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

November 21, 2017

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. § 1324a Proceeding OCAHO Case No. 16A00056
INTEGRITY CONCRETE, INC., Respondent,	)	
And	)	
AMERICAN CONCRETE, INC. Respondent	)	

AMENDED FINAL DECISION AND ORDER

A Final Decision and Order was initially issued in the above-captioned case on November 6, 2017. Pursuant to 28 C.F.R. § 68.52(f), this Amended Final Decision and Order amends the order issued on November 6, 2017, and corrects solely clerical and typographical errors.

Appearances

Amelia Anderson
Rhana Ishimoto,
For the Complainant, the United States

Fausta Albi
For the Respondents, American Concrete Inc. and Integrity Concrete Inc.

I. STATEMENT OF THE CASE

This is an action pursuant to the employer-sanction provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a (2012). Complainant, United States Department of Homeland Security,

Immigration and Customs Enforcement (ICE or the government), filed a three-count complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against Respondent, Integrity Concrete, Inc. (Integrity). ICE also filed a one-count complaint with OCAHO against Respondent, American Concrete, Inc. (American). Each Respondent filed an answer, and the parties completed prehearing procedures.

On December 22, 2016, counsel for Integrity and American submitted a Motion for Consolidation of Hearings because both companies share an owner, business address, witnesses and evidence. By Order dated January 9, 2017, these matters were consolidated for hearing because the same or substantially similar evidence is relevant and material to disposition, and both companies share an owner (Anthony Cannariato), business address, witnesses, and evidence.[1]

Pursuant to a prehearing conference call held on February 16, 2017, the parties stipulated to the substantive violations alleged in the complaints and agreed that the only matter in dispute is whether the civil penalty calculations proposed by ICE are appropriate.

On March 17, 2017, ICE and Respondents each filed a Motion for Summary Decision as to civil penalty issues, with attached exhibits. On April 10, 2017, Respondents filed a Response to Complainant's Motion for Summary Decision, with attached exhibits.

The issue of liability has been resolved. For the reasons set forth below, Complainant ICE's Motion for Summary Decision regarding civil penalties will be **GRANTED, IN PART,** and Respondents' Motion for Summary Decision regarding civil penalties will be **GRANTED, IN PART.** Based on my *de novo* review of all the evidence, the civil penalties against Integrity and American will be reduced in the exercise of discretion based on my application of statutory and/or non-statutory penalty factors.

[1] Order of Consolidation, *United States v. Integrity Concrete, Inc*., OCAHO Case No. 16A00056 (Jan. 9, 2017).

II. FACTUAL AND PROCEDURAL BACKGROUND AND POSITIONS OF THE PARTIES

A. Integrity

Respondent Integrity is a small company employing, at relevant times herein, 28 individuals in San Diego, California.[2] Integrity is engaged in the business of decorative concrete and paving, and has various divisions in concrete, interlocking pavers, and masonry.

On January 7, 2015, ICE served Integrity with a Notice of Inspection (NOI) requesting that Integrity present its Employment Eligibility Verification Forms (Forms I-9) no later than January 15, 2015. Thereafter, Integrity was granted an extension until January 23, 2015. Integrity presented Forms I-9 to ICE on January 28, 2015.

On March 11, 2015, ICE served Integrity with a Notice of Technical or Procedural Failures (NTPF) for four Forms I-9, a Notice of Suspect Documents (NOSD) that listed nine employees ((1) Mateo Gomez; (2) Victor Herrera Cardenas; (3) Carlos Ortega; (4) Felix Ortega; (5) Manuel Rebollar; (6) Fernando Rincon; (7) Carlos Rincon; (8) Antonio Rodriguez; and (9) Sergio Valdez)), and a Notice of Inspection Results that removed one name (Victor Herrera Cardenas) from the NOSD. On March 17, 2015, Integrity notified ICE that it no longer employed eight of the nine employees on the NOSD, and provided an updated Form I-9 for the remaining employee on the NOSD. *See* Complainant's Prehearing Statement, Stipulation ¶ 8.

On October 22, 2015, ICE served Integrity with a Notice of Intent to Fine (NIF). The NIF contained three counts, each charging violations of 8 U.S.C. § 1324a(a)(1)(B) for failure to comply with the employment verification requirements of 8 U.S.C. § 1324a(b). Count I alleged that Integrity failed to timely prepare and/or present Forms I-9 for the following five employees: (1) Juan Ortega; (2) Carlos Ortega; (3) Felix Ortega; (4) Ismael Rodriguez; and (5) Clemente Torres. Count II alleged that Integrity failed to ensure that the following three employees properly completed section 1 of their respective Forms I-9: (1) Jose Altamirano; (2) Pedro Bautista; and (3) Manuel Rebollar. Count III alleged that Integrity failed to properly complete section 2 and/or 3 of the Forms I-9 for the following sixteen employees: (1) Shannon Cannariato; (2) Carlos Cedillo; (3) Mateo Gomez; (4) Juan Gonzalez; (5) Victor Herrera Cardenas; (6) Jason Irving; (7) Alejandro Loresco Jr.; (8) Enrique Mares; (9) David Martinez; (10) Sergio Mendoza; (11) Matthew Patstone; (12) Antonio Rodriguez; (13) Casimiro Torres; (14) Sergio Valdez; (15) Louis Vargas; and (16) Martin Yepez. ICE assessed a total fine amount of $24,684, which reflects a base fine of $935 per violation, plus five percent enhancements due to lack of good

[2] Integrity's employee list in 2015, Ex. G-3A, lists 28 employees and this is the number that Complainant accepts in its motion for summary decision, but Integrity's 2014 quarterly tax return indicates that it had 35 employees. The difference is immaterial for purposes of this amended decision.

faith and the seriousness of the violations. By letter dated November 19, 2015, Respondent Integrity timely requested a hearing to contest the notice before an Administrative Law Judge (ALJ).

On September 1, 2016, ICE filed a complaint against Integrity. The complaint fully incorporated the three counts contained in the NIF, including the proposed civil money penalties. On October 24, 2016, Integrity filed an answer admitting Count I, in part, but denying that Carlos Ortega's Form I-9 was intentionally backdated, and fully admitting Counts II and III. Integrity challenged the proposed penalty assessments and requested reductions pursuant to 8 U.S.C. § 1324a(e)(5). Specifically, Integrity requested a reduction in the proposed penalties for its small size, and contends that it is inappropriate to assign bad faith as an aggravating factor because of its compliance after ICE's investigation began. Pursuant to public policy, Integrity also requested a reduction in the proposed penalties because of financial inability to pay and the alleged hardship that the proposed penalties would impose on its business. Accordingly, Integrity requested that all proposed penalties be reduced to $300 per violation, for a total penalty of $7,200.

On December 1, 2016, ICE filed its prehearing statement containing sixteen proposed factual stipulations, including a chronology of events and admission of liability on all three counts. On December 16, 2016, Integrity filed its prehearing statement and agreed to twelve of ICE's thirteen stipulations, but denied that Carlos Ortega's Form I-9 was intentionally backdated by an Integrity employee, and proposed a stipulation that ICE had issued a Change to Notice of Inspection Results, which specified that Victor Herrera Cardenas was authorized to work.

B. American

Respondent American, also owned by Anthony Cannariato, is located in San Diego, California and employs 48 workers. On January 15, 2015, ICE served a NOI on American and requested that the company present its Forms I-9 no later than January 23, 2015. Thereafter, American requested an extension until January 23, 2015. On January 28, 2015, American presented its Forms I-9.

