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

UNITED STATES OF AMERICA, Complainant, v. JOHN FERGUSON MOVING AND STORAGE, LLC, Respondent.	)	8 U.S.C. § 1324a Proceeding OCAHO Case No. 2021A00037

Appearances: Martin Celis, Esq., for Complainant
John Michael Ferguson, corporate representative of Respondent[1]

FINAL DECISION AND ORDER

I. INTRODUCTION

This case arises under the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a. On June 22, 2021, Complainant, the United States Department of Homeland Security (DHS), Immigration and Customs Enforcement (ICE), filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that Respondent, John Ferguson Moving and Storage, LLC, violated 8 U.S.C. § 1324a(a)(1)(B) by failing to prepare and/or present the Employment Eligibility Verification Forms (Forms I-9) for twenty-three individuals after being requested to do so by an authorized agency of the United

[1] Respondent's owner, John Michael Ferguson, entered an appearance as a corporate representative for Respondent in this matter by signing Respondent's request for hearing. *See* 28 C.F.R. §§ 68.33(c)(3)(iv), (f). On July 23, 2021, he filed a Notice of Appearance in this case.

States. Compl. ¶ 3. On July 23, 2021, Respondent filed its Answer to Complaint Regarding Unlawful Employment.

Pending before the Court are Complainant's Motion for Leave of Court to Reply to Respondent's Answer and Oppose Dismissal, Complainant's Reply to Respondent's Affirmative Defenses and Motion in Opposition of Dismissal, and Complainant's Motion for Summary Decision. Respondent did not file a response to Complainant's motions. These matters are ripe for resolution. For the reasons set forth herein, Complainant's Motion for Leave of Court to Reply to Respondent's Answer and Oppose Dismissal is granted, Complainant's Reply to Respondent's Affirmative Defenses and Motion in Opposition of Dismissal is accepted as a filing in this matter, Complainant's Motion in Opposition of Dismissal is denied as moot, Complainant's request to strike within its reply is granted, and Complainant's Motion for Summary Decision is granted.

II. PROCEDURAL HISTORY

Respondent is a limited liability company operating in the State of Texas. *See* Mot. Summ. Dec. Exs. G-4 at 1, G-5 at 1. On March 11, 2020, DHS served Respondent with a Notice of Inspection (NOI) and an Immigration Enforcement Subpoena to produce records (DHS Form I-138). *See generally id.* Exs. G-1, G-2; *see also* Ex. G-8 at 1. The NOI provided Respondent with notice that DHS had scheduled an inspection for March 16, 2020, of the Forms I-9 for all current employees and employees terminated on or after March 11, 2019, for John Ferguson Moving and Storage in El Paso, Texas. *Id.* Ex. G-1 at 1. The NOI explained that the purpose of the inspection of John Ferguson Moving and Storage, LLC, was to "assess your compliance with the provisions of the law." *Id.* at 2. The NOI identified the inspector as Special Agent Lillian Garcia with ICE's Homeland Security Investigations (HSI). *Id.* at 1. The Immigration Enforcement Subpoena indicated that Respondent was to produce to HSI Special Agent Garcia on March 25, 2020, certain records, including a "list of all employees receiving wages during the period 03/11/2019 to 03/10/2020[.]" *Id.* Ex. G-2 at 1–2. In a signed affidavit dated January 5, 2022, Special Agent Garcia stated that, during the inspection on March 16, 2020, Respondent's business dispatcher—Rosalinda Rangel—presented her with four incomplete Forms I-9.[2] *Id.* Ex. G-8 at 1. Special Agent Garcia stated

[2] While Exhibits G-1 and G-2 refer to HSI Special Agent "Lillian" Garcia, her name is spelled as "Lilian" Garcia in several places in her affidavit, including the title. *Id.*

that, "[a]t the time, Mrs. Rangel was in the process of completing these particular Forms I-9," and that Mrs. Rangel told her that, "*She* [Mrs. Rangel] *had not been able to locate a Form I-9 for any employee present or terminated*[.]" *Id.* (internal quotations omitted) (italics in original).

On August 20, 2020, in response to the Immigration Enforcement Subpoena, Mrs. Rangel delivered to Special Agent Garcia employee records for Respondent, including the following documents: (1) Form W-9 Request for Taxpayer Identification Number and Certification; (2) Certificate of Filing; (3) List of Current and Terminated Employees from March 11, 2019, through March 10, 2020; (4) List of Contractors with Form 1099; and (5) Texas Workforce Commission's Unemployment Tax Services Employer's Quarterly Reports. *Id.* Ex. G-8 at 2.

On January 27, 2021, Special Agent Garcia personally served Respondent, through its owner Mr. John Ferguson, with ICE Form I-763, being a Notice of Intent to Fine Pursuant to Section 274A of the INA (NIF). *See* Mot. Summ. Dec., Ex. G-8 at 2; Compl. Ex. A. In the NIF, Complainant alleged twenty-three violations of 8 U.S.C. § 1324a(a)(1)(B) by Respondent for failure to prepare and/or present the Forms I-9 for twenty-three individuals and sought a civil money penalty of $45,586. *Id.* Respondent, through Mr. Ferguson, timely requested a hearing before OCAHO by letter dated February 10, 2021. *See* Compl. Ex. B; 8 U.S.C. § 1324a(e)(3)(A).

On June 22, 2021, Complainant filed a complaint with OCAHO alleging that Respondent, John Ferguson Moving and Storage, LLC, violated 8 U.S.C. § 1324a(a)(1)(B) by failing to prepare and/or present the Employment Eligibility Verification Form (Form I-9) for twenty-three individuals after being requested to do so by an authorized agency of the United States. Compl. ¶ 3.[3]

Exs. G-8. In this Order, the Court uses the spelling given in the electronic signature on the affidavit: Lillian Garcia.

[3] In the complaint, DHS misidentifies Respondent as "Painted Dunes Desert Golf Course" when describing Respondent's request for hearing, attached as Exhibit B. Compl. ¶ 2. Respondent notes in its answer that it "has no knowledge of nor control over Painted Dunes Desert Golf Course." Answer 1. The request for hearing attached to the complaint is from John Ferguson Moving and Storage, LLC, and not from another entity. *See* Compl. Ex. B. Throughout the remainder of the complaint, including the charging language in Count I and the incorporated NIF, Respondent is correctly identified as John Ferguson Moving and Storage, LLC. The

On July 23, 2021, Respondent filed a Notice of Appearance of John Michael Ferguson on Behalf of Respondent John Ferguson Moving and Storage, LLC. In the Notice of Appearance, Mr. Fergusion represented that he was "the sole owner and general officer of John Ferguson Moving and Storage, LLC, and will appear and represent the company at all hearings and proceedings in this matter." Notice of Appearance 1.

On July 23, 2021, Respondent, through John Michael Ferguson, filed Respondent John Ferguson Moving and Storage, LLC's Answer to Complaint Regarding Unlawful Employment. In the answer, Respondent denied all material allegations set forth in the complaint from the NIF and asserted three affirmative defenses. Answer 1–2. First, Respondent asserted that the complaint "fail[ed] to state a claim upon which relief may be granted" because it was "vague and fail[ed] to identify with particularity how Respondent allegedly violated the Immigration and Nationality Act of 1952 (as amended)." *Id.* at 2. Next, Respondent asserted that it did not violate 8 U.S.C. § 1324a(a)(1)(B) because "it did not knowingly hire any unauthorized aliens." *Id.* Lastly, Respondent asserted that it had complied in good faith with the requirements of INA § 274A(b). *Id.* Respondent then requested that "this matter be dismissed, that it be set for hearing . . . and that the Administrative Law Judge enter an order dismissing these charges, or in the alternative, find that it complied in good faith and/or issue a penalty at the lowest amount allowed by law." *Id.* at 2–3.

On August 20, 2021, the Court issued an Order for Prehearing Statements and Scheduling Initial Prehearing Conference through which it directed the parties to make their initial disclosures, permitted them to begin discovery, and ordered Complainant to file its prehearing statement by September 20, 2021, and Respondent to file its prehearing statement by October 20, 2021. Order for Prehr'g

---

Court finds that Complainant has provided Respondent with adequate notice of the allegations against it through the complaint, *see* 28 C.F.R. § 68.7(b), and views the misidentification of the respondent business in paragraph two of the complaint as a typographical error. Although Complainant could have moved to amend the complaint to correct its error pursuant to 28 C.F.R. § 68.9(e), the Court finds no prejudice to Respondent arising from the misidentification of the respondent in connection with the attached request for hearing. *See, e.g.*, *United States v. Mario Saikhon, Inc.*, 1 OCAHO no. 279, 1811, 1814 (1990) (finding no prejudice to the respondent from typographical errors in the complaint).

Statements & Scheduling Initial Prehr'g Conf. 3–4. The Court also scheduled an initial prehearing conference for October 28, 2021. *Id.* at 5.

On August 25, 2021, Complainant filed Complainant's Motion for Leave of Court to Reply to Respondent's Answer and Oppose Dismissal. It attached to its motion Complainant's Reply to Respondent's Affirmative Defenses and Motion in Opposition of Dismissal. In its Reply, Complainant asked the Court to strike Respondent's affirmative good faith defense and to deny Respondent's request for dismissal. Reply to Resp't Affirmative Def. & Mot. in Opp'n of Dismissal 6.

On September 13, 2021, Complainant filed its Prehearing Statement. On October 20, 2021, Respondent filed Respondent John Fergusion Moving and Storage, LLC's Prehearing Statement.

On October 29, 2021, the Court issued an Order Rescheduling Initial Prehearing Conference, granting Complainant's Motion to Reschedule the Initial Prehearing Conference, which it filed on October 25, 2021, and rescheduling the initial prehearing conference to November 16, 2021.

The Court held the initial prehearing conference with the parties on November 16, 2021. On November 19, 2021, it issued an Order Summarizing Initial Prehearing Conference and Setting Case Schedule. Through that Order, the Court ordered the parties to file any dispositive motions by January 19, 2022. Order Summarizing Initial Prehr'g Conf. & Setting Case Schedule 4.

On December 28, 2021, Complainant filed Complainant's Motion for Extension of Time for Completion of Discovery and to File Dispositive Motions. On February 10, 2022, the Court issued an Order Granting Complainant's Unopposed Motion for Extension of Time and Setting Revised Case Schedule. The Court gave the parties through March 16, 2022, to file dispositive motions. Order Granting Complainant's Unopposed Mot. for Extension of Time & Setting Revised Case Schedule 3.

