Published 1/27/17 12 OCAHO no. 1296

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

January 19, 2017

UNITED STATES OF AMERICA, Complainant, v. 3679 COMMERCE PLACE, INC. D/B/A WATERSTONE GRILL, Respondent.	)))))))))	8 U.S.C. § 1324a Proceeding OCAHO Case No. 16A00043

FINAL DECISION AND ORDER

Appearances:

Marvin J. Muller III
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 June 10, 2016, alleging that 3679 Commerce Place, Inc. d/b/a Waterstone Grill (Waterstone or the company) engaged in seventy-two 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 four violations involving failure to prepare and/or present Forms I-9, and Count II alleges sixty-eight violations involving failure to properly complete Forms I-9.

Respondent filed an answer on July 11, 2016, admitting the material allegations in the complaint, while denying the appropriateness of the penalty assessment.

Based on each party's prehearing statements and a telephonic prehearing conference, the government agreed to withdraw one of the violations in Count II, regarding Darien Volker, because it was determined by the parties that he never actually became an employee of the company.

The parties have agreed to the following stipulations:

1. 3679 Commerce Place, Inc. is a domestic business incorporated, registered, and operating in the State of New York.

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

3. 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 Respondent on March 28, 2016, alleging seventy-two violations of 8 U.S.C. § 1324a(a)(1)(B), and seeking a total of $47,311.00 in civil money penalties.

5. Respondent filed a timely request for hearing on April 22, 2016.

6. The complaint was filed with OCAHO and served on Respondent on June 10, 2016.

7. Respondent filed a timely Answer to the complaint on July 13, 2016.

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

9. Respondent should be considered to be a small business for the purpose of calculating the penalties to be imposed.

10. The audit of Respondent's Forms I-9 did not reveal the employment of unauthorized aliens during the audited time-period specified in the Notice of Inspection.

11. Respondent has no history of previous violations of INA § 274A(a)(1)(B) for the purpose of calculating the penalties to be imposed.

12. Complainant and Respondent agree that Respondent is liable for seventy-one violations of the INA § 274A(a)(1)(B) as noted in the NIF and complaint.

On November 9, 2016, the government filed a Motion for Summary Decision (Motion). In its Motion, the government requests that summary decision be issued finding Respondent liable for the seventy-one violations alleged in the complaint, reflecting the one violation that has been withdrawn, and order Respondent to pay the proposed penalty. On December 12, 2016, Waterstone filed a Response to the Motion (Response), opposing the government's penalty assessment and contending that the penalty should be adjusted to the low range of permissible penalties.

Following a review of the record, and given Respondent's admission of liability, that portion of the government's Motion concerning liability is hereby **GRANTED**. The violation against Darien Volker in Count I of the complaint is hereby dismissed. Waterstone is found liable of the four violations alleged in Count I and the remaining sixty-seven violations in Count II, for a total of seventy-one violations. *See* Appendix.

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 Waterstone will be reduced in the exercise of discretion.

II. STANDARDS APPLIED

A. Summary Decision

OCAHO regulation 28 C.F.R. § 68.38(c)[1] 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 that "[a]n issue of material fact is genuine only if it has a real basis in the record" and that "[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]

[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

"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) (citations omitted).

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 OCAHO no. 729, 48, 51 (1995) (noting that 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). Further, the enumeration of these factors does not 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

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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.

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); *cf. 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); *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). 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 it alleges that pursuant to internal guidelines such a baseline fine is warranted whenever a company has a violation rate over 50% and that Waterstone's violation rate exceeds such a threshold.[3] The government then analyzes the five statutory factors, finding that Waterstone's size is a mitigating factor warranting a 5% reduction and that the seriousness of the violations is an aggravating factor warranting a 5% enhancement. Regarding the factor of whether an individual is an unauthorized alien, the government contends that 5% 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. Further, the government finds that 25% mitigation is warranted upon Respondent's demonstration of good faith in preparing the Forms I-9. Lastly, the government treats the remaining statutory factor involving a lack of history of previous violations as neutral.

[3] The government states in its Motion that Waterstone's violation rate is over 99%, finding that Respondent had 111 alleged violations out of 112 required Forms I-9. *See* Motion at 8. Those numbers, however, are incorrect and appear to have been erroneously introduced from another case, for the complaint in the instant case only initially alleged seventy-two violations. The March 28, 2016 Notice of Intent to Fine indicates that Respondent was required to submit 135 Forms I-9 and, of those, committed seventy-two violations, resulting in a violation rate of 53.7%. *See* Complaint at 10. Nevertheless, even considering the one alleged violation that was withdrawn, Respondent's violation rate remains over 50%.