On March 11, 2015, ICE served American with a Notice of Technical or Procedural Failures for twelve Forms I-9 (Ex. G-4B), and a NOSD that listed five employees (Mateo Gomez, Jose Gonzalez, Carlos Ortega, Fernando Perez and Antonio Rodriguez). Ex. G-5B. On the same day, American provided twelve amended Forms I-9 in response to the Notice of Technical or Procedural Failures.[3] On March 13, 2015, ICE served a Change to Notice of Inspection Results,

[3] Neither American nor ICE provided the Form I-9's that were supposed to be attached to the March 11, 2015 Notice of Technical or Procedural Failures and did not specify in this notice which forms were incorrectly prepared after the NOI was issued. Ex. G-4B. The text of Ex. G-4B indicates that the Form I-9's with technical or procedural failures are attached, but the exhibit does not provide the actual twelve forms referenced in the text of the letter. Ex. G-3B attaches

which asserted that one of the employees listed on the NOSD, Jose Gonzalez, was authorized to work in the United States. On the same day, American notified ICE that three of the four remaining employees listed on the NOSD, as stipulated in the prehearing statements, were no longer employed by American. On March 17, 2015, after the NOSD was issued, American notified ICE that the other remaining employee listed on the NOSD, no longer worked for American.[4]

On October 22, 2015, ICE served American with a NIF. Count I alleged that American violated 8 U.S.C. § 1324a by failing to prepare and/or present Forms I-9 for the following ten employees: (1) Nicholas Barragan; (2) Manuel Davalos; (3) Mateo Gomez; (4) Javier Gonzalez; (5) Manuel Herrera-Mota; (6) David Martinez; (7) Alfredo Orozco; (8) Carlos Ortega; (9) Antonio Rodriguez; and (10) Adolfo Zacarias. Count II alleged substantive paperwork violations for employee Jose Sifuentes. ICE proposed a total civil penalty against American of $5,390, which reflected $484 per violation, including five percent enhancements for lack of good faith and for the seriousness of the violations, and an additional five percent enhancement for three violations that involved the hiring of purported unauthorized aliens (Mateo Gomez, Carlos Ortega and Antonio Rodriguez). By letter dated November 19, 2015, Respondent American timely requested a hearing.

As indicated in the parties' prehearing stipulations, American notified ICE on March 13, 2015 that three of the employees suspected of being unauthorized were no longer employed. ICE Prehearing Statement, Stipulation ¶ 8; American Prehearing Statement at 2. The parties also stipulated that on March 17, 2015, American notified ICE that the remaining employee on the NOSD no longer worked for American. ICE Prehearing Statement, Stipulation ¶ 10. The record does not establish on what date these employees were terminated. Nevertheless, American indicates that it "took all permissible actions to mitigate the problem, up to and including termination, as soon as it was advised by ICE that there were individuals employed with the company who were working pursuant to suspect documentation, despite significant burden on the company's operations and ongoing projects." Respondents' Motion for Summary Decision at 9. Accordingly, the motion appears to concede that the three employees were terminated after the NOSD issued on March 11, 2017, but does not concede they were unauthorized aliens.

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ten Form 1-9's, but the exhibit does not clarify when these forms were submitted or the nature of the violations. Nevertheless, the parties stipulated that American committed eleven violations in its preparation and submission of the Form I-9's. American Prehearing Statement at 2.

[4] Subsequently, ICE asserted in its Motion for Summary Decision, but did not allege in its complaint, that three of these four employees (Mateo Gomez, Carlos Ortega and Antonio Rodriguez), were unauthorized aliens. Complainant's Motion for Summary Decision at 10. The fact that these three employees were no longer employed by American was stipulated to by Complainant and Respondent American in their prehearing statements. ICE Prehearing Statement, Stipulation ¶ 8, and American Prehearing Statement at 2.

On September 1, 2016, ICE filed a complaint against American. The complaint acknowledged that the NIF had incorrectly charged a violation for Jose Sifuentes under Count II. The Complaint corrected this and charged the violation for Jose Sifuentes under Count I as an untimely prepared Form I-9. Accordingly, the complaint against American charges eleven violations under Count I and none under Count II. The complaint fails to plead that any employees were unauthorized aliens. Otherwise, the complaint fully incorporates the allegations and proposed civil money penalties set forth in the NIF.

On October 25, 2016, American filed an answer admitting the material allegations of the complaint, but asserting that statutory and non-statutory factors warrant mitigation of the proposed penalty amounts based on 8 U.S.C. § 1324a(e)(5). Specifically, American requested a five percent mitigation for small size and a five percent mitigation for good faith. American contests the five percent aggravation for the potential hiring of three unauthorized aliens. In addition to the statutory factors of small size and good faith, American requests a penalty reduction based on the non-statutory factor favoring a public policy of leniency towards small businesses. American asserts that an appropriate penalty should be $220 for each of the eleven violations, for a total penalty amount of $2,420.

On December 1, 2016, ICE filed its prehearing statement, which proposed thirteen stipulations, a chronology of events, and American's admission of liability for all eleven violations. On December 16, 2016, American filed its prehearing statement admitting the violations, but challenging the appropriateness of the civil penalties. American agreed to twelve of ICE's thirteen proposed stipulations, objected to a typographical error in the second proposed stipulation, and proposed that ICE stipulate that American was granted an extension of time to comply with the NOI after American's failed attempt to confirm the proper address for delivery.

C. The Cross-Motions for Summary Decision

On March 17, 2017, ICE filed a Motion for Summary Decision against Integrity and American (ICE's Motion). ICE's Motion contains twenty two exhibits. The exhibits pertaining to Integrity include: (Ex. G-1A) Integrity Notice of Inspection (pp. 1-2); (Ex. G-2A) Forms I-9 (pp. 3-83); (Ex. G-3A) Employee List (pp. 84-85); (Ex. G-4A) Notice of Suspect Documents (pp. 86-88); (Ex. G-5A) Change to Notice of Inspection Results (pp. 89-90); (Ex. G-6A) Notice of Technical or Procedural Failures (pp. 91-94); (Ex. G-7A) Forms I-9 (pp. 95-108); (Ex. G-8A) Payroll Report (p. 109); (Ex. G-9A) 2014 Quarterly Tax Return (pp. 110-13); (Ex. G-10A) Articles of Incorporation, California Secretary of State (pp. 114-15); and (G-11A) Notice of Intent to Fine (pp. 116-20). The exhibits pertaining to American include: (Ex. G-1B) Notice of Inspection (pp. 1-2); (Ex. G-2B) Employee List (pp. 3-5); (Ex. G-3B) Forms I-9 (pp. 6-42); (Ex. G-4B) Notice of Technical or Procedural Failures (pp. 43-46); (Ex. G-5B) Notice of Suspect Documents (pp. 47-49); (Ex. G-6B) Change of Notice of Inspection Results (pp. 50-51); (Ex. G-7B) Payroll Report (pp. 52-59); (Ex. G-8B) 2014 Quarterly Tax Return (pp. 60-62); (Ex. G-9B) Active

License from Contractors State License Board of California (p. 63); (Ex. G-10B) Articles of Incorporation (pp. 64-65); and (Ex. G-11B) Notice of Intent to Fine (pp. 66-69).

ICE's Motion asserts it is entitled to summary decision because Respondents stipulated to liability for all alleged violations. ICE also asserts that there is no genuine issue of material fact regarding the proposed civil monetary penalty amounts for both Respondents.

As noted, ICE set the proposed base penalty assessment for each violation against Integrity at $935, and enhanced the base assessment proposal by a five percent aggravation factor for lack of good faith and a five percent aggravation factor for seriousness of the violations. Thus, for Respondent Integrity's five Count I violations, ICE recommended a proposed civil penalty amount of $5142.50. For Integrity's three Count II violations, ICE recommended a proposed civil penalty amount of $3,085.50. For Integrity's sixteen Count III violations, ICE recommended a proposed civil penalty amount of $16,456.00. Accordingly, ICE's total proposed civil penalty assessment against Respondent Integrity is $24,684.

As noted, ICE set the proposed base penalty assessment for each of the eleven violations under amended Count I against American at $440, and enhanced the base penalty assessment proposal by a five percent aggravation factor for lack of good faith and a five percent aggravation factor for seriousness of the violations for a total of $5,324. In addition, for three of the eleven violations, ICE proposed an additional five percent aggravation factor for employment of unauthorized aliens for a total of $66. Accordingly, ICE's total proposed civil penalty assessment against Respondent American equals $5,390.

