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

June 6, 1997

UNITED STATES OF AMERICA, Complainant, v. HUDSON DELIVERY SERVICE INC, D/B/A HOME DELIVERY SERVICE, YORK DELIVERY SERVICE, Respondent.	)))) 8 U.S.C. §1324a Proceeding) OCAHO Case No. 97A00003)))))

ORDER GRANTING COMPLAINANT'S MOTION FOR JUDGMENT

I. *Procedural Background*

In a three count Complaint filed on October 1, 1996, with the Office of the Chief Administrative Hearing Officer (OCAHO), Complainant charged the Respondent with numerous violations of §274(a)(1)(B) of the Immigration and Nationality Act (INA), 8 U.S.C. §1324a(a)(1)(B).[1] The Complaint was served on Respondent on

[1]The following abbreviations will be used throughout the Decision:

PHC Tr.	Transcript of the prehearing conference held March 17, 1997
Motion for Judgment or Motion	Complainant's Motion for Judgment on the Pleadings
C. Supp. Br.	Complainant's Supplemental Brief, filed March 10, 1997
C. S. Supp. Br.	Complainant's Second Supplemental Brief, filed May 16, 1997
Admis. (#)	Refers to specific admissions requested of Respondent by Complainant in its December 6, 1997 Request to Admit Facts and Genuineness of Documents and referenced in Complainant's Motion for Judgment on the Pleadings, filed January 13, 1997.

October 7, 1996, along with a copy of the OCAHO Rules of Practice and Procedure for Administrative Hearings (hereinafter OCAHO Rules of Practice), 28 C.F.R. Part 68. Specifically, Count I of the Complaint contends that Respondent failed to prepare an I–9 form for ninety-nine individuals. The second Count charged that Respondent failed to ensure that the one employee named in that count completed section 1 of the I–9 form and that Respondent failed to properly complete section 2 of that same Form.[2] Finally, the third Count charged that, with respect to four employees, Respondent failed to complete section 2 of the I–9 form within three business days of the date the individuals were hired. The Respondent filed an Answer on October 21, 1996, denying each and every Count of the Complaint, as well as proffering an affirmative defense that the individuals listed in Count I were independent contractors, thus absolving Respondent of a duty to prepare an I–9 form for those individuals. Respondent also asserted that the New York State Department of Labor had determined that these individuals were independent contractors.

Pursuant to the First Prehearing Order, Complainant filed a proposed procedural schedule on November 6, 1996. Complainant noted that it had attempted, but did not succeed, in contacting Respondent's counsel for the purpose of discussing the filing of a joint proposed procedural schedule. Respondent never submitted a proposed schedule of its own. Therefore, on November 13, 1996, I issued an Order Governing Prehearing Procedures (OGPP) granting Complainant's request for an initial discovery deadline of December 6, 1996, and a deadline of January 31, 1997, to serve any other discovery requests and to serve a motion for summary decision.

On December 6, 1996, Complainant served on Respondent a Request to Admit Facts and Genuineness of Documents. The requests consisted of fifty-two requests to admit facts, along with six requests that Respondent admit the genuineness of six exhibits attached to the request. Respondent *never* responded to Complainant's requests for admissions. On January 10, 1997, Complainant served a Motion for Judgment on the Pleadings, with attachments (hereinafter referred to as Motion for Judgment or Motion).[3] This Motion

[2]In a prehearing conference on March 17, 1997, Complainant's counsel advised the Court that she was amending Count II of the Complaint to drop the allegation that the Respondent failed to properly complete section 2 of the individual's I–9 Form. Complainant's amended Complaint, filed on April 28, 1997, did delete that change.

[3]Complainant attached to its Motion for Judgment on the Pleadings a copy of its request for admissions and the six documents which accompanied the request for which Complainant had requested an admission as to genuiness.

was based in anticipation of Complainant's Requests for Admissions being deemed admitted.[4] Because Respondent failed to respond to the requests, in an Order dated February 4, 1997, I deemed as admitted all of Complainant's requested admissions (hereinafter Admissions). *See* 28 C.F.R. §§68.21(b). Moreover, Respondent failed to file a timely response to the motion for judgment.[5]