Complainant filed a Motion for Summary Decision and Memorandum of Law in Support of Motion for Summary Decision on February 18, 2022, along with several exhibits.[4] Complainant asserts that it has presented sufficient evidence to

[4] Complainant mistakenly identifies Respondent as "Phoenix" in two subheadings within Complainant's Memorandum of Law in Support of Motion for Summary Judgment. Mot. Summ. Dec. 7, 14. The Court considers these to be typographical

establish Respondent's liability and that there is no genuine issue of material fact. Gov't Mem. of Law in Support of Mot. Summ. Dec. ("Gov't Mem.") 5–12, 14. It noted that the parties had exchanged discovery requests between October 2021 and January 2022. Mot. Summ. Dec. 3. Complainant moved the Court to enter summary decision against Respondent and proposed a penalty of $45,586.[5] *Id.* at 4.

Respondent did not file any dispositive motions or a response to Complainant's Motion for Summary Decision.

On May 9, 2022, given Complainant's Motion for Summary Decision, the Court issued an Order Striking Hearing Date.

III. EVIDENCE CONSIDERED

Complainant proffered the following exhibits with its Motion for Summary Decision: Ex. G-1 Notice of Inspection dated March 11, 2020; Ex. G-2 Immigration Enforcement Subpoena dated March 11, 2020; Ex. G-3 Original Forms I-9 with Identification Documents; Ex. G-4 State of Texas Certificate of Filing for John Ferguson Moving & Storage, LLC; Ex. G-5 El Paso County Assumed Name Records

---

errors by the government as the supporting paragraphs identify Respondent as "John Ferguson." *Id.*

[5] Complainant does not move the Court for the additional relief it sought in the complaint, namely, an order that Respondent "cease and desist" from the violations alleged in the NIF and comply with the requirements of section 274A(b) of the INA for three years. *See* Compl. ¶ 3. Even if Complainant had continued to seek that relief, the Court would not grant it because 8 U.S.C. § 1324a does not provide for a cease-and-desist order or a compliance order for the paperwork violations alleged in Count I of the complaint. *See* 8 U.S.C. § 1324a(e)(4); *see also United States v. Elsinore Mfg., Inc.*, 1 OCAHO no. 5, 13, 16 (1998), *modified by the CAHO on other grounds*, 1 OCAHO no. 13, 44–45 (1988) (explaining that DHS "is not entitled to a cease and desist order [in cases involving only paperwork violations] in light of the clear statutory distinction[.]"); *United States v. Gutierrez*, 3 OCAHO no. 554, 1513, 1514 (1993) (CAHO order modifying the ALJ's decision and order) (explaining that "there is no reference or language in section 1324a(e)(5) authorizing an ALJ to order compliance with the requirements of the employment verification system for a period of up to three years.").

for John Ferguson Moving & Storage, LLC; Ex. G-6 Respondent's employee list; Ex. G-7 Texas Workforce Commission's Unemployment Tax Services Employer's Quarterly Reports for First Quarter 2019–First Quarter 2020;[6] Ex. G-8 Affidavit from HSI Special Agent Lillian Garcia; and Ex. G-9 Affidavit from HSI Special Agent George Fernandez. Mot. Summ. Dec. Exs. G-1–G-9. Complainant asserts that it has presented sufficient evidence to establish Respondent's liability and that there is no genuine issue of material fact. Gov't Mem. 5.

Respondent did not file a response to Complainant's Motion for Summary Decisions or any exhibits. In its Motion for Summary Decision, Complainant stated that Respondent attached seventeen Forms I-9 to its prehearing statement and represented that sixteen of those Forms I-9 were completed after service of the NOI. Mot. Summ. Dec. 3. Although Respondent represented that its preliminary exhibit list would include thirty-four pages of Forms I-9s, Resp't Prehr'g Statement 3, it never filed any Forms I-9s with the Court. The Court relies on the evidence before it, namely, the exhibits attached to Complainant's Motion for Summary Decision. *See United States v. Hair U Wear, LLC*, 11 OCAHO no. 1268, 6 n.9 (2016) (considering only evidence that is in the record when ruling on a motion for summary decision);[7] *see also* 28 C.F.R. § 68.38(b) (providing that an opposition to a motion for summary decision "must set forth specific facts showing that there is a genuine issue of fact for the hearing"), *id.* § 68.38(c) (providing that only "the pleadings, affidavits, material obtained by discovery or otherwise, or matters

[6] These quarterly reports reflect filing dates by Respondent on: (a) April 30, 2019, for wage period January through March 2019; (b) July 11, 2019, for wage period April through June 2019; (c) October 3, 2019, for wage period July through September 2019; (d) October 11, 2019, for wage period October through December 2019, and (e) April 15, 2020, for wage period January through March 2020. *Id.*

[7] 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 after 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," the LexisNexis database "OCAHO," or on the United States Department of Justice's website at https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-decisions.

officially noticed" can support an Administrative Law Judge's entry of summary decision).

IV. PRELIMINARY MATTERS

Pending before the Court are three motions filed by Complainant: (a) Motion for Leave of Court to Reply to Respondent's Answer and Oppose Dismissal, (b) Reply to Respondent's Affirmative Defenses and Motion in Opposition of Dismissal, and (c) Motion for Summary Decision. The Court first addresses Complainant's Motion for Leave of Court and its Reply and Motion in Opposition of Dismissal.

A. Complainant's Motion for Leave to Reply and Oppose Dismissal

On August 25, 2021, Complainant filed a Motion for Leave of Court to Reply to Respondent's Answer and Oppose Dismissal. Through its motion, Complainant seeks the Court's leave to file a motion opposing dismissal and a reply to affirmative defenses Respondent raised in its answer. Mot. Leave Court Reply 2. Complainant attached to its motion the filing it seeks leave to file, namely, Complainant's Reply to Respondent's Affirmative Defenses and Motion in Opposition of Dismissal. *Id.* Ex. 1.

The Court grants Complainant's Motion for Leave of Court to Reply to Respondent's Answer and Oppose Dismissal and accepts Complainant's Reply to Respondent's Affirmative Defenses and Motion in Opposition of Dismissal as a filing in this case. The Court notes that "OCAHO's Rules of Practice and Procedure for Administrative Hearings do not provide a deadline for replies to answers," nor do they require parties to seek leave before filing a reply to an answer. *United States v. Space Expl. Techs.*, 18 OCAHO no. 1499, 8 (2023) (citing 28 C.F.R. § 68.9(d) ("Complainants may file a reply [to an answer] responding to each affirmative defense asserted.")).

B. Complainant's Motion in Opposition of Dismissal

The Court now denies as moot the portion of Complainant's filing that constitutes a motion in opposition of dismissal. There is no motion to dismiss pending in this case. Although Respondent identified affirmative defenses in its answer, it neither detailed supporting facts and law in its answer supporting dismissal nor filed a separate motion to dismiss stating with specificity the legal

basis in support of its motion in accordance with OCAHO's Rules of Practice and Procedure for Administrative Hearings, namely, 28 C.F.R. § 68.10(a).[8] Just as a "[m]otion to [d]ismiss is not a substitute for an answer which must meet the requirements for 28 C.F.R. § 68.9(c)[,]" an answer is not a substitute for a motion to dismiss. *United States v. Mendoza Maint. Grp., Inc.*, 18 OCAHO no. 1516, 3 (2024). OCAHO's Rules treat answers to complaints and motions to dismiss complaints as separate filings. *Compare* 28 C.F.R. § 68.9(c) (setting forth the requirements for an answer to a complaint), *with id.* § 68.10(a) (discussing the requirements for a motion to dismiss); *see also id.* (providing that "[t]he filing of a motion to dismiss does not affect the time period for filing answer"). Respondent mentioned dismissal only in passing in its answer when describing what it viewed as the potential outcomes in this matter, namely, dismissal, a contested hearing, or a finding of liability and accompanying order to pay a civil money penalty. Answer 2–3. Such a reference does not constitute a motion to dismiss the complaint pursuant to 28 C.F.R. § 68.10.

[8] OCAHO's Rules of Practice and Procedure for Administrative Hearings, being the provisions contained in 28 C.F.R. pt. 68 (2024), generally govern these proceedings and are available on the United States Department of Justice's website. *See* https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-regulations.

C. Complainant's Reply to Respondent's Affirmative Defenses

1. Good Faith

Through its Reply to Respondent's Affirmative Defenses and Motion in Opposition of Dismissal, Complainant moves this Court to strike Respondent's affirmative good faith defense, arguing that the good faith defense is legally inapplicable to the issue of Respondent's liability in this case. Reply to Resp't Affirmative Def. & Mot. in Opp'n of Dismissal 2–4, 6. In its answer, Respondent asserts that "it complied in good faith with the requirements of Section 274A(b) of the Immigration and Nationality Act" and supports its assertion by stating that it is "a small business with no human resources department or employees," its "employees are United States citizens," and its "owner verified the citizenship of its employees by reviewing the employee's U.S. passport and/or driver's license and Social Security card." Answer 2. In response, Complainant argues that Respondent's statements that its owner verified citizenship because it did not have a human resources department or employees is "inapposite to any claim that Respondent was engaged in good faith attempts to carry out its obligations" under IRCA and/or is "an admission of failure to comply with . . . document retention requirements." Reply 3.

"[A] defense will be stricken as insufficient if there is 'no prima facie viability of the legal theory upon which the defense is asserted, or if the supporting statement of facts is wholly conclusory.'" *United States v. LFW Dairy Corp.*, 10 OCAHO no. 1129, 2 (2009) (quoting *United States v. Chavez-Ramirez*, 5 OCAHO no. 774, 408, 410 (1995)). The United States Court of Appeals for the Fifth Circuit, the "appropriate circuit for review" pursuant to 28 C.F.R. § 68.56, has explained that "[a]lthough motions to strike a defense are generally disfavored, a Rule 12(f) motion to dismiss a defense is proper when the defense is insufficient as a matter of law." *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1057 (5th Cir. 1982).

"There are two good faith defenses to liability found in IRCA." *United States v. Frio Cnty. Partners, Inc.*, 12 OCAHO no. 1276, 13 (2016). The first is enumerated at 8 U.S.C. § 1324a(b)(6)(A) and provides "a narrow but complete defense where an entity is charged with technical or procedural failures in connection with completion of the Form I-9." *Id.* The second is found at 8 U.S.C. § 1324a(a)(3), which the Respondent cites in the answer, and "applies only to a charge of knowingly hiring unauthorized aliens for employment." *Id.*; *see also LFW Dairy Corp.*, 10 OCAHO no. 1129, at 4–5 (striking affirmative defense under 8 U.S.C.

§ 1324a(a)(3) where the respondent was not charged with "knowing hire" violations). Neither defense applies here.