On March 17, 2017, Respondents filed a Motion for Summary Decision (Respondents' Motion). Respondents' Motion contains three proposed exhibits: (R-1A) U.S. Small Business Administration Table of Small Business Size Standards (pp. 1-3); (R-2A) Integrity 2015 Income Tax Return (pp. 4-8); and (R-3A) American 2015 Income Tax Return (pp. 9-13). Respondents' Motion concedes that there is no genuine issue of material fact as to liability and admitted all violations alleged in the both complaints. Respondents contest the proposed civil penalty amounts and seek mitigation pursuant to statutory and non-statutory factors.

On April 10, 2017, Respondents filed a Response to Complainant's Motion for Summary Decision (Respondents' Response) and requested a reduction in the proposed civil monetary penalties. The Response includes two exhibits: (R-1B) Declaration of Sharon Weaver (p. 1); (R-2B) E-mail Exchange Confirming E-Verify Use (pp. 2-10). Respondents also request judicial notice of the Memorandum of Agreement between the U.S. Citizenship and Immigration Services and ICE, which gives ICE the ability to obtain evidence of compliance with the E-Verify program.

III. DISCUSSION AND ANALYSIS

A. Applicable Legal Standards

1. Summary Decision

Pursuant to OCAHO rules, an 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." 28 C.F.R. § 68.38(c); *see United States v. Metro. Enters., Inc.*, 12 OCAHO no. 1297, 4 (2017).[5] Relying on 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. 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)).

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

The presence of cross motions for summary decision does not necessarily mean "that summary decision should [be] issue[d] in favor of either party; each motion must be considered on its own

[5] 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.

merits." *United States v. Ketchikan Drywall Servs., Inc.*, 10 OCAHO no. 1139, 6 (2011) (citing *Santiglia v. Sun Microsystems, Inc.*, 9 OCAHO no. 1110, 8 (2004)).

2. Employment Verification Requirements

Employers must prepare and retain Forms I-9 for employees hired after November 6, 1986, and they are required to produce the Forms I-9 for inspection by the government upon three days' notice. 8 C.F.R. § 274a.2(b)(2)(ii); *United States v. Keegan Variety, LLC*, 11 OCAHO no. 1238, 2 (2014). The form must be retained for current employees. For former employees, the form must be retained "only for a period of three years after that employee's hire date, or one year after that employee's termination date, whichever is later." *United States v. H & H Saguaro Specialists*, 10 OCAHO no. 1144, 6 (2012) (quoting 8 U.S.C. § 1324a(b)(3) ("Retention of verification form"); 8 C.F.R. § 274a.2(b)(2)(i); *United States v. Ojeil*, 7 OCAHO no. 984, 982, 992 (1998)).

Employers must ensure that an employee completes Section 1 of the Form I-9 and attests to his or her citizenship or immigration status in the United States by signing and dating the Form I-9 no later than the first day of employment. 8 C.F.R. § 274a.2(a)(3) (attestation under penalty of perjury), (b)(1)(i)(A). For employees employed for three business days or more, an employer must sign Section 2 of the Form I-9 within three days of the employee's first day of employment to attest under penalty of perjury that it reviewed the appropriate documents to verify the individual's identity and employment authorization. 8 C.F.R. § 274a.2(a)(3), (b)(1)(ii).

The failure to satisfy the requirements of the employment verification system are "paperwork violations," which are either "substantive" or "technical or procedural." *See* Memorandum from Paul W. Virtue, INS Acting Exec. Comm'r of Programs, Interim Guidelines: Section 274A(b)(6) of the Immigration & Nationality Act Added by Section 411 of the Illegal Immigration Reform & Immigrant Responsibility Act of 1996 (Mar. 6, 1997) (Virtue Memorandum) available at 74 No. 16 Interpreter Releases 706 (Apr. 28, 1997). Relevant to the instant case, substantive violations include failure to prepare and/or present a Form I-9. 8 C.F.R. § 274a.2(b)(2)(ii); Virtue Memorandum at 3; *see also United States v. Horno MSJ, Ltd., Co.*, 11 OCAHO no. 1247, 7 (2015) ("Absent an extension of time, an employer cannot avoid liability for failure to timely present I-9 forms by submitting the forms at some point later in the process, whether in the course of the inspection itself or later during the ensuing litigation.") (citing *United States v. Liberty Packaging, Inc.*, 11 OCAHO no. 1245, 5-6 (2015); *United States v. A&J Kyoto Japanese Restaurant, Inc.*, 10 OCAHO no. 1186, 7 (2013)). The Virtue Memorandum also characterizes the following as substantive violations: (1) an employee's failure to check the appropriate box identifying his or her citizenship or immigration status in Section 1; (2) an employee's failure to sign the attestation in Section 1; (3) an employer's failure to record a proper List A document or proper Lists B and C documents in Section 2; and (4) an employer's failure to sign the attestation in Section 2. Virtue Memorandum at 3-4.

B. Respondents' Liability

During the telephonic prehearing conference call held on February 16, 2017, Respondents admitted their liability for all violations, as alleged in the two complaints.[6] Order and Memorandum of Telephonic Prehearing Conference, *United States v. Integrity Concrete, Inc.*, OCAHO Case No. 16A00056 (2017). In addition, the parties stipulated to the factual background outlined in their prehearing statements. Accordingly, there is no genuine issue of material fact as to liability for all violations alleged pursuant to 8 U.S.C. § 1324a(a)(1)(B) and Complainant ICE's Motion for Summary Decision with respect to liability is **GRANTED**.

C. Penalty Assessment

An OCAHO Administrative Law Judge may conduct a *de novo* review of ICE's penalty assessments. *United States v. Cawoods Produce, Inc.*, 12 OCAHO no. 1280, 8 (2016). The minimum penalty for each substantive violation for a first-time offender pursuant to the ICE penalty matrix is $110, and the maximum is $1100.

Five statutory factors must be considered when assessing civil money penalties for paperwork violations: (1) the size of the employer's business; (2) the employer's good faith; (3) the seriousness of the violations; (4) whether the individual was an unauthorized alien; and (5) the employer's history of previous violations. 8 U.S.C. § 1324a(e)(5). 8 U.S.C. § 1324a(e)(5) does not require good faith to be considered on a binary scale, and a factor that does not aggravate the penalty does not necessarily mitigate the penalty. *United States v. Pegasus Family Restaurant, Inc.*, 12 OCAHO no. 1293, 5 (2016) (citing *United States v. Int'l Packaging, Inc.*, 12 OCAHO no. 1275a, 6 (2016)). "The statute does not require that equal weight be given to each factor, and it does not rule out consideration of other factors as may be appropriate in particular circumstances." *United States v. Buffalo Transp., Inc.*, 11 OCAHO no. 1263, 9 (2015). Other non-statutory factors that may be taken into consideration include the public policy favoring leniency toward small businesses and a company's inability to pay the proposed penalty. *See id.*; *United States v. East Coast Foods, Inc.*, 12 OCAHO no. 1281, 7 (2016) (citing *Keegan Variety, LLC*, 11 OCAHO no. 1238 at 6); The Regulatory Flexibility Act, 5 U.S.C. § 601 et seq. (2006), amended by § 223(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 864 (1996)).

ICE's proposed penalty assessments are based on internal agency guidelines that give it discretion when assessing and setting the penalties. The ALJ reviewing this assessment, however, is not bound by ICE's penalty methodology. *United States v. Holtsville 811 Inc.*, 11 OCAHO no. 1258, 10 (2015) (citing *United States v. Aid Maint. Co.*, 8 OCAHO no. 1023, 321, 343 (1999); *United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6 (2011)).

[6] There is no allegation in the complaints of single employer, joint employer, or alter ego.

1. Size of Employer's Business

The size of an employer's business is determined as a statutory factor at the time that the ALJ determines the penalty assessment. *United States v. Niche*, 11 OCAHO no. 1250, 8 (2015). OCAHO precedent takes many factors into account when determining the size of a business, such as gross sales, the number of employees, the size of the payroll, and the value of assets. *See United States v. Karnival Fashions, Inc.*, 5 OCAHO no. 783, 477, 482 (1995).