However, in the February 4, 1997 Order and in an Order dated February 10, 1997, I required further briefing by Complainant on both the issues of liability and penalty. Complainant was ordered to cite specific admissions or other evidence which supported its motion with respect to Count I and to show why there were no disputed material issues of fact, with particular attention to the issue of whether the individuals listed in Count I were employees or independent contractors. Further, Complainant was ordered to discuss the factors which warranted the proposed civil penalty. Likewise, Respondent, which, as of February 10, 1997, had not filed a response to Complainant's Motion, was ordered to respond to Complainant's supplemental briefing on the independent contractor issue, and to provide a copy of the determination made by the New York State Department of Labor referenced in its affirmative defense. However, instead of waiting to respond to Complainant's supplemental brief, on February 18, 1997, Respondent filed a two page opposition to the motion. Two days later, on February 20, 1997, Respondent filed a "Supplemental Opposition to Judgment on the Pleadings," to which Respondent attached an October 30, 1995 letter from Robert Barnett, Esq. to the Internal Revenue Service concerning a tax dispute which centered on whether Respondent's delivery people are independent contractors or employees. Then, on March 10, 1997, Complainant filed its Supplemental Brief (C. Supp. Br.) supported by

[4]A response to Complainant's Request for Admissions was due no later than Monday, January 13, 1997. Respondent had not answered or otherwise objected to Complainant's Request for Admissions by that date. On that same day Complainant filed its Motion for Judgment on the Pleadings. Because Complainant filed its Motion contemporaneously with the due date for the admissions, Complainant subsequently filed an Amendment to its Motion for Judgment on the Pleadings stating that as of January 17, 1997, Respondent had not answered or otherwise objected to the Request for Admissions.

[5]Since Complainant's motion was served on January 10, 1997, as per the OCAHO Rules of Practice, an answer to the motion had to be filed within fifteen days, 28 C.F.R. §§68.8(b)(2) and 68.11(b). Respondent did not file its response until February 18, 1997, and only after being ordered to do so in my February 10, 1997 Order.

several extrinsic documents, including a signed Declaration by INS Special Agent Joseph Palmese (Palmese Declaration), numerous affidavits, and payroll records.[6] Therefore, because the Motion no longer relied solely on the pleadings, Complainant's Motion for Judgment is now more properly characterized as a motion for summary decision and will be treated as such. PHC Tr. 20–21; *see infra* at 6.

On March 12, 1997, Respondent filed, by a cover letter dated March 7, 1997, a document which consisted of a forty-eight page letter to the Internal Revenue Service (IRS) dated February 21, 1997, and signed by Scott Weinstein, President of Respondent.[7] Respondent's counsel was informed by my office that this submission was not timely, was unauthorized and would not be considered unless Respondent filed a motion for leave to file. On March 14, 1997, Respondent filed a motion to accept the Weinstein letter, which it referenced as a reply memorandum, out of time. However, given the continual late filings by Respondent in this case, the fact that it already had been permitted to file two responses to the Complainant's Motion, and that Respondent had failed to show the relevance of the February 21, 1997 letter to the IRS (which contained a discussion of IRS revenue rulings and tax cases) to the issues in this proceeding, I denied the motion. PHC Tr. 69.

On March 17, 1997, a prehearing conference was held to hear oral argument on Complainant's Motion, and particularly the question of whether the individuals listed in Count I of the Complaint were employees or independent contractors. Counsel for both parties were present, and Respondent's President, Scott Weinstein, was present during most of the conference.[8] During the conference, Respondent

[6]Although Mr. Palmese's Declaration is not submitted in the form of an affidavit and was not notarized, nevertheless the Declaration was made under penalty of perjury and was submitted pursuant to 28 U.S.C. §1746. In essence, Section 1746 provides that an unsworn declaration executed in conformance with Section 1746 has the same force and effect of an affidavit or other sworn statement. Mr. Palmese's Declaration was executed in conformance with Section 1746 and was made under penalty of perjury. Even though the Declaration has no jurat, Palmese has sworn to the truth of the information, and the Declaration is entitled to the same weight as an affidavit. *See Villegas-Valenzuela v. INS*, 103 F.3d 805, 812 (1996).

[7]The letter was prepared by attorney Barry Frank, who has been identified as the current tax counsel for Respondent. See Respondent Counsel's March 7, 1997 letter.