After taking into account the statutory factors, the government proposes a fine of $701.25 per Count I violation (totaling $2805) and a fine of $654.50 per Count II violation (totaling $43,851.50), for a total civil monetary penalty of $46,656.50 for the seventy-one violations alleged in the complaint. Motion at 9.[4] In support of its position, the Government previously filed five exhibits: (G-1) Notice of Inspection; (G-2) Quarterly Paychex Report, dated 10/4/14; (G-3) Payroll Journal, dated 12/13/13; (G-4) Excel Spreadsheet Explaining Violations; and, (G-5) Forms I-9.[5]

B. Respondent's Position

In its Response, Waterstone opposes the government's penalty assessment and contends that the penalty should be adjusted to the low range of permissible penalties. The Response contains six proposed exhibits: (R-1) Waterstone 2014 Form 1120 Tax Return; (R-2) Waterstone 2015 Form 1120 Tax Return; (R-3) Waterstone Balance Sheets for 2014-2015; (R-4) New York State Department of Labor Fact Sheet; (R-5) Robert J. Bengert Declaration; and, (R-6) E-Verify Enrollment Acknowledgment.

Waterstone contends that mitigation is warranted based on four of the five statutory factors, with the exception of seriousness of the violation, conceding that all seventy-one violations are serious. Response at 5-7. More specifically, it asserts that ICE correctly found that mitigation of the penalty is warranted based on the company's good faith, noting that it promptly provided ICE with all relevant information and promptly corrected and returned those Forms I-9 that were found to have technical or procedural failures. *Id.* at 5. It further argues that in addition to mitigating the penalty for all Count II violations on the basis of lack of unauthorized aliens, ICE should have mitigated the penalty for three of the four violations in Count I because they had designated social security numbers and it could be established that they are authorized for employment. *Id.* at 6.

[4] The government initially proposed a total civil monetary penalty of $47,311 for the seventy-two violations alleged in the complaint but reduced that figure by $654.50 in light of the one unsubstantiated violation from Count II discussed above.

[5] The government did not file any evidence regarding how it calculated the proposed fine against Waterstone. 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 five exhibits noted.

Waterstone 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 subsequent self-audit and enrollment in the E-Verify program,[6] and its ability to pay the proposed fine. *Id*. at 7-8.[7]

IV. DISCUSSION

Waterstone is a family restaurant incorporated in the State of New York. The company has been found liable for four violations involving failure to prepare and/or present Forms I-9 and sixty-seven violations of failure to properly complete Forms I-9, for a total of seventy-one violations. The permissible penalties for these violations range from a minimum of $7810 to a maximum of $78,100. 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 Waterstone: 1) the size of the employer's business, 2) the employer's good faith,

[6] In arguing for mitigation based on non-statutory factors, Waterstone 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 7-8. 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 heading of good faith.

[7] In conjunction with its arguments regarding an appropriate penalty amount, Respondent reports that it offered to settle this case, but that ICE declined to settle for less than 90% of the original penalty amount. Response at 8. 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 5. Thus, the undersigned has not considered Respondent's reported settlement attempts in assessing an appropriate civil monetary penalty.

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 Waterstone have noted, mitigation of the penalty is warranted given that Waterstone 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 found mitigation of the penalty warranted based on the company's good faith and reduced the penalty by 25%. While it appears that Respondent fully complied with the government's investigation, the record is otherwise devoid of any evidence supporting such significant mitigation. *See supra* note 5. Based on the totality of the evidence, I find that some mitigation is warranted for good faith; however, the record does not support a reduction of the magnitude proposed by ICE, particularly when no explanation for that reduction has been given.

Regarding the seriousness of the violations, Respondent stipulated that all seventy-one violations for which it is liable are serious. Response at 6. Among the serious violations alleged in the complaint and confirmed by the evidence related to Respondent's Forms I-9 are the failure to prepare a Form I-9 at all, the failure to ensure that the employee checks a box attesting to his or her status, the failure to ensure that the employee signs section 1, and the failure of the employer to sign the attestation in section 2. *See United States v. Durable, Inc.*, 11 OCAHO no. 1229, 15 (2014) (explaining why these violations are considered serious). Although seriousness of violations is evaluated along a continuum and other categories of violations may be marginally less serious, *see id*., 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*. ICE's disparate treatment of the presence of unauthorized aliens factor predicated on this line of reasoning cannot be supported because "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); *see also United States v. Pegasus Family Rest., Inc.*, 12 OCAHO no. 1293, 10 (2016) (rejecting a similar proposed distinction based solely on suspicion). 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 5. 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, nor has it advanced a persuasive explanation for why the violations in Count

II warrant mitigation for this factor but not the violations in Count I. 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." *United States v. 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 7. 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.[8]

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

[8] The issue of whether an employer's small size is appropriately double-counted for mitigation of a civil money penalty under both section 223(a) of the SBREFA and 8 U.S.C. § 1324a(e)(5) has not been fully addressed in this forum previously. *See Pegasus*, 12 OCAHO no. 1293 at 11 n.11. The instant case, however, does not provide a need to address this issue more explicitly.