OCAHO's precedent considers businesses employing 90-100 workers to be small businesses. *United States v. Muniz Concrete & Contracting, Inc.*, 12 OCAHO no. 1278 (2016). "OCAHO cases have also looked to the United States Small Business Administration's definitions of whether a business is considered 'small.'" *Id.* at 1278. The Small Business Act "establishes a policy of leniency toward small business entities." *Niche*, 11 OCAHO no. 1250 at 10 (internal citations omitted).

In addition to considering the size of the business as a statutory factor, OCAHO precedent considers the size of the business as a non-statutory factor in the context of leniency. The ALJ may consider the public policy of leniency towards small businesses. *Frio County Partners*, Inc., 12 OCAHO no. 1276 at 19 (2016) (citing *United States v. Keegan Variety*, 11 OCAHO no. 1238, 6 (2014)). When considering business size as a non-statutory factor, the proponent for consideration of such factor "bears the burden of showing that the factor should be considered as a matter of equity and that the facts support a favorable exercise of discretion." *United States v. Century Hotels Corp*., 11 OCAHO no. 1218, 4 (2014).

ICE did not mitigate the proposed penalties on account of the size of Respondents' businesses. In its Motion for Summary Decision, ICE asserts that mitigation based on the size of Respondents' businesses is inappropriate. ICE Motion for Summary Decision at 7-8. Citing gross receipts and sales, tax returns, and income from 2014 and 2015, ICE asserts that Respondent Integrity should not be considered a small business. *Id*. Respondent Integrity's 2015 tax return shows over $2.3 million in gross receipts or sales, gross assets of $1.021 million, and a loss of $623,842. Ex. R-2A. Respondent American's 2015 tax return shows gross receipts or sales of $8.8 million and a net income of $1.4 million. Ex. R-3A.

Respondents assert that both Integrity and American are small businesses under OCAHO precedent. Respondents rely, inter alia, on the number of employees as an indication of the small size of its businesses. Respondents also rely on the Small Business Administration's definition of a "small business." Respondents' Motion for Summary Decision at 4**.**

I agree with Respondents that they are small businesses under OCAHO precedent. As noted, Respondent Integrity employs about twenty-eight persons and Respondent American employs about 48 persons. According to the "Table of Small Business Size Standards Matched to North American Industry Classification System Codes" at "Sector 23: Construction," Subsectors 236

and 237, Respondents are small businesses because they do not make the $27.5 million minimum required to qualify for a large business in the construction industry category. *Id*. at 3, 4; Ex. R-1A. In the last quarter of 2014, American had 45 employees on its payroll, had a gross payroll of $820,809, and its employees worked 20,840 hours. Ex. G-7B; Ex. G-8B. American had total deposits of $199,818 and withheld $46,961 from its employees' wages for Social Security. Ex. G-8B. In the last quarter of 2014, Integrity had 38 people on its payroll, incurred $210,333 in tax liability, paid out $793,158 in gross wages, and withheld $97,142 in social security tax for its employees. Ex. G-9A,

Given the relatively small size of the workforce and payroll, and the relatively small amount of gross deposits for both Integrity and American, the undersigned finds that they are small businesses under OCAHO precedent. *Karnival Fashions, Inc.*, 5 OCAHO no. 783 at 482. Accordingly, accounting for the size of the businesses as a statutory factor, I mitigate the proposed penalty amounts for each violation committed by Integrity and American by five percent.

2. Good Faith

Compliance with an investigation is expected, so "[t]he primary focus of a good faith analysis is on the respondent's compliance *before* the investigation." *United States v. Jula888, LLC*, 12 OCAHO no. 1286, 10 (2016) (citing *United States v. New China Buffet Rest.*, 10 OCAHO no. 1133, 5 (2010)) (emphasis in original). Accordingly, OCAHO precedent "looks primarily to the steps an employer took before issuance of the NOI, not what it did afterward." *United States v. Hartmann Studios, Inc.*, 11 OCAHO no. 1255, 12 (2015) (citing *United States v. Durable*, 11 OCAHO no. 1229, 14 (2014); *see United States v. SKZ Harvesting, Inc.*, 11 OCAHO no. 1266 (2016).The government cannot merely point to a company's poor rate of compliance to demonstrate a lack of good faith. Instead, the government must present some evidence of "culpable behavior beyond mere failure of compliance." *United States v. Solutions Group Int'l, LLC*, 12 OCAHO no. 1288, 8 (2016) (citing *Karnival Fashion*, 5 OCAHO no. at 480).

There are two statutory defenses of good faith. The first defense is a complete bar if the alleged violations are procedural or technical. Here, this complete bar is inapplicable because Respondents have been found liable for substantive violations. *See supra* § *III B;* 8 U.S.C. § 1324a(a)(3); *United States v. Frio County Partners, Inc.*, 12 OCAHO no. 1276, 11 (2016); *see also* Virtue Memorandum at 3. The second defense "applies only to a charge of knowingly hiring unauthorized aliens for employment," under 8 U.S.C. § 1324a(a)(1)(A). For the reasons discussed below, I find that this defense also is inapplicable here. *Frio County Partners, Inc.*, 12 OCAHO no. 1276 at 11; 8 U.S.C. § 1324a(a)(1)(A).

ICE aggravated the proposed penalty for each of Respondents' violations by five percent due to a lack of good faith. ICE identifies three specific reasons for aggravation that undercut Respondents' good faith: (1) Carlos Ortega's backdated Form I-9 by Integrity; (2) Respondents'

purported failure to prepare 12 Forms I-9 until after the NOI issuance; and (3) both Integrity's and American's failure to present evidence that they utilize E-Verify pursuant to 8 C.F.R. § 274A.2(b).

With regard to Respondent Integrity's alleged backdating of Carlos Ortega's Form I-9, the Form I-9 used by Respondent Integrity was released in 2013, but Section 1 of the form was dated for February 12, 2008. Exhibit G-2A at 8-11. OCAHO precedent "provides that backdating alone, without more, is insufficient to support a finding by a preponderance of the evidence that good faith was lacking." *United States v. Speedy Gonzalez Constr., Inc.*, 11 OCAHO no. 1243, 4 (2015) (citing *United States v. Pharaoh's Gentleman's Club, Inc.*, 10 OCAHO no. 1189, 4-5 (2013)). OCAHO precedent further provides "that in order to support a finding of bad faith, there must be evidence of culpable conduct that goes beyond the mere failure of compliance with the verification requirements." *United States v Azteca Dunkirk, Inc*., 10 OCAHO 1172, 1, 3 (2013). For example in *Karnival Fashions*, "the fact that Respondent did produce most of the required Forms I-9, albeit deficient in content, shows that its officer/managers knew of IRCA's requirement that an employer verify employment eligibility yet still failed to verify properly employment eligibility. Accordingly, the factor of good faith will be applied to aggravate the civil money penalty." *United States v. Karnival Fashions, Inc.*, 5 OCAHO no. 783, 477, 480 (1995) (internal citations omitted).

In this case, the Respondents' assert that the backdating was unintentional and done by Carlos Ortega, who is no longer employed by Integrity. Response to Complainant's Motion for Summary Decision at 2. Respondents provide an affidavit from Sharon Weaver, an office manager for American, with knowledge of Integrity's operations. The affidavit attempts to contextualize the backdating, and the instructions given by Matthew Patstone, then a Field Supervisor at Integrity. Patstone certified Ortega's Form 1-9 on January 12, 2015, despite the fact that Ortega filled in the date of his initial hire as February 12, 2008, not the date the form was completed. The affidavit states, "I recall that Mr. Patstone mistakenly advised Carlos Ortega to sign and date the revised Form I-9 with his original date of hire of February 12, 2008, rather than January 12, 2015, the date the new form was completed. This was not due to an intention to mislead the Agency; rather, it was due to a lack of knowledge of the proper manner to correct an I-9 form. Mr. Patstone completed Section 3, dating it with the proper date of January 12, 2015." Ex. R-1B.