Through the complaint, Complainant alleges that Respondent committed substantive violations of 8 U.S.C. § 1324a by failing to prepare or present a Form I-9 for twenty-three individuals. Compl. ¶ 3. "[A] failure to prepare an I-9 form when hiring a new employee is not a technical or procedural failure; it is substantive in nature and defeats the purpose of the law." *United States v. Dr. Robert Schaus, D.D.S.*, 11 OCAHO no. 1239, 7 (2014). A memorandum by Paul W. Virtue distinguishes technical and procedural violations from those that are substantive. *See* 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), *available at* 74 No. 16 Interpreter Releases 706 (Apr. 28, 1997) (hereinafter the Virtue Memorandum). The Virtue Memorandum specifies that violations of 8 U.S.C. § 1324a(a)(1)(B) are substantive, not technical or procedural. Virtue Mem. at 3–4; 8 C.F.R. § 274a.2(b)(2)(ii). Therefore, because the good faith defense in 8 U.S.C. § 1324a(b)(6)(A) applies only to technical or procedural violations, not substantive violations, Respondent cannot avail itself of it. *See, e.g.*, *United States v. ABCO Solar, Inc.*, 17 OCAHO no. 1465a, 7 (2023) (finding that the good faith defense was not available to the respondent because the violations of 8 U.S.C. § 1324a(a)(1)(B) were substantive in nature). Additionally, the complaint does not allege any "knowing hire" violations,[9] and so the good faith defense found at 8 U.S.C. § 1324a(a)(3) is likewise inapplicable. *See Frio Cnty. Partners, Inc.*, 12 OCAHO no. 1276, at 13 (noting "a 'knowing hire' violation was not alleged" and therefore finding 8 U.S.C. § 1324a(a)(3)'s defense was inapplicable); *LFW Dairy Corp.*, 10 OCAHO no. 1129, at 4 (same).

[9] Under the "Affirmative Defenses" section of its answer, Respondent also argues that it did not violate 8 U.S.C. § 1324a(a)(1)(B) because "it did not knowingly hire any unauthorized aliens." Answer 2. As explained above, the complaint did not charge Respondent with knowingly hiring any unauthorized workers, so Respondent's stated affirmative defense is inapplicable and insufficient as a defense to the allegations in this case. "The employment authorization of an individual for whom a Form I-9 is prepared . . . is not relevant to the initial issue of determining liability for such a violation." *United States v. Harran Transp. Co.*, 6 OCAHO no. 857, 342, 348 (1996). Rather, the Court will consider whether or not each of the twenty-three individuals at issue was authorized to work in the United States when determining the appropriate penalty. *See id.*; 8 U.S.C. § 1324a(e)(5).

Because the inapplicability and insufficiency of the asserted affirmative good faith defense is readily apparent in this matter, the Court grants Complainant's request and strikes Respondent's affirmative defense of good faith.[10] *United States v. Nev. Lifestyles, Inc.*, 3 OCAHO no. 463, 673, 697 (1992) (striking the respondent's affirmative defense because good faith "does not shield an employer from liability for violations of the employment eligibility verification system"). The Court will however consider Respondent's good faith when determining the appropriate penalty to assess in accordance with 8 U.S.C. § 1324a(e)(5). *See id.* (finding that "the good faith defense is only relevant to paperwork violations as one of the factors to be considered in respect of the quantum of civil money penalty.").

2. Failure to State a Claim

In its Reply to Respondent's Affirmative Defenses and Motion in Opposition of Dismissal, Complainant also addresses Respondent's affirmative defense that the complaint fails to state a claim upon which relief may be granted because it is "vague and fails to identify with particularity how Respondent violated the [INA]." Answer 2.[11] Complainant argues that the complaint was "sufficient to apprise the Respondent of the alleged violation" because it alleged the elements of a violation under 8 U.S.C. § 1324a(a)(1)(B). Reply 5 (citing *United States v. Lazy Days South, Inc.*, 13 OCAHO no. 1322a, at 3 (2019)). The Court agrees.

---

[10] Even if the Court were to deny Complainant's request to strike, given the Court's findings of fact, the Court would find Respondent's good faith defense to be meritless regarding Respondent's liability.

[11] Respondent provided neither supporting facts nor citations to legal authority in support of its affirmative defense of failure to state a claim, *see* Answer 2, and thus the Court finds that it failed to comply with OCAHO's Rules of Practice and Procedure for Administrative Hearings, namely, 28 C.F.R. § 68.9(c)(2) which requires an answer to contain a "statement of facts supporting each affirmative defense." *See Nev. Lifestyles, Inc.*, 3 OCAHO no. 463, at 693 (finding that "affirmative defenses must be more than mere conclusory allegations"); *see also United States v. Limon-Perez*, 5 OCAHO no. 796, 1, 4 (1995) (explaining that "OCAHO case law has consistently held that affirmative defenses will be ordered stricken when not supported by the required statement of facts."); *United States v. Chavez-Ramirez*, 5 OCAHO no. 774, 1, 3 (1995) (same).

The Court finds that the complaint satisfies the minimal pleading requirements set forth in 28 C.F.R. § 68.7(b). Through the complaint, Complainant asserts jurisdiction pursuant to Section 274A of the INA, identifies John Ferguson Moving and Storage, LLC, as the entity which committed the alleged violations, describes in Count I and the incorporated NIF the alleged twenty-three violations of 8 U.S.C. § 1324a(a)(1)(B) and the time frame and employees at issue, specifies the remedies, sanctions, and the civil money penalty it seeks from Respondent, and identifies the party to be served with notice of the complaint. Compl. ¶¶ 1–3; *id.* Ex. A. The government's complaint gives Respondent sufficient notice of the alleged violations and the supporting facts. It therefore complies with OCAHO's pleading standard. *See United States v. Split Rail Fence Co., Inc.*, 10 OCAHO no. 1181, 4–6 (2013) (the CAHO discussing pleading standard in OCAHO cases).

Lastly, the Court finds that Respondent has raised no issue of material fact through any of its affirmative defenses and has not further argued or supported them during this case. While the Court will decline to find the affirmative defenses to have been abandoned, *see United States v. Alpine Staffing Inc.*, 12 OCAHO no. 1303, 3 n.2 (2017), it finds Respondent's affirmative defenses to be meritless regarding its liability in this matter. *See United States v. Metro. Enters., Inc.*, 12 OCAHO no. 1297, 2 n.3 (2017).

The Court turns now to the remaining motion pending before it, namely, Complainant's Motion for Summary Decision.

V. THE PARTIES' POSITIONS ON SUMMARY DECISION

A. Complainant's Motion for Summary Decision

1. Liability

Complainant contends that it has met its burden of proof, having presented sufficient evidence to establish that there is no genuine issue of material fact with respect to Respondent's liability for the violations alleged in Count I of the complaint. Gov't Mem. 14. According to Complainant, it served the NOI on Respondent on March 11, 2020. Mot. Summ. Dec. 3. The NOI required that Respondent present Forms I-9 for all "current employees and those terminated on or after March 11, 2019" to DHS by March 16, 2020. *Id.* On March 16, 2020, Respondent's business dispatcher presented to the government "four Forms I-9 that were in the process of being completed." *Id.* On August 20, 2020, Respondent's

business dispatcher provided the government with a list of its employees for the relevant period, a copy of its payroll registry, tax documentation for the business, Texas Workforce Commission's Unemployment Tax Services Employer's Quarterly Reports, and documentation regarding the formation of the business. *Id.* According to Complainant, the twenty-three employees identified in Count I of the complaint through the NIF were hired by Respondent after November 6, 1986, and were employed by Respondent "during some or all of the period between March 11, 2019, and March 11, 2020." *Id.*

Complainant argues that it has demonstrated that Respondent failed to prepare or present Forms I-9 for the twenty-three employees listed in Count I of the complaint and that no genuine issue of material fact exists. Gov't Mem. 12. In its motion, for eighteen of the twenty-three employees identified in the complaint and NIF, Complainant asserts that there is no question of material fact that these employees appear on Respondent's payroll as an employee during the relevant period, and that Respondent did not provide the original Form I-9 to the government during the inspection of its Forms I-9. Gov't Mem. 7–12.[12] For one additional employee, Complainant asserts that Respondent did not provide an original Form I-9 for this employee and that the employee is listed as a current or terminated employee subject to the retention period in the Employee List for March 11, 2019, through March 10, 2020, provided to Complainant by Respondent, but that the employee "does not appear on Respondent's payroll documents." *Id.* at 10.[13] As for the remaining four employees, Complainant asserts that, while those individuals appeared on Respondent's payroll during the relevant period, Respondent provided HSI with an incomplete Form I-9 for each of them. *See id.* at 8–9, 11.[14]

After explaining that the parties engaged in discovery between October 2021 and January 2022, Complainant states that "John Ferguson has provided no

---

[12] The attachment to the NIF lists these employees using the following numbers: 1, 2, 4, 5, 6, 8, 9, 10, 12, 13, 15, 16, 17, 18, 19, 20, 22, and 23. Notice of Intent to Fine 3.

[13] The attachment to the NIF identifies this employee using number 14. Notice of Intent to Fine 3.

[14] The NIF's attachment identifies these employees using numbers 3, 7, and 11. Notice of Intent to Fine 3.

evidence to support its denials of the violations . . . [and] has failed to offer any further proof that the Form I-9 was prepared and/or presented to the Department for the individuals listed in Count I." Mot. Summ. Dec. 4. Complainant further argues that no genuine issue of material fact exists with respect to its civil money penalty calculation and moves the Court to order Respondent to pay its proposed civil money penalty of $45,586. Gov't Mem. 12–15.

2. Penalty

Complainant seeks a $1,982 penalty for each alleged violation pursuant to its agency's standardized fine structure. Gov't Mem. 12–13. Complainant states that it requested to inspect twenty-three total Forms I-9, and "[n]one of them were prepared or presented to ICE." *Id.* at 12. Complainant then compared the number of violations to the total number of Respondent's employees—both being twenty-three—and determined that Respondent had a 100-percent violation rate. *Id.* Since the violation rate was above fifty percent, Complainant selected as the base fine the maximum permissible fine per violation within the penalty range of $234 to $1,982 in effect at the time. *Id.*; Civil Monetary Penalties Inflation Adjustments for 2020, 85 Fed. Reg. 36469 (June 17, 2020).

In setting the penalty, Complainant also considered the following five statutory factors: (1) the size of the business, (2) the good faith of the employer, (3) the seriousness of the violations, (4) whether the individual was an unauthorized alien, and (5) the history of any previous violations of the employer. Gov't Mem. 12–13 (citing 8 C.F.R. § 274a.10(b)(2)(i)–(v)). Complainant neither mitigated the penalty based on the five factors nor aggravated it, given that it was already at the maximum permissible penalty amount with its baseline penalty assessment. *Id.* at 13–14. Accordingly, Complainant seeks a total proposed civil monetary penalty of $45,586.

B. Respondent's Position

Respondent did not move for summary decision and did not file a response to Complainant's Motion for Summary Decision. In its Answer, it asserted that it is "a small business with no human resource department or employees." Answer 2. It stated that its employees were United States citizens and that its "owner verified the citizenship of its employees by reviewing the employee's U.S. passport and/or driver's license and Social Security card." *Id.* As a result, Respondent requests the Court "issue a penalty at the lowest amount allowed by the law." *Id.* at 3.

