*. In short, Respondent's financial situation is notably stronger than that of the respondent in *Pegasus Colorado*—including approximately $400,000 more in gross annual sales and more than twice the taxable income—and its concomitant ability to pay a civil money penalty appears somewhat greater as well. Furthermore, although the increase in the state minimum wage *may* increase Respondent's future operating costs, any assessment of those costs would be purely speculative based on the record, as Respondent has not provided evidence showing the extent of the impact of that increase on its business, if any; indeed, the NYDOL Fact Sheet, by itself, has little probative value regarding Respondent's specific circumstances. Ex. R-5. Overall, as with the respondent in *Pegasus Colorado*, the evidence does not show that Respondent could not pay a reasonable penalty at all. Nevertheless, the goal in calculating civil penalties is to establish a sufficiently meaningful penalty in order to enhance the probability of future compliance; it is not to force employers out of business or to be "unduly punitive" in light of an employer's resources. *Pegasus Colorado*, 10 OCAHO no. 1143 at 7; *United States v. Kobe Sapporo Japanese, Inc*., 10 OCAHO no. 1204, 6 (2013). Therefore, based on the record as a whole, it is appropriate to consider Respondent's financial situation in mitigation of the overall civil monetary penalty warranted.

Separate from the issue of ability to pay, on which its support of Respondent's position is limited, *Pegasus Colorado* provides little additional support for Respondent's request for mitigation. Although the ALJ in that case concluded that a failure to prepare a Form I-9 at all is among the most serious paperwork violations, she did not otherwise analyze the seriousness of the violations in determining the civil money penalty; thus, it is difficult to discern how she

assessed the seriousness of the violations relative to the other factors in making a determination regarding an appropriate penalty. *Pegasus Colorado*, 10 OCAHO no. 1143 at 7, 9. Moreover, it is not clear whether she mitigated the penalty for good faith or treated that factor as neutral or whether she mitigated the penalty for any particular factors other than the respondent's size and ability to pay. *Id*. at 7-10. As discussed, *supra*, Respondent's violations are serious and clearly warrant some aggravation of its penalty amount, the statutory factor of good faith is appropriately treated as neutral, and its ability to pay is a less salient factor than it was for respondent in *Pegasus Colorado*. Thus, the two cases are not substantially similar. Moreover, even if the cases were more similar, "it is well-settled that prior OCAHO ALJ decisions do not necessarily bind a different ALJ in a future case." *Red Coach Rest*., 10 OCAHO no. 1200 at 4 n.3. Accordingly, although I have fully considered Respondent's arguments regarding *Pegasus Colorado*, I find that further mitigation is not warranted based on the decision.

Similarly, Respondent's post-inspection activities, including a self-audit and enrollment in the E-Verify program, though perhaps laudable, do not warrant additional mitigation. OCAHO case law has rarely, if ever, found post-inspection remedial measures to warrant additional mitigation for violations of 8 U.S.C. § 1324a. Indeed, "compliance with the law is the expectation, not the exception." *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 9 (2010). Although I do not propose that post-inspection remedial measures can never support penalty mitigation, the record in this case does not warrant further mitigation solely for Respondent's post-inspection efforts to bring itself into compliance with the law.

Finally, Respondent points to the company's high turnover rate as an additional factor warranting mitigation of the penalty. Response at 6. OCAHO case law has generally considered a high turnover rate as part of the calculus regarding whether a company is a small business for purposes of the statutory factor in 8 U.S.C. § 1324a(e)(5). *See, e.g., United States v. MEMF LLC*, 10 OCAHO no. 1170, 4 (2013) (noting "the high turnover inherent in the restaurant industry" in assessing how to count employees in order to determine the size of the business for purposes of 8 U.S.C. § 1324a(e)(5)). In isolated cases, however, it has arguably also been considered as a separate, non-statutory discretionary factor. *See Ice Castles Daycare Too*, 10 OCAHO no. 1142 at 7 (finding that "the high turnover rate in the child care industry" warrants "further reduc[tion]" of the civil monetary penalty based on the nature of the business). Although a high turnover rate may overstate the size of an employer's business and, thus, may magnify the scope of an employer's success or failure at complying with the requirements of 8 U.S.C. § 1324a, these issues are already subsumed under other statutory and non-statutory considerations regarding an appropriate civil money penalty. By itself, a high turnover rate is neither inherently mitigating nor aggravating, and its impact, if any, will vary depending on the specific facts of a particular case. *See Romans Racing Stables*, 11 OCAHO no. 1232 at 6 ("[T]he final penalty in each case will depend upon the totality of the facts and circumstances of that particular case."). Thus, because Respondent's high turnover rate has already been considered as an aspect of mitigation related to the size of its business, its lack of unauthorized aliens, its