In my view, this evidence confirms (1) that the employee backdated the form; and (2) that Integrity instructed the employee to backdate the form. Respondent Integrity knew, or should have known that Section 1 of the form was backdated by Ortega based on instruction from Patstone. This shows a casual indifference for accurate completion of the Form I-9. Reading *Karnival* and *Azteca* together, there was sufficient culpability to establish bad faith by Respondent Integrity. Thus, after the ICE investigation had begun and Integrity was on notice of the violation, Patstone incorrectly instructed Ortega to date his Form I-9 in 2008, and clouded the truth about when the form was completed. It is important to note that the I-9 signed by Ortega

for American, was not backdated. Ex. G-9B at 31. In these circumstances, based on the totality of the evidence, I find an absence of good faith on the part of Integrity in the completion of the backdated Form I-9 for Carlos Ortega. Accordingly, the civil penalty for this violation will be aggravated by five percent.

With regard to Respondents' alleged failure to prepare 12 Forms I-9 until after the NOI issued, Respondents have failed to contest this allegation in response to ICE's Motion. Response to Complainant's Motion for Summary Decision; Respondents' Motion for Summary Decision. Nonetheless, ICE has not pled with specificity, nor argued by motion, which specific forms were prepared in bad faith after the issuance of the NOI. *See generally* American and Integrity Compl.; Complainant's Motion for Summary Decision at 7-8. The undersigned cannot simply aggravate unspecified violations based on bad faith unless the Complainant clarifies which forms were allegedly so prepared in bad faith. The burden of proving culpability by its nature requires specificity, and the Complainant has the burden to showing culpability by such specificity. *Holtsville 811* Inc., 11 OCAHO no. 1258 at 8. ICE's failure to clarify which twelve forms were completed in bad faith after the NOI was issued, makes it impossible for the undersigned to assign bad faith for those unspecified violations. In addition, since ICE calculated the penalties against American and Integrity as separate legal entities, the undersigned is in no position to assign bad faith without knowing which company allegedly committed which violation indicating bad faith.

With regard to Respondent Integrity's and Respondent American's alleged failure to provide evidence that they used the E-Verify system pursuant to 8 C.F.R. § 274A.2, Respondents subsequently provided evidence that both Integrity and American are registered with E-Verify. Response to Complainant's Motion for Summary Decision, Ex. R-2B. The exhibit shows (1) that in April 2016, American and Integrity were enrolled in E-Verify; and (2) that at some unspecified date, American and/or Integrity had posters indicating that they use E-Verify. Ex. R-2B at 7-9. This evidence fails to support either an inference of good faith or bad faith. Use of E-Verify is voluntary, and as such, failure to use the system creates no inference of good or bad faith. *See, e.g., Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 860 (9th Cir. 2009), aff'd sub nom. *Chamber of Commerce of United States v. Whiting*, 563 U.S. 582, 131 (2011) ("E–Verify[,] [u]nder current federal immigration law . . . is voluntary); *Snack Attack Deli, Inc.*, 10 OCAHO no. 1137 at 9 (2010). Accordingly, Respondents' purported use or non-use of E-Verify is a neutral factor in the penalty calculation and does not support aggravation based on an absence of good faith.

In sum, I find that Respondent Integrity's liability should be enhanced by an absence of good faith in the completion of one Form I-9, i.e., the backdated Form I-9 for Carlos Ortega. Complainant has failed to establish any other bad faith by either Respondent.

2. Seriousness of the Violations

OCAHO precedent establishes that paperwork violations are always potentially serious. *United States v. Frio*, 12 OCAHO no. 1276, 16 (2016) (citing *United States v. Skydive Acad. of Haw. Corp.*, 6 OCAHO no. 848, 235, 245 (1996)). "The seriousness of a failure to prepare a Form I-9 aggregates over time, as delays in preparing the Forms I-9 create higher risks of unauthorized employment." *Muniz*, 12 OCAHO no. 1278 at 18 (internal citations omitted). Violations vary in seriousness and "should be evaluated on a continuum." *Id.* at 17 (citing *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 8 (2010)).

OCAHO precedent recognizes that substantive violations include the "listing of improper documents to establish identity or employment eligibility, and the lack of a complete document title, identification number, and/or expiration date where no legible copy of the document is retained with the I-9 and presented at the inspection." *Ketchikan Drywall Servs., Inc.*, 10 OCAHO 1139 at 5 (citing Virtue Memorandum, apps. A & B). OCAHO precedent also recognizes that "the lack of an employer signature in the attestation section" is a substantive violation. *Id.* Such omission is "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 . . . . Failing to sign section 2 could also be interpreted as an employer's avoidance of liability for perjury." *Durable*, 11 OCAHO 1229 at 13 (citing *Ketchikan Drywall Servs., Inc.*, 10 OCAHO 1139 at 10).

ICE charged Respondent Integrity with three kinds of substantive violations, which Integrity has admitted. Count I alleged failure to prepare and/or present Forms I-9 for the following five employees: (1) Juan Ortega; (2) Carlos Ortega; (3) Felix Ortega; (4) Ismael Rodriguez; and (5) Clemente Torres. Count II alleged failure to ensure that the following three employees properly completed section 1 of their Forms I-9: (1) Jose Altamirano; (2) Pedro Bautista; and (3) Manuel Rebollar. Count III alleged failure to properly complete section 2 and/or 3 of the Forms I-9 for the following sixteen employees: (1) Shannon Cannariato; (2) Carlos Cedillo; (3) Mateo Gomez; (4) Juan Gonzalez; (5) Victor Herrera Cardenas; (6) Jason Irving; (7) Alejandro Loresco Jr.; (8) Enrique Mares; (9) David Martinez; (10) Sergio Mendoza; (11) Matthew Patstone; (12) Antonio Rodriguez; (13) Casimiro Torres; (14) Sergio Valdez; (15) Louis Vargas; and (16) Martin Yepez.

ICE charged Respondent American with eleven substantive violations, which it has admitted. Count I, as amended, alleged that American violated 8 U.S.C. § 1324a by failing to prepare and/or present Forms I-9 for the following eleven employees: (1) Nicholas Barragan; (2) Manuel Davalos; (3) Mateo Gomez; (4) Javier Gonzalez; (5) Manuel Herrera-Mota; (6) David Martinez; (7) Alfredo Orozco; (8) Carlos Ortega; (9) Antonio Rodriguez; (10) Adolfo Zacarias; and (11) Jose Sifuentes.

Given the Notice of Suspect Documents (NOSD) received by Respondents, ICE asserts that Respondents' policies and procedures are inadequate to prevent the hiring of unauthorized aliens.

Respondents concede that the violations are serious, but request that the seriousness factor be considered neutrally. Respondents cite their alleged good faith, the lack of evidence that they falsified documents, and the fact that Respondent American did not knowingly employ unauthorized aliens.

I reject Respondent's arguments. Given the extent of substantive paperwork violations for failure to properly prepare and/or present Forms I-9, I find that the seriousness of each of the admitted violations supports a five-percent aggravation enhancement under OCAHO precedent. *United States v. Alpine Staffing, Inc*. 12 OCAHO no. 1303, 18 (2016)**.** This aggravation will be incorporated into my penalty assessment for each violation.

4. Employment of Unauthorized Aliens

"OCAHO case law has repeatedly held that Notices of Suspect Documents and Notices of Discrepancies do not suffice to establish that an individual is necessarily an unauthorized alien." *East Coast Foods, Inc.*, 12 OCAHO no. 1281 at 8 (2016). Furthermore, the termination of employees does not "sufficiently establish the presence of unauthorized aliens to warrant aggravation of the penalty for that reason." *Int'l Packaging, Inc.*, 12 OCAHO no. 1275a at 5 (citing *United States v. Platinum Builders of Cent. Fla., Inc.*, 10 OCAHO no. 1199, 9 (2013) (noting that "suspicion alone" does not warrant aggravation of the statutory factor of whether an individual was an unauthorized alien)). If the government meets its burden and proves the presence of unauthorized aliens, OCAHO case law allows a penalty enhancement based on violations involving those particular unauthorized aliens, however, there is not an automatic across-the-board enhancement for other violations that do not involve the hiring of unauthorized aliens. *East Coast Foods, Inc.*, 12 OCAHO no. 1281 at 10; *United States v. Nebeker, Inc*., 10 OCAHO no. 1165, 5 (2013).