VI. DISCUSSION AND ANALYSIS

A. Legal Standards

1. Summary Decision

Under OCAHO's Rules of Practice and Procedure for Administrative Hearings, the 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." 28 C.F.R. § 68.38(c). "An issue of fact is genuine only if it has a real basis in the record" and 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); and then citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)). All facts and reasonable inferences are viewed "in the light most favorable to the non-moving party" when the ALJ is determining whether there is a genuine issue as to material fact. *United States v. Prima Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994) (citations omitted).

"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). "[T]he 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.'" *United States v. 3679 Commerce Place, Inc.*, 12 OCAHO no. 1296, 4 (2017) (quoting 28 C.F.R. § 68.38(b)).

2. Burdens of Proof and Production

In cases arising under 8 U.S.C. § 1324a, it is the government's burden to prove a respondent's liability by a preponderance of the evidence. *Alpine Staffing Inc.*, 12 OCAHO no. 1303, at 8 (citing *United States v. Nebeker, Inc.*, 10 OCAHO no. 1165, 4 (2013)). The government's burden of proof extends to the issue of a civil money penalty as well, for which it must prove by a preponderance of

the evidence "the existence of any aggravating factor." *Id.* (quoting *United States v. Niche, Inc.*, 11 OCAHO no. 1250, 6 (2015).

Once the government introduces evidence sufficient to meet its burden of proof, "the burden of *production* shifts to the respondent to introduce evidence . . . to controvert the government's evidence. If the respondent fails to introduce any such evidence, the unrebutted evidence introduced by the government may be sufficient to satisfy its burden . . . ." *United States v. Durable, Inc.*, 11 OCAHO no. 1231, 5 (2014) (affirmance by the CAHO) (citations omitted).

3. Employment Verification Requirements

"Employers must prepare and retain Forms I-9 for employees hired after November 6, 1986." *Metro Enters., Inc.*, 12 OCAHO no. 1297, at 7 (citing 8 C.F.R. § 274a.2(b)(2)(ii); *United States v. Keegan Variety, LLC*, 11 OCAHO no. 1238, 2 (2014)). "[A]n employer . . . must examine documents that evidence the identity and employment authorization of the individual. The employer . . . and the individual must each complete an attestation on the Form I-9 under penalty of perjury." 8 C.F.R. § 274a.2(a)(3). An employer must ensure that an employee completes section 1 of the I-9 on the date of hire, and the employer must complete section 2 of the Form I-9 within three days of hire. *United States v. A&J Kyoto Japanese Rest., Inc.*, 10 OCAHO no. 1186, 5 (2013); 8 C.F.R. §§ 274a.2(b)(1)(i)(A), (ii)(B). "Employers must retain an employee's I-9 for three years after the date of hire or one year after the date of termination, whichever is later." *United States v. Imacuclean Cleaning Servs., LLC*, 13 OCAHO no. 1327, 3 (2019) (citing 8 C.F.R. § 274a.2(b)(2)(i)(A)); 8 U.S.C. § 1324a(b)(3).

The government may inspect an employer's Forms I-9s for its employees. 8 C.F.R. § 274a.2(b)(2)(ii). An employer "shall be provided with at least three business days notice to an inspection of Forms I-9 by officers of an authorized agency of the United States." *Id.*; *see Metro. Enters.*, 12 OCAHO no. 1297, at 7 ("Employers must prepare and retain Forms I-9 for employees hired after November 6, 1986, and employers must produce the I-9s for government inspection upon three days' notice.").

"Failures to satisfy the requirements of the employment verification system are known as 'paperwork violations,' which are either 'substantive' or 'technical or procedural.'" *Metro. Enters., Inc.*, 12 OCAHO no. 1297, at 7 (citing Virtue Memorandum). Relevant to this case, substantive violations include failure to prepare and/or present a Form I-9. Virtue Mem. at 3–4; 8 C.F.R. § 274a.2(b)(2)(ii).

4. Civil Money Penalty

Pursuant to 8 C.F.R. § 274a.10(b)(2), civil money penalties for paperwork violations occurring after November 2, 2015, may be no less than $288 and no more than $2,861 for each violation. *See also* 28 C.F.R. §§ 85.1, 85.5 (providing for the annual adjustment of penalty ranges to account for inflation). Paperwork violations are generally "continuing" violations until they are corrected or until the employer is no longer required to retain Forms I-9 pursuant to IRCA's retention requirements. *See* 8 C.F.R.§ 274a.2(b)(2)(i)(A); *United States v. Curran Eng'g, Co.*, 7 OCAHO no. 975, 874, 895 (1997).

When determining the appropriate penalty to assess, due consideration must be given to these five factors: (1) the size of the employer's business, (2) the employer's good faith, (3) the seriousness of the violations, (4) whether or not the individual was an unauthorized alien, and (5) the employer's history of violations. 8 C.F.R. §§ 274a.10(b)(2)(i–v); 8 U.S.C. § 1324a(e)(5). It is the government's burden to prove by a preponderance of the evidence the existence of any aggravating factor. *See* discussion *supra* Section VI.A.2.

The facts and circumstances of each individual case determine the weight to be given to each of the five factors identified above. *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). OCAHO ALJs have explained that:

> While § 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, 8 U.S.C. § 1324a(e)(5) does not preclude consideration of additional factors when determining the penalty amount. *See United States v. Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355, 5 (2020) (citing *3679 Commerce Place*, 12 OCAHO no. 1296, at 4); *see also United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000) (explaining that "[t]he statute does not require that equal weight necessarily be given to each factor, nor does it rule out

consideration of other factors."). For a non-statutory factor to be considered, however, the party requesting its consideration bears the burden of proving the factor warrants a favorable exercise of discretion. *Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355, at 5. Further, "while the statute calls for consideration of the five factors in each case, there is otherwise no single method mandated for calculating civil money penalties for violations of 8 U.S.C. § 1324a(a)(1)(B)." *Alpine Staffing, Inc.*, 12 OCAHO no. 1303, at 10 (internal citations omitted). Finally, the government's "penalty calculations are not binding in OCAHO proceedings, and penalties may be examined *de novo* by the [ALJ] if appropriate." *United States v. Int'l Packaging, Inc.*, 12 OCAHO no. 1275a, 3 (2016) (citing *Ice Castles Daycare*, 10 OCAHO no. 1142 at 6); *see also United States v. Edgemont*, 17 OCAHO no. 1470e, 26, n.32 (2023) (CAHO order) ("OCAHO's longstanding position [is] that no aspect of DHS's civil money penalty calculation is binding on OCAHO adjudicators."); *ABCO Solar, Inc.*, 17 OCAHO no. 1465a, at 4.

B. Application

1. Liability

The Court turns now to Complainant's Motion for Summary Decision and Memorandum of Law in Support of Motion for Summary Decision. Complainant, as the moving party, has provided arguments and evidence to meet its burden of proving the allegations in Count I of the complaint by a preponderance of the evidence and its penalty assessment. The Court finds that it is entitled to summary decision. As such, the burden of production shifted to Respondent to produce arguments and evidence to rebut Complainant's evidence. Respondent however did not file a response to Complainant's Motion for Summary Decision and has not meaningfully challenged its liability.

The Court finds that Complainant has met its burden to demonstrate no question of material fact that the twenty-three individuals named in Count I of the complaint—and identified in the NIF by first and last names in a list numbered 1 through 23—were hired after November 6, 1986, as alleged in the complaint. *See* Mot. Summ. Dec. Ex. G-4 (demonstrating that the Respondent-business did not come into existence until September 5, 2013). Moreover, Complainant has proven that these twenty-three individuals were employees for whom Respondent had to

prepare and/or present Forms I-9 because Respondent paid them individual wages between March 11, 2019, and March 10, 2020. *See* Mot. Summ. Dec. Exs. G-2, G-6, G-7.

The Court notes that Complainant incorrectly stated in its Memorandum of Law in Support of Motion for Summary Decision that one of these twenty-three employees "does not appear on Respondent's payroll documents." Gov't Mem. 10.[15] Contrary to Complainant's assertion, this employee, Employee No. 14, is listed as one of Respondent's employees by first initial and last name on the Texas Workforce Commission's Unemployment Tax Services Employer's Quarterly Report filed on October 11, 2019, which was during the relevant time period. *See* Mot. Summ. Dec. Ex. G-7. The social security number listed for Employee No. 14 on Respondent's quarterly report, *see id.*, matches the social security number listed on the employee list Respondent provided to Complainant in response to the Immigration Enforcement Subpoena. *See id.* Ex. G-6.

In the list of twenty-three current or former employees it provided to the government in response to the Immigration Enforcement Subpoena,[16] Respondent identified nine of these individuals as current employees of John Ferguson Moving and Storage, LLC, at the time of HSI's inspection on March 10, 2020. Mot. Summ. Dec. Ex. G-6.[17] Respondent identified the remaining fourteen individuals, including Employee No. 14, as former employees who worked for Respondent between March

[15] The attachment to the NIF identifies this employee using number 14 (Employee No. 14). Notice of Intent to Fine 3.

[16] The Immigration Enforcement Subpoena requested "[a] list of all employees receiving wages during the period 03/11/2019 to 03/10/2020 identifying employee name, Social Security Number, hire data, termination date, and physical work location or client company." Mot. Summ. Dec. Ex. G-2 at 2. Complainant provided affidavits from HSI Special Agents Lillian Garcia and George Fernandez, in which both stated that Respondent's business dispatcher, Mrs. Rosalinda Rangel, provided the employee list in response to the Immigration Enforcement Subpoena served on March 11, 2020. *Id.* Exs. G-8 at 2, G-9 at 2.

[17] The NIF's attachment identifies these employees using numbers 3, 5, 7, 9, 11, 13, 16, 21, and 23. Notice of Intent to Fine 3.

11, 2019, and March 10, 2020. *Id.*[18] Because these employees earned wages, all twenty-three individuals qualify as employees under 8 C.F.R. § 274a.1(f). Given the dates in evidence before the Court, including the payroll records Respondent filed with the State of Texas and Respondent's own list of employees, *see* Mot. Summ. Dec. Exs. G-6, G-7, all twenty-three individuals identified through the complaint were Respondent's current or former employees whose Forms I-9 fell within the relevant Form I-9 retention period specified in the NOI served on Respondent. *See, e.g.*, *United States v. Cawoods Produce, Inc.*, 12 OCAHO no. 1280, 11–12 (2016) (finding that the record established that individuals were employees of the respondent-company during the inspection period when the employees were listed on an employee roster and a Texas Workforce Commission's Unemployment Tax Services Employer's Quarterly Reports).