ability to pay, and the general public policy of leniency toward small businesses, it does not warrant any further mitigation by itself.

V. CONCLUSION

The undersigned has given due consideration to all of the statutory factors in 8 U.S.C. § 1324a(e)(5), as well as to several non-statutory factors. After considering the totality of evidence, the arguments of the parties, and the statutory and non-statutory factors to be considered in penalty assessments, the undersigned finds that the penalties proposed by ICE are disproportionate to the Form I-9 violations and mitigating factors in this case. Thus, I find that the penalty in the instant case should be reduced in the exercise of discretion. *See Ice Castles Daycare Too*, 10 OCAHO no. 1142 at 6. The penalty requested here, $935.00 for each Count I violation, and $888.25 for each Count II violation, is just shy of the maximum permissible penalty per violation. 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. The violations in this case are troubling and unquestionably serious, but after considering the factors discussed above and the record as a whole, they do not rise to a level of egregiousness warranting a penalty approaching the statutory maximum amount. Rather, penalty adjustment to the midrange of permissible penalties is warranted due to the small size of Respondent's business, its financial situation and ability to pay, the apparent absence of unauthorized aliens among its employees, and the overall public policy regarding treatment of small businesses.

Accordingly, I find that in the exercise of discretion, the proposed penalty in this case should be reduced to $550 for each of the 107 violations in Counts I and II for which Respondent is liable. The total civil money penalty for all 107 violations for which Respondent is liable is assessed at $58,850.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Pegasus Family Restaurant, Inc. is an entity incorporated in the State of New York.

2. On December 13, 2013, the Department of Homeland Security, Immigration and Customs Enforcement, served Pegasus Family Restaurant, Inc. with a Notice of Inspection.

3. The Department of Homeland Security, Immigration and Customs Enforcement, served Pegasus Family Restaurant, Inc. with a Notice of Intent to Fine on December 22, 2015.

4. Pegasus Family Restaurant, Inc. timely requested a hearing on January 15, 2016.

5. The Department of Homeland Security, Immigration and Customs Enforcement, filed a complaint with the Office of the Chief Administrative Hearing Officer on May 3, 2016.

6. Pegasus Family Restaurant, Inc. employed all of the individuals identified in the complaint after November 6, 1986.

7. The Department of Homeland Security, Immigration and Customs Enforcement, withdrew the alleged violations involving Themis Koutsandreas and Jabbar Saif from Count I, and Robert Bengert and Steven Lawrence from Count II.

8. Pegasus Family Restaurant, Inc. failed to timely prepare and/or present Forms I-9 for twenty-nine employees.

9. Pegasus Family Restaurant, Inc. failed to properly complete Forms I-9 for seventy-eight employees.

10. Pegasus Family Restaurant, Inc. is a small business, with no history of previous violations, and was not found to have the presence of unauthorized aliens in its workforce.

B. Conclusions of Law

1. Pegasus Family Restaurant, 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. Pegasus Family Restaurant, Inc. is liable for 107 violations of 8 U.S.C. § 1324a(a)(1)(B).

4. OCAHO regulation 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 regulation 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 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)).

9. 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.

10. 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.

11. 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 ICE 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).