ICE aggravated the proposed penalty by five percent for three of Respondent American's violations involving Forms 1-9 for Mateo Gomez, Carlos Ortega and Antonio Rodriguez, after issuing NOSDs to American. ICE requested verification of the employees' eligibility from Respondent American. ICE limited the proposed aggravation to the three alleged violations involving the purported unauthorized aliens. The issuance of the NOSDs was the only "evidence" presented to establish the three employees' purported unauthorized status. Nevertheless, in ICE's Motion for Summary Decision, the agency argues that no genuine issue of material fact exists as to whether these three violations involved unauthorized aliens hired by Respondent American.

It is important to emphasize that ICE has failed to specifically plead the hiring of three unauthorized aliens in its complaint against Respondent American. Instead, it argues simply that the presence of these purported unauthorized aliens should be factored in as an enhancement to the penalties of the three substantive violations. ICE's American Compl. at 3. Although Respondents' Motion for Summary Decision and Respondents' Response to Complainant's

Motions for Summary Decision do not address the issue of aggravated penalties for Respondent American's purported hiring of three undocumented aliens, under OCAHO precedent outlined above, ICE must do more than raise mere suspicion of the hiring of undocumented aliens based on issuance of NOSDs and the subsequent termination of such employees. American concedes that after it received notice of these suspect documents it "took all permissible actions to mitigate the problem, up to and including termination, as soon as it was advised by ICE." Respondents' Motion for Summary Decision at 9. Such corrective action on its own, however, is not an admission that the workers were unauthorized aliens. Rather, it may merely represent an attempt by American to comply with the law after receiving the NOSD.

The facts of this case are similar to those in *United States v. Liberty Packaging*, 11 OCAHO no. 1245, 10. In that case, "Liberty Packaging [the charged company] says it fired the five employees at issue immediately. . . [e]vidence as to the status of these individuals is suggestive, but does not rise to the level of a preponderance absent some evidence that the employees were afforded the opportunity to challenge their inclusion on the list and failed to do so or to present other documents." *Id.* Similarly here, ICE failed to present sufficient evidence to meet its burden of establishing that Respondent American hired Mateo Gomez, Carlos Ortega and Antonio Rodriguez as unauthorized aliens. Accordingly, I find that no enhancement of the penalties against American is warranted for the presence of three purported unauthorized aliens.

5. History of Previous Violations

The fact that a respondent has no previous violations of the law "does not necessarily warrant additional leniency, and it is still appropriate to treat this factor as a neutral one." *Cawoods Produce*, 12 OCAHO no. 1280 at 15 (citing *New China Buffet Rest.*, 10 OCAHO no. 1133 at 6) (internal quotation marks omitted). OCAHO precedent provides that "compliance with the law is the expectation, not the exception." *Snack Attack Deli, Inc.*, 10 OCAHO no. 1137 at 9.

ICE does not contend that either Respondent has a history of previous violations and recommends that this factor be treated as neutral. I agree. Accordingly, I find that Respondents' history of previous violations is a neutral factor in my penalty assessments.

6. Non-Statutory Factors

Respondents assert two non-statutory factors to mitigate ICE's proposed penalty assessments: (1) that the proposed penalties cause extreme financial hardship on Respondent Integrity based on its inability to pay; and (2) that both Respondent Integrity and Respondent American are small businesses and the large fines proposed against them contravene the public policy of affording leniency to small businesses. Respondents' Motion for Summary Decision at 5-7. The party seeking consideration of non-statutory factors "bears the burden of showing that the factor should be considered as a matter of equity and that the facts support a favorable exercise of discretion." *Buffalo Transp.*, 11 OCAHO 1263 at 10 (citing *United States v. Century Hotels*

Corp., 11 OCAHO no. 1218, 4 (2014)). OCAHO case law provides that "penalties are not meant to force employers out of business or result in the loss of employment for workers." *United States v. Two for Seven, LLC*, 10 OCAHO no. 1208, 9-8 (2014). OCAHO precedent has also found that an ALJ is not precluded from considering factors not explicitly outlined in the statute as "there is no reason that additional considerations cannot be weighed separately." *United States v. M.T.S. Service Corp*., 3 OCAHO 448, 527, 531 (1992).

In a very general sense, OCAHO case law states that "[o]ne factor which is often looked at in the precedents is the respondent's 'ability to pay."' *United States v Raygoza*, 5 OCAHO 729, 49, 52 (1995) (internal citations omitted). Accordingly, a 'respondent's ability to pay a proposed fine may be an appropriate factor to be weighted in assessing the amount of the penalty.'" *Niche*, 11 OCAHO no. 1250 at 10 (citing *United States v. Mr. Mike's Pizza, Inc.*, 10 OCAHO no. 1196, 3 (2013)). The ability to pay as a non-statutory factor is governed by (1) the fact that the burden of proof is placed on the company; and (2) that as a matter of equity, the ALJ may weigh the facts to determine whether discretion warrants adjustment of the fine. *See generally United States v. 3679 Commerce Place, Inc*. 12 OCAHO No. 1269, 10 (2017) (quoting *United States v. Romans Racing Stables*, 11 OCAHO no. 1232, 4 (2014).

To support the assertion that the proposed penalty is too burdensome based on Integrity's purported financial inability to pay, Respondents rely on Integrity's tax return for calendar year 2015 showing that Integrity lost $623,842. Ex. R-2A. This tax return also shows that shareholders undistributed taxable income previously taxed equals $1,353,758, which includes a negative balance of $728,320 from prior years. *Id*. This 2015 tax return also shows $2,379,274 in gross receipts and sales and $2,503,513 for the cost of the goods. Among other things, Integrity took a $499,603 deduction for salaries, taxes and licenses, employee benefits programs, and other matters. *Id.* Perhaps most significantly, Integrity indicates that by the end of the tax year, it had $735,883 in trade notes and accounts receivable. On its face, this indicates that by the end of 2015, Integrity was owed over $735,883, which is more than sufficient to make up for the loss it reported that year. Respondent American's 2015 tax return shows a profit of $39,622, as compared to Integrity's loss. Ex. R-3A. Respondent American has failed to demonstrate any additional mitigation due to financial inability to pay.

A clear picture of Integrity's overall financial health has not been established by its 2015 tax return. Although the 2014 quarterly report (Ex. R-2B) provides some added information, it is not detailed enough to show whether there was an operating loss for more than 2015, or to show a complete picture of Integrity's financial health. Without an audited financial history or more detailed information concerning Integrity's overall financial health, I find that Integrity has failed to establish financial inability to pay the total civil penalty at issue in this matter. The amount of the total civil penalty ($11,325, as calculated below), is small in comparison to Integrity's apparent $2 million plus a year in gross receipts, and the large amount of accounts receivable

that Integrity appears to be carrying over into 2016. Based on the existing record and the exercise of my discretion, I find that Integrity has failed to establish an inability to pay.[7]

As noted, Respondents also argue that the proposed civil penalties against both Integrity and American should be reduced because of the public policy of affording leniency to small businesses. As discussed above when dealing with the statutory factor of size of the businesses, Respondents have already received mitigation based on the size of their businesses. As such, in the exercise of discretion, I find that it is inappropriate to grant any additional mitigation based on the non-statutory factor of affording leniency to small businesses.

7. Recalculation of the Proposed Penalty and De Novo Penalty Assessments

Before addressing the various mitigating or aggravating statutory and/or non-statutory factors, I first address the proposed base penalties assessed by ICE. ICE assessed a base penalty amount of $935 per violation for Respondent Integrity, which represents a fine in the upper range of assessments for first-time offenses. ICE assessed a base penalty amount of $440 for Respondent American, which represents a fine in the mid-range of assessments for first-time offenses. ICE then aggravated each base penalty amount by five percent for the seriousness of the violation and by five percent for each Respondent's lack of good faith. In addition, three of the violations against Respondent American were aggravated by five percent due to the presence of unauthorized aliens. ICE found no mitigating factors.