The Court also finds that Complainant has met its burden of proving that Respondent is liable for the violations of failing to prepare and/or present Forms I-9 to HSI during inspection, as required under 8 U.S.C. §§ 1324a(a)(1)(B) and (b)(3); *see also Harran Transp. Co.*, 6 OCAHO no. 857, at 344 ("The INA imposes an affirmative duty upon employers to prepare and retain a Form I-9 for each employee . . . and to make these forms available for inspection by [HSI] officers."). The evidence before the Court reflects that Respondent did not prepare and/or present Forms I-9 for the individuals identified in Count I of the complaint. HSI Special Agent Garcia stated in her affidavit that, at the time of the inspection, Respondent's business dispatcher, Rosalina Rangel, said that she "had not been able to locate a Form I-9 for any employee present or terminated and did not know where the I-9's were previously kept as she had only been with the company since September 2019."[19] Mot. Summ. Dec. Ex. G-8 at 1. Consistent with this statement and Complainant's assertions in its Memorandum of Law in Support of Motion for Summary Decision, the record reflects that Respondent did not provide Forms I-9 to HSI during the inspection for nineteen of the twenty-three individuals identified in

[18] The attachment to the NIF identifies these employees using numbers 1, 2, 4, 6, 8, 10, 12, 14–15, 17–20, and 22. Notice of Intent to Fine 3.

[19] Generally, documentary evidence that is complete, signed, sworn under penalty of perjury, dated, authenticated, and laid down with foundation contain sufficient indicia of reliability. *See United States v. Psychosomatic Fitness LLC*, 14 OCAHO no. 1387a, 5–7 (2021). The Court finds that the affidavits in evidence to have indicia of reliability. Mot. Summ. Dec. Exs. 8–9.

the complaint. Gov't Mem. 7–12.[20] As for the remaining four individuals identified in the complaint, HSI Special Agent Garcia represented, "[a]t the time [of the inspection], Mrs. Rangel was in the process of completing these particular Forms I-9." Mot. Summ. Dec. Ex. G-8 at 1.

The evidence before the Court includes the four attempted Forms I-9. Mot. Summ. Dec. Ex. G-3.[21] One of those Forms I-9 is for the employee whom HSI Special Agent Garcia observed completing forms during the inspection, namely, Mrs. Rangel.[22] *Id.* Exs. G-3 at 1–2, G-8 at 1. A review of Mrs. Rangel's attempted Form I-9, as well as the other three attempted Forms I-9s, reflects that only section 1—the employee attestation section—of each form was completed.[23] Section 1 of all four Forms I-9 was signed and dated March 16, 2020, confirming that the employees filled out these forms during the inspection which occurred five days after the March 11, 2020, service of the NOA, and months after each employee began working for Respondent. *Id.* Exs. G-3, G-7; *see also* Gov't Mem. 8–9, 11.[24] Photocopies of documents for three of the employees were provided to HSI, along

---

[20] The attachment to the NIF lists these employees using the following numbers: 1, 2, 4, 5, 6, 8, 9, 10, 12, 13, 15, 16, 17, 18, 19, 20, 22, and 23. Notice of Intent to Fine 3.

[21] The NIF's attachment identifies these employees using numbers 3, 7, 11, and 21. Notice of Intent to Fine 3.

[22] The Form I-9 for Employee No. 21 is for the business dispatcher—Mrs. Rosalinda Rangel. *Id.* Ex. G-3 at 1–2.

[23] 8 U.S.C. § 1324a(b)(2); 8 C.F.R. §§ 274a.2(a)(3), (b)(1)(i)(A); *see also A&J Kyoto Japanese Rest. Inc.*, 10 OCAHO no. 1186, at 5 (explaining that an employee must provide information under penalty of perjury about his or her status in the United States in section 1).

[24] Complainant states that the incomplete Form I-9s for Employees Nos. 3 and 7 were completed on November 18, 2020, after the NOI was served on Respondent. Mot. Summ. Dec. 14. The Court understands this to be a typographical error as the evidence Complainant submitted in this case reflects that those employees completed, signed, and dated section 1 of the four Forms I-9 on March 16, 2020, not November 18, 2020. Mot. Summ. Dec. Ex. G-8 at 1; *id.* Ex. G-3 at 1–2, 4–7, 9–10.

with the attempted Forms I-9.[25] The second page of each form consisting of sections 2 and 3—which the employer must complete and sign under penalty of perjury—was completely blank, including the employer's attestation "that it has verified that the individual is not an unauthorized alien by examining" documents that evidence their identity and employment authorization.[26] 8 U.S.C. § 1324a(b)(1)(A); Mot. Summ. Dec. Ex. G-3 at 1–11.

OCAHO precedent has defined a "failure to prepare" violation as:

> an employer's failure to attest on the Forms I-9 that the prospective or current employee 'is not an unauthorized alien' by their examination of a list of documents identified in § 1324a(b)(1)(B) (e.g., a passport) and the employer's requirement to have their prospective or actual employee attest that they are a person lawfully permitted to work in the United States.

United States v. El Paso Paper Box, Inc., 17 OCAHO no. 1451, 6 (2022) (citing 8 U.S.C. § 1324a(b)(2)). This is in keeping with 8 U.S.C. § 1324a(a)(1)(B)(i), which

---

[25] The photocopied documents included: (a) a Texas driver's license for Employee No. 21, being Mrs. Rosalinda Rangel; (b) a Texas driver's license and Social Security card for Employee No. 3; and (c) a SENTRI card for Employee No. 7. Mot. Summ. Dec. Ex. G-3 at 3, 8, and 11. Although Respondent asserts in its answer that it verified its employees' citizenship by reviewing "the employee's U.S. passport and/or driver's license and Social Security card," Answer 2, it does not identify any specific employees or time period, and it offers no evidence supporting its assertion. The only documents in evidence are the four photocopied documents Mrs. Rangel submitted during the inspection. Mot. Summ. Dec. Ex. G-3 at 1–11. Even if Respondent had reviewed documents from one or more employees and copied those documents, "[t]he copying or electronic imaging of any such document and retention of the copy or electronic image does not relieve the employer from the requirement to fully complete section 2 of the Form I-9." 8 C.F.R. § 274a.2(b)(3); *see also United States v. Manos & Assocs.*, 1 OCAHO no. 130, 877, 890 (1989) (holding that the copying of employee documentation "is not intended to serve as an alternative mode of complying with [the mandatory completion of the Form I-9]").

[26] An employer must complete section 2 of the Form I-9 to verify new hires and section 3 to reverify rehires. 8 C.F.R. §§ 274a.2(b)(1)(ii)(B), (b)(1)(vii).

provides that "[i]t is unlawful [for an employer] . . . to hire for employment in the United States an individual without complying with the requirements of subsection (b)." That subsection explains that an employer "must attest, under penalty of perjury and on a form designated or established by the Attorney General by regulation, that it has verified that the individual is not an unauthorized alien by examining" documents evidencing employment authorization and/or establishing the identity of the individual. 8 U.S.C. § 1324a(b)(1)(A); 8 C.F.R. §§ 274a.2(a)(3), (b)(1)(ii)(A–B).[27] "Such attestation may be manifested by either a hand-written or an electronic signature" on the form. 8 U.S.C. § 1324a(b)(1)(A)(ii); 8 C.F.R. § 274a.2(b)(1)(ii)(B).

Here, there has been no attestation by Respondent as to these four individuals' authorization to work in the United States. Forms I-9 lacking an employer's attestation in either section 2 or 3, by operation of law, have not been "prepared" by the employer, as those are the only sections they are legally required to complete.[28] *See* 8 U.S.C. § 1324a(b)(2) (stating that only the employee may complete the attestation in section 1 of the Form I-9). "The section 2 attestation has long been described as 'the very heart' of the employment eligibility verification process." *United States v. Liberty Packaging, Inc.*, 11 OCAHO no. 1245, 1, 9 (2015) (quoting *United States v. Acevedo*, 1 OCAHO no. 95, 647, 651 (1989)); *see also United States v. Min Goldblatt and Sons, Inc.*, 1 OCAHO no. 154, 1089, 1094–95 (1990) (explaining that "absent attestation [under penalty of perjury] it is not

[27] Regulations designate the Form I-9 as the Employment Eligibility Verification Form to be used by employers. 8 C.F.R. § 274a.2(a)(2).

[28] Even if Respondent had completed the Forms I-9 on the day of inspection, being five days after it was served with the NOI, the forms would have been untimely given that they should have been prepared within three business days of each employee's first day of employment as required by law. 8 U.S.C. § 1324a(a)(1)(B); 8 C.F.R. § 274a.2(b)(1)(ii); *see also United States v. El Paso Paper Box, Inc.*, 17 OCAHO no. 1451b, 7 (2023) ("An employer who does not prepare a Form I-9 for an employee until after it has been served with an NOI by DHS has likely committed a substantive violation of 8 U.S.C. § 1324a(a)(1)(B)."). As the CAHO has explained, "a charge of failure to prepare a Form I-9 necessarily and inherently encompasses an allegation of a failure to timely prepare a Form I-9." *El Paso Paper Box, Inc.*, 17 OCAHO no. 1451b, at 7; *cf. El Paso Paper Box, Inc.*, 17 OCAHO no. 1451, at 6–7 (finding the respondent to be subject to liability based on other charges where it prepared, signed, and presented completed Forms I-9 after service of the NOI).

possible to determine whether the employer has satisfied the substantive requirement that it has 'verified that the individual is not an unauthorized alien.'") (citing 8 U.S.C. § 1324a(b)(1)). The Court therefore finds that Complainant has met its burden of proving that Respondent is liable for the violation of failing to prepare and/or present Forms I-9 pursuant to 8 U.S.C. § 1324a(b)(1)(B) for all twenty-three individuals identified in Count I of the complaint. Because the government has met its burden, the Court grants it summary decision as to the twenty-three violations in the complaint.

2. Appropriate Penalty

Respondent is liable for twenty-three substantive violations of 8 U.S.C. § 1324a(a)(1)(B). The Court is authorized to issue a civil penalty that is a sufficiently meaningful fine to promote future compliance without being unduly punitive. *See* 8 C.F.R. § 274a.10(b)(2); 28 C.F.R. § 85.5; *United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013). The Court looks first to the applicable penalty range which is based on the date of the violations and the date of assessment, being the date of the Court's final order. *See ABCO Solar, Inc.*, 17 OCAHO no. 1465a, at 12 (citing 8 C.F.R. § 274a.10(b)(2) and 28 C.F.R. § 85.5); *Edgemont Grp.*, 17 OCAHO no. 1470e, at 26. Here, the permissible penalties for these violations range from a minimum of $281 to a maximum of $2,789. Civil Monetary Penalties Inflation Adjustments for 2024, 89 Fed. Reg. 9764 (Feb. 12, 2024). Complainant proposes a penalty of $1,982 per violation given that Respondent's violation rate was 100 percent.[29] Gov't Mem. 12.

a. Statutory Factors

In determining the amount of the penalty, the Court has given due consideration to the following five statutory factors: (1) the size of the employer's business, (2) the employer's good faith, (3) the seriousness of the violations, (4) whether or not the individual was an unauthorized alien, and (5) the employer's history of previous violations.[30] 8 U.S.C. § 1324a(e)(5).