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 8. 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 8-9. 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 wage of $7.50 and a tip credit of $1.50. *Id.*, Ex. R-4.

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 informational value regarding Respondent's specific circumstances.[9] Ex. R-4; *see also Pegasus*, 12 OCAHO no. 1293 at 12 (questioning the probative value of a similar NYDOL Fact Sheet). Respondent's financial information shows a decrease in sales between 2014 and 2015 but an increase in income during that same period, and its overall financial picture is somewhat equivocal.[10] Exs. R-1, R-2. The evidence as a whole does not demonstrate that Respondent could not pay a reasonable penalty, though it is appropriate to consider Respondent's financial situation in mitigation of the overall civil monetary penalty warranted.

Finally, Respondent's post-inspection activities, including a self-audit and enrollment in the E-Verify program, do not warrant additional mitigation. See *Pegasus*, 12 OCAHO no. 1293 at 13 (noting that OCAHO case law has rarely, if ever, found post-inspection remedial measures to warrant additional mitigation). Similarly, its high turnover rate, which 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, also does not warrant further mitigation. *Id.* (finding that a high turnover rate is neither inherently

[9] Respondent's majority shareholder, Robert J. Bengert, asserted that Respondent's operating costs "increased significantly" as of December 31, 2015, due to the state law minimum wage increase. Ex. R-5. No financial information was submitted to quantify or clarify the extent of the impact of the minimum wage increase on Respondent's business, and Mr. Bengert's bare, generalized statement carries little probative weight by itself.

[10] Respondent's 2014 income tax returns are dated April 21, 2016, almost two months after its 2015 returns. Exs. R-1, R-2. The record does not include an explanation for this unconventional filing order or any statement regarding whether the 2014 returns were previously filed or why they were delayed and filed after the 2015 returns.

mitigating nor aggravating regarding the penalty calculation for violations of 8 U.S.C. § 1324a(a)(1)(b)).

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 modestly 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, $701.25 for each Count I violation, and $654.50 for each Count II violation, is slightly higher than is warranted given the facts of the case. Penalty adjustment closer to the lower midrange of permissible penalties is warranted due to the small size of Respondent's business, its good faith, 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 $475 for each of the seventy-one violations in Counts I and II for which Respondent is liable. The total civil money penalty for all seventy-one violations for which Respondent is liable is assessed at $33,725.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. 3679 Commerce Place, Inc. d/b/a Waterstone Grill 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 3679 Commerce Place, Inc. d/b/a Waterstone Grill with a Notice of Inspection.

3. The Department of Homeland Security, Immigration and Customs Enforcement, served 3679 Commerce Place, Inc. d/b/a Waterstone Grill with a Notice of Intent to Fine on March 28, 2016.

4. 3679 Commerce Place, Inc. d/b/a Waterstone Grill timely requested a hearing on April 22, 2016.

5. The Department of Homeland Security, Immigration and Customs Enforcement, filed a complaint with the Office of the Chief Administrative Hearing Officer on June 10, 2016.

6. 3679 Commerce Place, Inc. d/b/a Waterstone Grill 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 violation involving Darien Volker from Count II.

8. 3679 Commerce Place, Inc. d/b/a Waterstone Grill failed to timely prepare and/or present Forms I-9 for four employees.

9. 3679 Commerce Place, Inc. d/b/a Waterstone Grill failed to properly complete Forms I-9 for sixty-seven employees.

10. 3679 Commerce Place, Inc. d/b/a Waterstone Grill is a small business, that acted in good faith, 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. 3679 Commerce Place, Inc. d/b/a Waterstone Grill 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. 3679 Commerce Place, Inc. d/b/a Waterstone Grill is liable for seventy-one 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) (citations omitted).

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) (commenting that 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. "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).

20. "[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).

21. "[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).

22. 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)).

23. 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).

24. 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)).

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

ICE's Motion for Summary Decision is **GRANTED** as to liability and **GRANTED, IN PART** as to the penalty amount. The violation alleged against Darien Volker in Count II is dismissed. Waterstone is found liable for the four violations alleged in Count I and the remaining sixty-seven violations in Count II, for a total of seventy-one violations. Respondent is liable for seventy-one violations of 8 U.S.C. § 1324a(a)(1)(B) and is directed to pay civil penalties in the total amount of $33,725. 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 January 19, 2017.

_____

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.