Civil penalty calculations are meant to set sufficiently meaningful fines to promote future compliance, without being unduly punitive. *See United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013). Penalties approaching the maximum permissible fine amount should be reserved for the most egregious violations. *Id*. Given the differing degrees to which an employer has deviated from the proper form, it is appropriate to adjust the penalties assessed by ICE to mirror the differing degrees of seriousness of violations in each case. *See, e.g., United States v. Hair U Wear*, 11 OCAHO no. 1268 (2016) (citing *Holtsville 811 Inc.*, 11 OCAHO no. 1258 at 10; *Niche*, 11 OCAHO no. 1250 at 10). The ICE penalty matrix is simply a guideline and does not bind OCAHO's assessments. *Holtsville 811* Inc., 11 OCAHO no. 1258 at 10. The penalty for each violation, however, must fall between the minimum ($100 per violation) and the maximum ($1100 per violation) that is allowed by the law. 8 C.F.R. § 274a.10(b)(2).

ICE provided insufficient justification for assessing different base fines against Respondents Integrity and American, given the similarities in the size of their concrete businesses, the nature of their substantive violations, and their common ownership. ICE did not persuasively explain

[7] Respondent American's 2015 tax return shows a profit of $39,622, as compared to Integrity's loss. Ex. R-3A. Respondent American has failed to argue or demonstrate any mitigation due to financial inability to pay.

why it assessed a base fine against Respondent Integrity of $935 and a significantly less drastic base fine against Respondent American of $440. Concededly, in Complainant's Motion for Summary Decision, ICE noted that 86% of Integrity's Forms I-9 contained substantive violations, while only 23% of American Concrete's forms contained Form 1-9 substantive violations. In the interest of consistency, however, I find that the compliance rate alone is insufficient to justify a variation between the fines imposed on these two companies for the same types of violations. As noted, in most respects, the two companies are similarly situated, have common ownership, share similar small size, and operate in the concrete industry.

Other than the compliance rate, there is no other persuasive record support for ICE's conclusion that Respondent Integrity's violations, as a first time offender, were of the most egregious nature and deserve to be assessed at the high end of the fine matrix, whereas Respondent American's similar first-time violations deserve assessment at the mid-range of the fine matrix, particularly given the apparent, better financial health of Respondent American and the suspicion that it hired three unauthorized aliens.

Absent a more persuasive basis from ICE to distinguish between these two Respondents and assess different base fines, before mitigation or aggravation, for the same types of violations, I find that both Respondents should be liable for the same base fine for each category of violation. Accordingly, each Respondent will be assessed a $400 base penalty for paperwork violations and a $500 base penalty for failure to prepare Forms I-9. The failure to complete a Form I-9 is assessed at a higher fine because such failure "subverts the purpose of the employment verification requirements." *United States v Clean Sweep Janitor Serv*., 11 OCAHO 1226, 3 (2014). The base penalties for each Respondent will be aggravated by five percent due to the seriousness of the violations and mitigated by five percent based on the small size of the businesses. In addition, Respondent Integrity's base penalty for one violation, i.e., the backdated Form I-9 for Carlos Ortega, will be enhanced by five percent for bad faith.

Considering the record as a whole, the statutory and non-statutory factors that warrant mitigation, aggravation, or neutrality as outlined above, the penalties in this case are assessed as a matter of discretion, as follows:

Respondent Integrity is found to have committed five violations for failing to prepare and/or present Forms I-9. Each of these violations will be assessed at $500, which includes a $500 base fine, a five percent ($25) enhancement for seriousness of the violations, a five percent ($25) reduction for the small size of the business. In addition, the violation concerning Carlos Ortega's backdated Form I-9 will be enhanced by five percent ($25) for bad faith. Accordingly, Respondent Integrity is liable for $2,525 under Count I. Under Count II, Integrity is liable for substantive violations for failure to properly complete three Forms I-9 with a base fine of $400, a five percent ($20) enhancement for the seriousness of the violations, and a five percent ($20) reduction for the small size of the business. Accordingly, Respondent Integrity is liable for $1,200 under Count II. Under Count III, Respondent Integrity is liable for 19 substantive

paperwork violations with a base fine of $400, a five percent ($20) enhancement for seriousness of the violations and a five percent ($20) reduction for the small size of the business. Accordingly, Respondent Integrity is liable for $7,600 under Count III. Adding up Integrity's liability for all counts, Integrity is liable for a total civil penalty of $11,325.

Respondent American is liable under Count I, as amended, for eleven substantive violations for failing to prepare and/or present Forms I-9. Each of these violations will be assessed at $500, which includes the $500 base fine, a five percent ($25) enhancement for seriousness of the violations, and a five percent ($25) reduction for the small size of the business. Accordingly, Respondent American is assessed a total civil penalty $5,500.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Integrity Concrete, Inc., is an entity incorporated in the state of California.

2. On January 7, 2015, the Department of Homeland Security, Immigration and Customs Enforcement, served Integrity Concrete, Inc. with a Notice of Inspection.

3. On January 28, 2015, Integrity Concrete Inc. presented Forms I-9 to the Department of Homeland Security, Immigration and Customs Enforcement.

4. The Department of Homeland Security, Immigration and Customs Enforcement served Integrity Concrete, Inc. with a Notice of Intent to Fine on October 22, 2015.

5. By letter November 19, 2015, Integrity Concrete, Inc. timely requested a hearing to contest the notice before an Administrative Law Judge.

6. On September 1, 2016, the Department of Homeland Security, Immigration and Customs Enforcement, filed a complaint with the Office of the Chief Administrative Hearing Officer.

7. Integrity Concrete, Inc. hired and employed the 24 individuals identified in the complaint after November 6, 1986.

8. Integrity Concrete, Inc. failed to prepare and/or present Forms I-9 for the following five employees: (1) Juan Ortega; (2) Carlos Ortega; (3) Felix Ortega; (4) Ismael Rodriguez; and (5) Clemente Torres.

9. Integrity Concrete, Inc., failed to ensure that the following three employees properly completed section 1 of the Forms I-9: (1) Jose Altamirano; (2) Pedro Bautista; and (3) Manuel Rebollar.

10. Integrity Concrete, Inc. failed to properly complete section 2 and/or 3 of the Forms I-9 for the following sixteen employees: (1) Shannon Cannariato; (2) Carlos Cedillo; (3) Mateo Gomez; (4) Juan Gonzalez; (5) Victor Herrera Cardenas; (6) Jason Irving; (7) Alejandro Loresco Jr.; (8) Enrique Mares; (9) David Martinez; (10) Sergio Mendoza; (11) Matthew Patstone; (12) Antonio Rodriguez; (13) Casimiro Torres; (14) Sergio Valdez; (15) Louis Vargas; and (16) Martin Yepez.

11. Integrity Concrete, Inc. is a small business with no history of previous violations.

12. Integrity Concrete, Inc. has not been shown to have acted in bad faith except as it relates to the backdating of Carlos Ortega's Form I-9.

13. American Concrete, Inc. is an entity incorporated in the state of California.

14. On January 14, 2015, the Department of Homeland Security, Immigration and Customs Enforcement, served American Concrete, Inc. with a Notice of Inspection (NOI).

15. On January 28, 2015, American Concrete Inc. presented Forms I-9 to the Department of Homeland Security, Immigration and Customs Enforcement.

16. On October 22, 2015, the Department of Homeland Security, Immigration and Customs Enforcement served American Concrete, Inc. with a Notice of Intent to Fine.

17. By letter dated November 19, 2015, American Concrete, Inc. timely requested a hearing to contest the notice before an Administrative Law Judge.

18. On September, 1, 2016, the Department of Homeland Security, Immigration and Customs Enforcement, filed a complaint with the Office of the Chief Administrative Hearing Officer.