---

[29] DHS selected as the base fine the maximum permissible fine per violation within the penalty range of $234 to $1,982 in effect at the time. Gov't Mem. 2; Civil Monetary Penalties Inflation Adjustments for 2020, 85 Fed. Reg. 36469 (June 17, 2020).

[30] In cases arising under 8 U.S.C. § 1324a, OCAHO ALJs also may evaluate non-statutory factors when calculating a penalty. *See, e.g.*, *3679 Commerce Place*,

Complainant has supported its penalty assessment through its Memorandum of Law in Support of Motion for Summary Decision. Gov't Mem. 12–14. Respondent has not addressed the penalty assessment directly through a response or presented any evidence to the Court with respect to penalty. The Court however has fully considered Respondent's arguments and assertions in its filings in this case, including its answer,[31] through which it asks the Court to "issue a penalty at the lowest amount allowed by law." Answer 3. Respondent also asserts in its answer that it is a small business without a human resources department which acted in good faith, verified its employees' citizenship, and employed United States citizens, not unauthorized aliens. *Id.* at 2. As the CAHO has explained, "proportionality and reasonableness are the touchstones in imposing a civil money penalty for violations of 8 U.S.C. § 1324a[,]" and the Court is guided by those factors in making the penalty determination. *United States v. Edgemont Grp., LLC*, 17 OCAHO no. 1470d, 27 (2023) (CAHO Notification of Admin. Rev.).

i. The Size of Respondent's Business

---

12 OCAHO no. 1296, at 4. However, "[a] party seeking consideration of a non-statutory factor, such as the 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." *United States v. Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355a, 3 (2020). In this case, Respondent neither responded to Complainant's Motion for Summary Decision nor otherwise requested that the Court consider a specific non-statutory factor. Although the parties have not asked the Court to consider any non-statutory factors, it is within the Court's discretion to do so. *See United States v. Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416b, 4 (2023) (noting intent to evaluate non-statutory penalty factor sua sponte as a consideration "of discretion"); *United States v. Visiontron Corp.*, 13 OCAHO no. 1348, 3 (2020) ("[T]he Court may also consider other, non-statutory factors as appropriate in the specific case.").

[31] Evidence and assertions made in an answer are part of the record and may be considered by the Court. Fed. R. Civ. P. 56(c)(1)(A) (stating that a party may support or oppose a motion for summary judgment by "citing to particular parts of materials in the record, including depositions, documents . . .").

Respondent asserts that it is "a small business with no human resource department or employees." Answer 2. Complainant acknowledges that Respondent "is a small business, both in terms of its annual sales and in terms of the size of its workforce." Gov't Mem. 13. It notes that Respondent employed between eight and fifteen employees at the time of inspection, and a total of twenty-three employees during the relevant period. *Id.* Complainant concludes that no aggravation of the penalty is warranted for this factor. *Id.*

The Court likewise finds that Respondent is a small business because it employs fewer than 100 employees. *United States v. Carter*, 7 OCAHO no. 931, 123, 160–62 (1997). The record shows that at the time of inspection and during the entire inspection period, Respondent did not employ more than twenty-three individuals. *See* Mot. Summ. Dec. Ex. G-6. The Texas Workforce Commission's Unemployment Tax Services Employer's Quarterly Reports reflect that Respondent employed between twelve and fifteen employees from the first quarter of 2019 through the first quarter of 2020. *Id.* at Ex. G-7. Therefore, Respondent falls clearly within the small business range. *See, e.g.*, *United States v. Commander Produce, LLC*, 16 OCAHO no. 1428d, 6–7 (2023) (treating business with between nine and twelve employees as a small business). In keeping with OCAHO precedent and the general public policy of leniency toward small businesses,[32] the Court finds that mitigation is warranted for this factor.

ii. Respondent's Good Faith

Concerning the factor of good faith, "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) (citing *United States v.*

[32] The Court gives due consideration to the "general public policy of leniency toward small entities, as set out in 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)," *United States v. Red Bowl of Cary, LLC, Inc.*, 10 OCAHO no. 1206, 4–5 (2013), when analyzing the size of Respondent's business pursuant to 8 U.S.C. § 1324a(e)(5). Respondent has not sought additional consideration of its small size as a non-statutory factor, and, even if it had, the Court would give weight to the size of Respondent's business only as a statutory factor. *See Psychosomatic Fitness, LLC*, 14 OCAHO no. 1387a, at 12 n.4 (finding that Congress "already required [the ALJ] to consider 'the general public policy of leniency toward small entities' with the statutory factor of 'size of business'").

Great Bend Packing Co., 6 OCAHO no. 835, 129, 136 (1996)). Although Complainant acknowledges that Respondent "cooperated fully with the Form I-9 inspection," it notes that Respondent "took no steps prior to service of the NOI" and "did not participate in E-verify or the Social Security Number Verification System." Gov't Mem. 13. Thus, Complainant asserts that the good faith factor should be viewed as neutral. *Id.*

In calculating the penalty, the Court does not consider whether Respondent registered with E-Verify or the Social Security Number Verification System, *see United States v. Psychosomatic Fitness, LLC*, 14 OCAHO no. 1387a, 13 (2021) (finding failure to register with E-Verify irrelevant to penalty assessment because 8 U.S.C. § 1324 does not require it), but focuses on "whether or not the employer reasonably attempted to comply with its obligations under § 1324a prior to the issuance of the [NOI]." *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 10 (2010) (citations omitted). Although Respondent asserted good faith as an affirmative defense and claimed that it verified its employees' citizenship, Answer 2, it has not offered any evidence of its good-faith compliance before the Notice of Inspection, including by verifying its employees' authorization to work. Rather, Respondent stated that it lacks a human resources department or employees. *Id.* The Court therefore finds that the record substantiates treatment of good faith as a neutral factor.

iii. Seriousness of the Violations

Although "[t]he complete failure to prepare a Form I-9 for an employee is among the most serious of paperwork violations," *United States v. Solutions Grp. Int'l, LLC*, 12 OCAHO no. 1288, 10 (2016), Complainant "argues that the factor should be treated as neutral." Gov't Mem. 14. Respondent has not addressed the seriousness of the violations.

The Court finds that Respondent's violations are very serious and shall treat them as such. "[A] failure to complete any Forms I-9 whatsoever fundamentally undermines the effectiveness of the employer sanctions statute and should not be treated as anything less than serious." *United States v. Charles C.W. Wu*, 3 OCAHO no. 434, 424, 425 (1992); *Int'l Packaging, Inc.*, 12 OCAHO no. 1275a, at 6 (aggravating penalty because failure to prepare and/or present Forms I-9 is "the most serious of paperwork violations"). In keeping with OCAHO precedent, not only is the complete failure to prepare a Form I-9 very serious, but "[f]ailure to complete any part of section 2, including an employer's failure to sign his or her name is . . . a serious violation." *Acevedo*, 1 OCAHO no. 95, at 651. The Court will not mitigate

the penalty for any of the twenty-three violations, including the four violations for the incomplete Forms I-9—with blank sections 2—that Respondent's employees attempted to prepare during the HSI inspection. *See Alpine Staffing, Inc.*, 12 OCAHO no. 1303, at 18 (explaining that "[a]n employer's failure to complete the attestation in section 2 is . . . very serious . . . [and] [t]he failure to properly verify a document under List A or Lists B and C in section 2 is also serious.").

Although Complainant has not advocated for aggravation on this factor, it gave the percentage of violations determinative weight in setting the baseline fine at $1,982, being the maximum penalty amount per violation permissible at the time. *See* Gov't Mem. 12. This outcome was driven by the government's calculation of its proposed base fine using its "standardized fine structure" that compares the number of violations (here, twenty-three) to the total number of employees (also twenty-three). *Id.* The use of this fine structure results in "the most aggravated cases [being] those with the highest percentages of violations, regardless of the other [statutory] factors." *United States v. 1523 Ave. J Foods Inc.*, 14 OCAHO no. 1361, 8–9 (2020). Although the Court does not adopt Complainant's proposed base fine calculation, it will consider Respondent's 100-percent violation rate in connection with the seriousness of the violations when setting the appropriate penalty. *See United States v. Maverick Constr., LLC*, 15 OCAHO no. 1405a, 8 (2022); *see also 1523 Ave. J Foods Inc.*, 14 OCAHO no. 1361, 9 (finding the complainant's proposed penalty to be disproportionate and considering the rate of the entity's violations along with the other factors when determining the appropriate penalty). Given the evidence before the Court, an aggravation of the penalty for the seriousness of the violations is warranted.

iv. Unauthorized Individuals

Respondent asserts in its answer that its employees are United States citizens and that it did not knowingly hire any unauthorized aliens. Answer 2. Complainant does not allege that Respondent employed any unauthorized individuals and states that "no aggravation of penalty is warranted for this factor." Gov't Mem. 14. The record containing no evidence that Respondent employed any unauthorized individuals, the Court finds that this factor is appropriately considered neutral. *See United States v. Romans Racing Stables, Inc.*, 11 OCAHO no. 1232, 5 (2014) (affirmance by CAHO) ("ICE's failure to affirmatively show that particular individuals were unauthorized for employment does not require that the factor be treated as a mitigating factor. It may be treated as

neutral, under the rationale that compliance with the law is the expectation, not the exception.") (internal quotes omitted)).

v. Respondent's History of Violations

Complainant does not allege that Respondent previously violated Section 274A of the INA, Gov't Mem. 14, and there is no evidence before the Court of prior violations of the law by Respondent. Because "compliance with the law is the expectation, not the exception," *Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, at 9, the Court will not mitigate the fine on this factor due to the lack of a history of previous violations by Respondent. Rather, the Court treats this factor as neutral.

b. Recalculation of the Penalty

After considering the totality of the evidence, the parties' arguments, and the five statutory factors in 8 U.S.C. § 1324a(e)(5), the Court exercises its discretion and finds that a reduction in the proposed penalty amount is just and reasonable. *See Edgemont Grp., LLC*, 17 OCAHO no. 1470d, at 10 ("OCAHO ALJs have broad discretion in imposing a penalty for violations of 8 U.S.C. § 1324a(a)(1)(B)."). Complainant proposes a penalty of $1,982 per violation, Gov't Mem. 12–13, which is approximately seventy-one percent of the maximum of the penalty range the Court can consider for these violations.[33] "Penalties at or near the maximum permissible [fine amount] should be reserved for more egregious circumstances[.]" *United States v. La Hacienda Mexican Cafe*, 10 OCAHO no. 1167, 3 (2013). Here, the Court weighs most heavily the seriousness of the violations for failure to prepare and/or present Forms I-9 and considers that the violations included all of Respondent's employees. *See 1523 Ave. J Foods Inc.*, 14 OCAHO no. 1361, at 9 (weighing the seriousness factor more heavily because of the rate of violations); *Psychosomatic Fitness LLC*, 14 OCAHO no. 1387a, at 16 (weighing the seriousness of the offenses, including failure to prepare Forms I-9, most heavily when calculating an appropriate fine); *see generally Hernandez*, 8 OCAHO no. 1043, at 664 ("The statute does not require that equal weight be given to each factor."). After considering the record in this case, including the remaining statutory factors in 8 U.S.C.