12. The weight to be given each of these factors will depend upon the facts and circumstances of the individual case. *United States v. Raygoza*, 5 OCAHO no. 729, 48, 51 (1995) (each factor's significance is based on the specific facts in the case).

13. Although 8 U.S.C. § 1324a(e)(5) "requires due consideration of the enumerated factors, it does not mandate any particular outcome of such consideration, and nothing in the statute or the regulations requires in OCAHO proceedings either that the same weight be given to each of the factors in every case . . . or that the weight given to any one factor is limited to any particular percentage of the total." *United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6-7 (2011) (internal citations omitted).

14. Nothing in the statute suggests that equal weight must be given to each factor, nor does the enumeration of these factors rule out consideration of such additional factors as may be

appropriate in a specific case. *See United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000).

15. Although the statutory factors must be considered in every case, there is otherwise no single method mandated for calculating civil money penalties for violations of 8 U.S.C. § 1324a(a)(1)(B). *United States v. Senox Corp.*, 11 OCAHO no. 1219, 4 (2014); *see also United States v. Red Coach Rest., Inc.*, 10 OCAHO no. 1200, 3 (2013) (affirmance by the Chief Administrative Hearing Officer (CAHO) noting decisions using varied approaches to calculating penalties); *United States v. Int'l Packaging, Inc.*, 12 OCAHO no. 1275a, 6 (2016) ("[N]othing in 8 U.S.C. § 1324a(e)(5) requires the five statutory factors to be considered solely on a binary scale.").

16. ICE's penalty calculations are not binding in OCAHO proceedings, and penalties may be examined *de novo* by the Administrative Law Judge if appropriate. *See United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6 (2011).

17. The goal in calculating civil penalties is to set a sufficiently meaningful fine to promote future compliance without being unduly punitive. *See United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013).

18. 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).

19. "A dismal rate of compliance with employment verification requirements cannot alone be used to increase a penalty based on the good faith criterion." *United States v. Two for Seven, LLC*, 10 OCAHO no. 1208, 8 (2014); *see also United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 477 (1995) (modification by the CAHO); *but see United States v. Williams Produce, Inc.*, 5 OCAHO no. 730, 54, 62 (1995) (noting that lack of reasonable care and diligence in acting in accordance with 8 U.S.C. § 1324a(a)(1)(B) as manifested by a large magnitude of paperwork violations warrants penalty aggravation for a lack of good faith), *aff'd sub nom. Williams Produce, Inc. v. INS*, 73 F.3d 1108 (11th Cir. 1995) (Table).

20. A critical focus of a good faith analysis is for companies "to ascertain what the law requires and to conform its conduct to the law." *United States v. SKZ Harvesting, Inc.*, 11 OCAHO no. 1266, 15 (2016).

21. The statute, 8 U.S.C. § 1324a(e)(5), does not require good faith to be considered solely on a binary scale. *See United States v. Int'l Packaging, Inc.*, 12 OCAHO no. 1275a, 6 (2016); *see also United States v. Romans Racing Stables, Inc.*, 11 OCAHO no. 1232, 5 (2014) (noting that a failure to affirmatively establish a statutory factor as aggravating does not require that the factor necessarily be treated as mitigating).

22. The failure to prepare an I-9 at all is among the most serious of possible violations because it frustrates the national policy intended to ensure that unauthorized aliens are excluded from the workplace. *See United States v. Super 8 Motel*, 10 OCAHO no. 1191, 14 (2013).

23. Failure to ensure that an employee checks the box attesting to his or her status in section 1 is serious because if the employee fails to provide information sufficient to disclose his or her immigration status on the face of the form, the employee's signature attests to nothing at all. *United States v. Durable, Inc.*, 11 OCAHO no. 1229, 15 (2014) (citing *United States v. Ketchikan Drywall Services, Inc.*, 10 OCAHO no. 1139, 15 (2011)), *aff'd by CAHO*, 11 OCAHO no. 1231 (2014).