19. American Concrete, Inc. hired and employed the 11 individuals identified in the amended complaint after November 6, 1986.

20. American Concrete, Inc., failed to prepare and/or present Forms I-9 for the following eleven employees: (1) Nicholas Barragan; (2) Manuel Davalos; (3)

Mateo Gomez; (4) Javier Gonzalez; (5) Manuel Herrera-Mota; (6) David Martinez; (7) Alfredo Orozco; (8) Carlos Ortega; (9) Antonio Rodriguez; (10) Adolfo Zacarias; and (11) Jose Sifuentes.

21. American Concrete, Inc. is a small business with no history of previous violations.

22. American Concrete, Inc. was not shown to have acted in bad faith.

23. On February 16, 2017, the presiding Administrative Law Judge granted Integrity Concrete, Inc., and American Concrete Inc.'s Motion for Consolidation of Hearings.

B. Conclusions of Law

1. Integrity Concrete, Inc., and American Concrete Inc., are entities 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. American Concrete Inc. is liable under Count I for eleven substantive violations for failing to prepare and/or present Forms I-9 and assessed a total civil penalty $5,500.

4. Integrity is liable for five violations under Count I for failing to prepare and/or present Forms I-9, for an amount equal to $2,525.

5. Integrity is liable for three violations under Count II for failure to complete respective Forms I-9, for an amount equal to $1,200.

6. Integrity is liable for 19 substantive paperwork violations for an amount equal to $7,600.

7. Integrity is liable for a total assessed penalty of $11,325.

8. Integrity was assessed five-percent aggravation for the seriousness of each violation, and five-percent mitigation for each violation for the small size of its business.

9. Integrity's fine in relation to Carlos Ortega's backdated Form I-9 was aggravated by five percent on account of bad faith.

10. American was assessed five-percent aggravation for the seriousness of each violation, and five-percent mitigation for each violation for the small size of its business.

11. The fines for American and Integrity were not mitigated on account of inability to pay.

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

13. "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)).

14. "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).

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

16. "[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)).

17. 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.

18. 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.

19. "The statute does not require that equal weight be given to each factor, and it does not rule out consideration of other factors as may be appropriate in particular circumstances." *United States v. Buffalo Transp., Inc.*, 11 OCAHO no. 1263, 9 (2015).

20. The government has the burden of proving both liability and an appropriate penalty. In addition, the government must prove the existence of aggravating factors by a preponderance of the evidence. *See United States v. Nebeker, Inc.*, 10 OCAHO no. 1165, 3 (2013).

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

22. 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).

23. 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).

24. OCAHO case law considers gross sales, the number of employees, the size of the payroll, and the value of its assets when determining the size of a business. *See United States v. Karnival Fashions, Inc.*, 5 OCAHO no. 783, 477, 482 (1995) (internal citations omitted).

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

26. Even though a "company points to its good faith conduct during and after the inspection" an assessment conforming to precedent "looks primarily to the steps an employer took before issuance of the NOI, not what it did afterward." *United States v. Hartmann Studios, Inc.*, 11 OCAHO no. 1255, 12 (2015) (citing *United States v. Durable*, 11 OCAHO no. 1229, 14 (2014); *see United States v. SKZ Harvesting, Inc.*, 11 OCAHO no. 1266 (2016).

27. 8 U.S.C. § 1324a(e)(5) does not require good faith to be considered on a binary scale. *United States v. Pegasus Family Restaurant, Inc.*, 12 OCAHO no. 1293, 5 (2016) (citing *United States v. Int'l Packaging, Inc.*, 12 OCAHO no. 1275a, 6 (2016); *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)).

28. The government cannot merely point to a company's poor rate of compliance in order to demonstrate a lack of good faith. Rather, the government must present some evidence of

"culpable behavior beyond mere failure [to comply]." *United States v. Solutions Group Int'l, LLC*, 12 OCAHO no. 1288, 8 (2016) (citing *United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 477, 480 (1995) (modification by the CAHO)).

29. Statutory defenses of good faith only apply: (1) if the charges are procedural or technical or (2) "to a charge of knowingly hiring unauthorized aliens for employment." 8 U.S.C. § 1324a(a)(3), § 1324a(a)(1)(A) (2017); *Frio County Partners*, 12 OCAHO no. 1276 at 11; *see* Virtue Memorandum at 3.

30. "Paperwork violations are always potentially serious." *United States v. Frio*, 12 OCAHO no. 1276, 16 (2016) (citing *United States v. Skydive Acad. Of Haw. Corp.*, 6 OCAHO no. 848, 235, 245 (1996)).

31. Violations vary in seriousness and "should be evaluated on a continuum." *United States v. Muniz Concrete & Contracting, Inc.*, 12 OCAHO no. 1278, 17 (2016) (citing *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 8 (2010)).

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

33. Failure to sign the employer attestation in section 2 is "among the most serious of possible violations." *United States v. Hartmann Studios, Inc.*, 11 OCAHO no. 1255, 14 (2015); *see also United States v. Employer Solutions Staffing Grp. II, LLC*, 11 OCAHO no. 1242, 11 (2015), *vacated on other grounds*, 2016 WL 4254370 (5th Cir. 2016) (describing section 2 as "the very heart" of the verification process).

34. "OCAHO case law has repeatedly held that Notices of Suspect Documents and Notices of Discrepancies do not suffice to establish that an individual is necessarily an unauthorized alien." *United States v. East Coast Foods, Inc.*, 12 OCAHO no. 1281, 8 (2016).

35. "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).

36. "[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).

37. 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)).

38. A company's ability to pay the proposed fine is an appropriate factor to consider. *See United States v. Niche*, 11 OCAHO 1250, 10 (2015) (citing *United States v. Mr. Mike's Pizza, Inc.*, 10 OCAHO no. 1196, 3 (2013)).

39. Leniency toward small businesses is another non-statutory factor appropriate for consideration in this penalty assessment. *See United States v. Buffalo Transp., Inc.*, 11 OCAHO no. 1263, 9 (2015); *United States v. East Coast Foods, Inc*., 12 OCAHO no. 1281, 7 (2016) (citing *Keegan Variety, LLC*, 11 OCAHO no. 1238 at 6); The Regulatory Flexibility Act, 5 U.S.C. § 601 et seq. (2006), amended by § 223(a) of the Small Business Regulatory Enforcement Fairness Act of 1996, Pub. L. No. 104-121, 110 Stat. 864 (1996)).

40. Pursuant to these statutory and discretionary factors, the undersigned assesses a total civil penalty against Respondent Integrity of $11,325 and a total civil penalty against Respondent American of $5,500.

ORDER

Complainant's Motion for Summary Decision is **GRANTED, IN PART**, because the government established that there is no genuine issue of material fact with respect to Respondent Integrity's and Respondent American's liability for all charged violations. Complainant's proposed civil penalties, however, have been adjusted in the exercise of discretion pursuant to a *de novo* review of the totality of the evidence. Further, Respondents' Motion for Summary Decision is **GRANTED, IN PART**, because they established under OCAHO precedent that each Respondent is entitled to a reduction in penalty based on statutory and/or non-statutory factors.

SO ORDERED.

Dated and entered on 21st day of November, 2017.

_____

Thomas P. McCarthy
Administrative Law Judge

Appeal Information

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

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

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

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

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

December 20, 2017

UNITED STATES OF AMERICA, Complainant, v. INTEGRITY CONCRETE, INC., Respondent.	)))))))))	8 U.S.C. § 1324a Proceeding OCAHO Case No. 16A00056

ERRATA

In the Amended Final Order of Dismissal issued November 21, 2017. This order is herby amended to correct the following two errors:

1. On Page 4, in the first full paragraph, the order is corrected to delete the following sentence, "Thereafter, American requested an extension until January 23, 2015."

2. On page 19, in the first full paragraph, '$100' is corrected to read '$110'

SO ORDERED.

Dated and entered on December 20, 2017.

Thomas P. McCarthy
Administrative Law Judge