[33] The Court takes into account the changes to the penalty range since the issuance of the NIF.

§ 1324a(e)(5), however, the Court finds that the violations do not warrant a penalty toward the high end of the penalty range. Rather, the Court exercises its de novo authority and finds that a penalty slightly above the midrange is warranted. *See Ice Castles Daycare Too*, 10 OCAHO no. 1142 at 6–7 (explaining that OCAHO ALJs may exercise their authority to review the penalty question de novo and assess a penalty based on the facts and circumstances of the case). In making this determination, the Court has considered the totality of the circumstances set forth in the evidence and pleadings, including that Respondent is a small business. Accordingly, for the twenty-three violations, the Court will impose a fine of $1,573 per violation.

VI. CONCLUSION

Complainant's Motion for Summary Decision is granted pursuant to 28 C.F.R. § 68.38. DHS has demonstrated by uncontroverted proof that no genuine issue of material fact exists with respect to Respondent's liability for the twenty-three violations charged in Count I of the complaint. Having given due consideration to each statutory factor in 8 U.S.C. § 1324a(e)(5), the Court orders Respondent to pay a total civil money penalty of $36,179.

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. John Ferguson Moving and Storage, LLC, is a limited liability company operating in the State of Texas. *See* Mot. Summ. Dec. Exs. G-4 at 1, G-5 at 1.

2. On March 11, 2020, the United States Department of Homeland Security, Immigration and Customs Enforcement initiated a Form I-9 inspection of Respondent and served Respondent with a Notice of Inspection and an Immigration Enforcement Subpoena. *See generally id.* Exs. G-1, G-2; *see also* Ex. G-8 at 1.

3. On March 25, 2020, Respondent was to appear before Homeland Security Investigations Special Agent Lillian Garcia and produce certain records, including a list of all employees receiving wages during the period from March 11, 2019, to March 10, 2020. *See id.* Ex. G-2 at 1–2.

4. Respondent was required to present for inspection Forms I-9 no later than March 16, 2020, for current employees and employees terminated on or after March 11, 2019. *See id.*

5. On March 16, 2020, Respondent's business dispatcher, Rosalinda Rangel, presented the HSI auditor, Special Agent Garcia, with four attempted Forms I-9. *See* Mot. Summ. Dec. Ex. G-3.[34]

6. Page 1 of the Form I-9 contains section 1 which the employee completes and signs. *See* Mot. Summ. Dec. Ex. G-7. Page 1 of all four attempted Forms I-9 were completed, signed, and dated March 16, 2020. *See id.* Ex. G-8 at 1; *see id.* Ex. G-3 at 1–2, 4–7, 9–10.

7. Page 2 of the Form I-9 contains section 2 and 3, where the employer attests to verifying the employee's employment authorization documents. An employer must complete section 2 of the Form I-9 to verify new hires and section 3 to reverify rehires. Page 2 was blank on all four attempted Forms I-9 Mrs. Rangel presented to Complainant. *See id.* Ex. G-7.

8. The NIF's attachment identifies the employees for the four attempted Forms I-9 using numbers 3, 7, 11, and 21. *See* Notice of Intent to Fine 3. The Form I-9 for Employee No. 21 is for the business dispatcher—Mrs. Rosalinda Rangel. *See* Mot. Summ. Dec. Ex. G-3 at 1–2.

9. Three of the incomplete Forms I-9 contained photocopies of documents. *See* Mot. Summ. Dec. Ex. G-3 at 3, 8, and 11. These documents were: (a) a Texas driver's license for Employee No. 21, being Mrs. Rosalinda Rangel; (b) a Texas driver's license and Social Security card for Employee No. 3; and (c) a SENTRI card for Employee No. 7. *See id.*

10. At the time the four incomplete Forms I-9 were presented to the HSI auditor, Mrs. Rangel was "in the process of completing these particular Forms I-9," and Mrs. Rangel stated that, "She had not been able to locate a Form I-9 for any employee present or terminated and did not know where the I-9's were

previously kept as she had only been with the company since September 2019." *See id.* Ex. 8.

11. On August 20, 2020, Mrs. Rangel delivered to the HSI auditor the following employee records pursuant to the Immigration Enforcement Subpoena: (1) Form W-9 Request for Taxpayer Identification Number and Certification; (2) Certificate of Filing; List of Current and Terminated Employees from March 11, 2019, through March 10, 2020; (3) List of Contractors with Form 1099; and (4) Texas Workforce Commission's Unemployment Tax Services Employer's Quarterly Reports. *See id.* Ex. G-8 at 2.

12. Respondent did not produce to HSI during the inspection Forms I-9 for eighteen employees who appear on Respondent's payroll as an employee during the relevant period. *See* Gov't Mem. 7–12. The attachment to the NIF lists these employees using the following numbers: 1, 2, 4, 5, 6, 8, 9, 10, 12, 13, 15, 16, 17, 18, 19, 20, 22, and 23. *See* Notice of Intent to Fine 3.

13. Respondent identified twenty-three individuals as former, or current, employees who worked for Respondent between March 11, 2019, and March 10, 2020. *See* Mot. Summ. Dec. Exs. G-6, G-7. Because these employees earned wages, all twenty-three individuals qualify as employees under 8 C.F.R. § 274a.1(f). *See* Mot. Summ. Dec. Ex. 7; *see* Notice of Intent to Fine 3.

14. The twenty-three individuals were hired by Respondent after November 6, 1986. *See* Mot. Summ. Dec. Ex. G-4; Notice of Intent to Fine 3.

15. Respondent identified nine individuals as current employees of John Ferguson Moving and Storage, LLC, at the time of HSI's inspection on March 10, 2020. Mot. Summ. Dec. Ex. G-6. The NIF's attachment identifies these employees using numbers 3, 5, 7, 9, 11, 13, 16, 21, and 23. *See* Notice of Intent to Fine 3.

16. Of the twenty-three employees, Respondent identified fourteen individuals as former employees who worked for Respondent between March 11, 2019, and March 10, 2020. *See* Mot. Summ. Dec. Ex. G-6. The attachment to the NIF identifies these employees using numbers 1, 2, 4, 6, 8, 10, 12, 14–15, 17–20, and 22. *See* Notice of Intent to Fine 3.

17. On January 27, 2021, DHS served Respondent with ICE Form I-763, being a Notice of Intent to Fine Pursuant to Section 274A of the INA, alleging twenty-three violations of 8 U.S.C. § 1324a(a)(1)(B) and seeking $45,586 in civil penalties. *See* Mot. Summ. Dec.; Compl. Ex. A.

18. On February 10, 2021, Respondent timely requested a hearing before this Court. *See* Compl. Ex. B; 8 U.S.C. § 1324a(e)(3)(A).

19. Respondent failed to prepare and/or present a Form I-9 for twenty-three individuals who were employed by Respondent during the relevant period. *See* Mot. Summ. Dec. Exs. G-2, G-7.

20. The twenty-three charged violations for which the Court finds Respondent liable occurred after November 2, 2015. *See generally* Mot. Summ. Dec. Exs. G-1, G-2, G-8.

21. The date of assessment of the penalty is the date of this Decision and Order's issuance, which is after February 12, 2024.

B. Conclusions of Law

1. Respondent is an entity within the meaning of 8 U.S.C. § 1324a(a)(1).

2. The complaint satisfies the minimal pleading requirements set forth in 28 C.F.R. § 68.7(b). *See United States v. Split Rail Fence Co., Inc.*, 10 OCAHO no. 1181, 4–6 (2013) (the CAHO discussing pleading standard in OCAHO cases).

3. 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." 28 C.F.R. § 68.38(c).

4. "An issue of fact is genuine only if it has a real basis in the record" and 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) (citations omitted).

5. "In cases arising under 8 U.S.C. § 1324a, the government has the burden of proving by a preponderance of the evidence that the respondent is liable for committing a violation of the employment eligibility verification requirements." *United States v. Metro. Enters., Inc.*, 12 OCAHO no. 1297, 7 (2017) (citing *United States v. Nebeker, Inc.*, 10 OCAHO no. 1165, 4 (2013)). Complainant met its burden to prove that Respondent failed to prepare and/or present Forms I-9 for twenty-three employees.

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." *Four Seasons Earthworks, Inc.*, 10 OCAHO no. 1150, at 3 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).

7. "[T]he 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.'" *United States v. 3679 Commerce Place, Inc.*, 12 OCAHO no. 1296, 4 (2017) (quoting 28 C.F.R. § 68.38(b)).

8. If the government meets its burden of proof, "the burden of *production* shifts to the respondent to introduce evidence . . . to controvert the government's evidence . . . If the respondent fails to introduce any such evidence, the unrebutted evidence introduced by the government may be sufficient to satisfy its burden[.]" *United States v. Durable, Inc.*, 11 OCAHO no. 1231, 5 (2014) (affirmance by the CAHO) (citations omitted).

9. All facts and reasonable inferences are viewed "in the light most favorable to the non-moving party." *United States v. Prima Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994).

10. The Court considers only the evidence in the record when ruling on a motion for summary decision. *See United States v. Hair U Wear, LLC*, 11 OCAHO no. 1268, 6 n.9 (2016); *see also* 28 C.F.R. § 68.38(b) (providing that an opposition to a motion for summary decision "must set forth specific facts showing that there is a genuine issue of fact for the hearing"), *id.* § 68.38(c) (providing that only "the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed" can support an Administrative Law Judge's entry of summary decision).

11. Evidence and assertions made in an answer are part of the record and may be considered by the Court. Fed. R. Civ. P. 56(c)(1)(A) (stating that a party may support or oppose a motion for summary judgment by "citing to particular parts of materials in the record, including depositions, documents . . .").

12. Generally, documentary evidence that is complete, signed, sworn under penalty of perjury, dated, authenticated, and laid down with foundation contain sufficient indicia of reliability. *See United States v. Psychosomatic Fitness LLC*, 14 OCAHO no. 1387a, 5–7 (2021).

13. "Employers must prepare and retain Forms I-9 for employees hired after November 6, 1986," and employers must produce the I-9s for government inspection upon three days' notice. *Metro. Enters.*, 12 OCAHO no. 1297, at 7 (citing, inter alia, 8 C.F.R. § 274a.2(b)(2)(ii)).