24. Failure to ensure that the employee signs section 1 is a serious violation because the employee has not attested to being authorized to work in the United States. *See United States v. Durable, Inc.*, 11 OCAHO no. 1229, 15 (2014) *(citing United States v. Task Force Sec., Inc.*, 4 OCAHO no. 625, 333, 341 (1994)).

25. "An employer's failure to sign the section 2 attestation is also serious because this is the section that proves the employer reviewed documents sufficient to demonstrate the employee's eligibility to work in the United States." *United States v. Durable, Inc.*, 11 OCAHO no. 1229, 15 (2014) (citing *United States v. New Outlook Homecare, LLC*, 10 OCAHO no. 1210, 5 (2014)).

26. "Failing to sign section 2 could also be interpreted as an employer's avoidance of liability for perjury." *United States v. Durable, Inc.*, 11 OCAHO no. 1229, 15 (2014) (citing *Ketchikan*, 10 OCAHO no. 1139 at 10)); *see also United States v. Frimmel Mgmt., LLC*, 12 OCAHO no. 1271c, 19 (2016) ("Section 2 of the Form I-9 has been described as 'the very heart' of the employment verification system.").

27. "Suspicion alone" is insufficient to aggravate the penalty amount due to the presence of unauthorized aliens. *United States v. Platinum Builders of Cent. Fla., Inc.*, 10 OCAHO no. 1199, 9 (2013).

28. "[A] finding that respondent does not have a history of previous violations does not automatically entitle the respondent to mitigation of the civil penalty based on this factor." *United States v. Red Coach Rest., Inc.*, 10 OCAHO no. 1200, 4 (2013).

29. "[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).

30. 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)).

31. Federal law and prior OCAHO decisions do generally reflect a policy of leniency toward small businesses as a basis for mitigation of penalties in cases involving violations of 8 U.S.C. § 1324a(a)(1)(B). *See United States v. Keegan Variety*, 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 (SBREFA), Pub. L. No. 104-121, 110 Stat. 864 (1996)); *see also United States v. Red Bowl of Cary, LLC, Inc.*, 10 OCAHO no. 1206, 4-5 (2013); *United States v. Ice Castles Daycare Too*, 10 OCAHO no. 1142, 7 (2011).

32. Ability to pay is an appropriate non-statutory consideration, particularly for a small business. *See* SBREFA § 223(a) ("Under appropriate circumstances, an agency may consider ability to pay in determining penalty assessments on small entities."); *United States v. Romans Racing Stables, Inc.*, 11 OCAHO no. 1232, 4 (2014) (noting that "numerous OCAHO cases have considered the ability to pay as a matter of equity" in assessing a penalty for violations of 8 U.S.C. § 1324a(a)(1)(B)).

33. "[I]t is well-settled that prior OCAHO ALJ decisions do not necessarily bind a different ALJ in a future case." *United States v. Red Coach Rest., Inc.*, 10 OCAHO no. 1200, 4 n.3 (2013).

34. "[C]ompliance with the law is the expectation, not the exception." *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 9 (2010).

35. By itself, a high turnover rate is neither inherently mitigating nor aggravating, and its impact, if any, will vary depending on the specific facts of a particular case. *See United States v. Romans Racing Stables, Inc.*, 11 OCAHO no. 1232, 6 (2014) ("[T]he final penalty in each case will depend upon the totality of the facts and circumstances of that particular case.").

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

ORDER

The parties' Joint Motion Stipulating to Liability is **GRANTED**. The violations alleged against Themis Koutsandreas and Jabbar Saif in Count I of the complaint and against Robert Bengert and Steven Lawrence in Count II of the complaint are dismissed. Pegasus is found liable for the remaining twenty-nine violations alleged in Count I and the remaining seventy-eight violations in Count II, for a total of 107 violations. ICE's Motion for Summary Decision is **GRANTED, IN PART**. Pegasus Family Restaurant, Inc. is liable for 107 violations of 8 U.S.C. § 1324a(a)(1)(B) and is directed to pay civil penalties in the total amount of $58,850. 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 December 22, 2016.

_____

James R. McHenry III
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.