14. An employer must ensure that an employee completes section 1 of the I-9 on the date of hire, and the employer must complete section 2 of the Form I-9 within three days of hire. *A&J Kyoto Japanese Rest., Inc.*, 10 OCAHO no. 1186, at 5; 8 C.F.R. §§ 274a.2(b)(1)(i)(A), (ii)(B).

15. "Employers must retain an employee's I-9 for three years after the date of hire or one year after the date of termination, whichever is later." *United States v. Imacuclean Cleaning Servs., LLC*, 13 OCAHO no. 1327, 3 (2019) (citing 8 C.F.R. § 274a.2(b)(2)(i)(A)).

16. "Failures to satisfy the requirements of the employment verification system are known as 'paperwork violations,' which are either 'substantive' or 'technical or procedural.'" *Metro. Enters., Inc.*, 12 OCAHO no. 1297, at 7 (citing Virtue Memorandum).

17. With respect to technical or procedural violations, the employer must be given a period of not less than ten business days to correct the failure voluntarily. 8 U.S.C. § 1324a(b)(6)(A)–(B).

18. "There are two good faith defenses to liability found in IRCA." *United States v. Frio Cnty. Partners, Inc.*, 12 OCAHO no. 1276, 13 (2016).

19. The first good faith defense is enumerated at 8 U.S.C. § 1324a(b)(6)(A) "and provides a narrow but complete defense where an entity is charged with

technical or procedural failures in connection with completion of the Form I-9." *Id.* (citations omitted).

20. The second good faith defense is found at 8 U.S.C. § 1324a(a)(3), which the Respondent cites in the answer, and "applies only to a charge of knowingly hiring unauthorized aliens for employment." *Id.*; *see also United States v. LFW Dairy Corp.*, 10 OCAHO no. 1129, 3 (2009).

21. Neither good faith defense is applicable to Respondent.

22. Failure to prepare or present a Form I-9 upon request by DHS is a substantive violation, not a technical or procedural one. *United States v. ABCO Solar, Inc.*, 17 OCAHO no. 1465a, 7 (2023); *see also* Virtue Memorandum.

23. The evidence submitted by both parties reveals there is no genuine issue of material fact.

24. Respondent is liable for twenty-three violations of 8 U.S.C. § 1324a(a)(1)(B).

25. Where a party is found to have violated 8 U.S.C. § 1324a(a)(1)(B), the Court is authorized to issue a civil penalty pursuant to 8 C.F.R. § 274a.10(b)(2) and 28 C.F.R. § 85.5.

26. "The applicable penalty range depends on the date of the violations and the date of assessment." *ABCO Solar, Inc.*, 17 OCAHO no. 1465a, at 12 (citing 8 C.F.R. § 274a.10(b)(2) and 28 C.F.R. § 85.5).

27. Paperwork violations are generally "continuing" violations until they are corrected or until the employer is no longer required to retain Forms I-9 pursuant to IRCA's retention requirements. *See* 8 C.F.R.§ 274a.2(b)(2)(i)(A); *United States v. Curran Eng'g, Co.*, 7 OCAHO no. 975, 874, 895 (1997).

28. In the case of OCAHO civil penalties, "the date of assessment is the date of the OCAHO final order." *United States v. Edgemont*, 17 OCAHO no. 1470e, 26, (2023) (CAHO order modifying the ALJ's final order on remand).

29. For violations occurring after November 2, 2015, 28 C.F.R. § 85.5's adjusted penalty range controls. It states that when a "paperwork violation" occurs after November 2, 2015, and the penalty is assessed after February 12, 2024,

the minimum penalty is $281, and the maximum is $2,789. Civil Monetary Penalties Inflation Adjustments for 2024, 89 Fed. Reg. 9764 (Feb. 12, 2024).

30. Because each violation for which Respondent is liable occurred after November 2, 2015, and the date of assessment of the penalty is after February 12, 2024, the appropriate penalty range is $281–$2,789 per violation.

31. In calculating the appropriate penalty, the Court considers the following statutory factors: "1) the size of the employer's business, 2) the employer's good faith, 3) the seriousness of the violations, 4) whether or not the individual was an unauthorized alien, and 5) the employer's history of previous violations. *United States v. Alpine Staffing Inc.*, 12 OCAHO no. 1303, 9 (2017) (citing 8 U.S.C. § 1324a(e)(5)).

32. "In addition to proving liability, the government has the burden of proof with respect to the penalty, and must prove the existence of any aggravating factor by a preponderance of the evidence." *Alpine Staffing, Inc.*, 12 OCAHO no. 1303, at 8 (quoting *United States v. Niche, Inc.*, 11 OCAHO no. 1250, 6 (2015)) (internal quotes omitted).

33. The weight to be given to each factor depends upon the facts and circumstances of each 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).

34. In cases arising under 8 U.S.C. § 1324a, OCAHO ALJs also may evaluate non-statutory factors when calculating a penalty. *See, e.g.*, *3679 Commerce Place*, 12 OCAHO no. 1296, at 4.

35. However, "[a] party seeking consideration of a non-statutory factor 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." *Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355a, 3 (2020).

36. Although the parties have not asked the Court to consider any non-statutory factors, it is within the Court's discretion to do so. *See United States v. Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416b, 4 (2023) (noting intent to evaluate non-statutory penalty factor sua sponte as a consideration "of discretion"); *United States v. Visiontron Corp.*, 13 OCAHO no. 1348, 3 (2020)

("[T]he Court may also consider other, non-statutory factors as appropriate in the specific case.").

37. It is "OCAHO's longstanding position that no aspect of DHS's civil money penalty calculation is binding on OCAHO adjudicators." *Edgemont*, 17 OCAHO no. 1470e (CAHO order), at 26, n.32; *ABCO Solar, Inc.*, 17 OCAHO no. 1465a, at 4.

38. "[P]enalties may be examined *de novo* by the [ALJ] if appropriate." *United States v. Int'l Packaging, Inc.*, 12 OCAHO no. 1275a, 3 (2016) (citing *Ice Castles Daycare*, 10 OCAHO no. 1142, at 6).

39. This Court generally considers a small business to be one with fewer than 100 employees. *United States v. Carter*, 7 OCAHO no. 931, 121, 162 (1997).

40. The Court finds that Respondent is a small business and considers the general public policy of leniency toward small business in finding that mitigation is warranted for this statutory factor. *See Psychosomatic Fitness, LLC*, 14 OCAHO no. 1387a, at 12 n.4 (finding that Congress "already required [the ALJ] to consider 'the general public policy of leniency toward small entities' with the statutory factor of 'size of business.'").

41. "The 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).

42. The Court treats the good-faith statutory factor as neutral because Respondent has not offered any evidence of its good-faith compliance before the HSI inspection. "OCAHO precedent 'looks primarily to the steps an employer took before issuance of the NOI, not what it did afterward.'" *United States v. Integrity Concrete, Inc.*, 13 OCAHO no. 1307, 12 (2017) (quoting *United States v. Speedy Gonzalez Constr., Inc.*, 11 OCAHO no. 1243, 4 (2015)).

43. "An absence of bad faith does not demonstrate good faith." *United States v. Guewell*, 3 OCAHO no. 478, 814, 820 (1992).

44. "Paperwork violations are always potentially serious," *United States v. Skydive Acad. of Haw. Corp.*, 6 OCAHO no. 848, 235, 245 (1996), and "[t]he complete failure to prepare a Form I-9 for an employee is among the most

serious of paperwork violations[.]" *United States v. Solutions Grp. Int'l, LLC*, 12 OCAHO no. 1288, 10 (2016). The seriousness of Respondent's violations justifies penalty aggravation.

45. The Court considers the rate of a respondent's violations in connection with the seriousness of the violations, along with other factors, when determining the appropriate penalty. *See United States v. Maverick Constr., LLC*, 15 OCAHO no. 1405a, 8 (2022); *see also United States v. 1523 Ave. J Foods Inc.*, 14 OCAHO no. 1361, 9 (2020).

46. The Court treats the statutory factor regarding unauthorized workers as neutral because there is no evidence that Respondent employed individuals without authorization to work in the United States. *See United States v. Roman Racing Stables, Inc.*, 11 OCAHO no. 1232, 5 (2014) (affirmance by CAHO).

47. The Court treats the lack of history of violations by Respondent as neutral. *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1137, 9 (2010).

48. "Penalties at or near the maximum permissible [fine amount] should be reserved for more egregious circumstances[.]" *La Hacienda Mexican Cafe*, 10 OCAHO no. 1167, 3 (2013).

49. The Court will not issue a "cease and desist" order or a three-year compliance order for the paperwork violations alleged in Count I of the complaint. *See* 8 U.S.C. § 1324a(e)(4); *see also United States v. Elsinore Mfg., Inc.*, 1 OCAHO no. 5, 13, 16 (1998), *modified by the CAHO on other grounds*, 1 OCAHO no. 13, 44–45 (1988) (explaining that DHS "is not entitled to a cease and desist order [in cases involving only paperwork violations] in light of the clear statutory distinction[.]"); *United States v. Gutierrez*, 3 OCAHO no. 554, 1513, 1514 (1993) (CAHO order modifying the ALJ's decision and order) (explaining that "there is no reference or language in section 1324a(e)(5) authorizing an ALJ to order compliance with the requirements of the employment verification system for a period of up to three years.").

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 act, the same is so denominated as if set forth as such.

VIII. ORDERS

IT IS SO ORDERED that the Motion for Summary Decision filed by Complainant, the United States Department of Homeland Security, Immigration and Customs Enforcement, is GRANTED. Respondent, John Ferguson Moving and Storage, LLC, is liable for twenty-three violations of 8 U.S.C. § 1324a(a)(1)(B) and is directed to pay a total civil monetary penalty of $36,179. The parties may agree to a payment schedule to minimize any impact of the penalty on the operations of John Ferguson Moving and Storage, LLC.

IT IS FURTHER ORDERED that Complainant's Motion for Leave of Court to Reply to Respondent's Answer and Oppose Dismissal is GRANTED, and Complainant's Reply to Respondent's Affirmative Defenses and Motion in Opposition of Dismissal is ACCEPTED as a filing in this case;

IT IS FURTHER ORDERED that Complainant's request to strike within its Reply to Respondent's Answer is GRANTED, and Respondent's good faith affirmative defense raised in Respondent John Ferguson Moving and Storage, LLC's Answer to Complaint Regarding Unlawful Employment is STRICKEN; and

IT IS FURTHER ORDERED that Complainant's Motion in Opposition of Dismissal is DENIED as moot.

SO ORDERED.

Dated and entered on March 13, 2025.

_____

Honorable Carol A. Bell
Administrative Law Judge

Appeal Information

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

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

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

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