[8]Since a court reporter was present and a transcript of the conference has been prepared, no written report of the rulings made during the prehearing conference was issued. However, in accordance with the OCAHO Rules of Practice, *see* 28 C.F.R. §68.13(c), the present Order summarizes the rulings, and the transcript contains a verbatim account.

admitted liability as to the alleged violations in both Counts II and III of the Complaint. PHC Tr. 19–20, 30–31. With respect to the allegations in Count I, Respondent admitted that it had not prepared I–9 forms for any of the individuals listed in Count I. PHC Tr. 19. Respondent stated that the individuals listed in Count I were not employees because it did not "hire" the individuals listed in Count I, but rather acted as a broker for the individuals who were independent contractors. Respondent acknowledged that there were no disputed factual issues in the case; i.e., the issue as to whether the individuals were employees or independent contractors was a legal issue. PHC Tr. 17.

The matter of unauthorized aliens employed by Respondent also was discussed during the prehearing conference. The original complaint sought a penalty of $470 for eighty-six violations in Count I, but sought a penalty of $590 for thirteen violations. The greater penalty was sought for those individuals who were unauthorized aliens. PHC Tr. 77. The complaint recommendation appeared to be at variance with the statements made in the Palmese Declaration filed in support of Complainant's Motion, in which Mr. Palmese only asserted that eight of the individuals were unauthorized aliens. Palmese Declaration, ¶¶14, 16. Consequently, during the conference, Complainant agreed to amend its complaint to reflect the fact that there were eight, rather than thirteen, unauthorized aliens. PHC Tr. 78. However, when the amended complaint was filed on April 28, 1997, Complainant only reduced the penalty for three individuals and still sought the $590 penalty for ten, rather than eight, individuals. Complainant did not explain why it failed to amend the complaint in conformance with its statement during the prehearing conference.

Finally, during the discussion of penalty factors during the conference Complainant requested, and I granted, the opportunity to conduct some further discovery on the issue of the size of Respondent's business. On March 24, 1997, Complainant served a Request for Production of Documents which consisted of eleven requests for information pertaining to Respondent's business. By Order dated April 30, 1997, I ordered Complainant to file its supplemental brief on the size of Respondent's business not later than May 16, 1997, and Respondent to serve its response on May 23, 1997. On May 16, 1997, Complainant filed its Second Supplemental Brief (C. S. Supp. Br.),

supported by nine exhibits, in which Complainant contends that, based on the number of employees and the amount of its payroll, Respondent is not a small business.[9] On May 23, 1997, Respondent filed its reply to Complainant's Second Supplemental Brief, contending that, based on business revenue, amount of payroll, number of salaried employees, nature of ownership, and length of time in business, Respondent should be considered as a small business.

Since briefing now has been completed, Complainant's Motion is ready for adjudication.

II. *Issues*

Since Respondent has admitted liability for the violations alleged in Counts II and III of the Complaint, the remaining issues in dispute are as follows:

1. Whether the ninety-nine individuals charged in Count I of the Complaint were Respondent's employees within the meaning of 8 U.S.C. §1324a and, if so, what is the appropriate penalty for its failure to prepare I–9 forms for those employees?

2. What is the appropriate penalty for the violations in Counts II and III?

III. *Standards for Summary Decision*

OCAHO procedural rules and case law recognize motions for summary decision, *see* 28 C.F.R. §68.38 (1996), and motions for judgment on the pleadings, *see United States v. Harran Transp. Co.*, 6 OCAHO 857 (1996), 1996 WL 455000. As in a motion for summary decision, the party seeking judgment on the pleadings must demonstrate that no genuine issue of fact exists and that it is entitled to judgment as a matter of law. *Id.* at 2. "The difference is that matters outside the pleadings, with a few narrow exceptions, may not be considered in ruling upon a motion for judgment on the pleadings. The contents of the pleadings thus provide the only appropriate basis for decision on this motion." *Id.* at 2–3.

[9]The exhibits attached to Complainant's Supplemental Brief are marked with capital letters, whereas the exhibits attached to Complainant's Second Supplemental Brief are designated by numbers.

The rules governing motions for summary decision, however, contemplate that the record as a whole will provide the basis for deciding whether to grant or to deny that motion. *See* 28 C.F.R. §68.38(c) (1996) (authorizing the ALJ to grant a motion for summary decision "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision"); *United States v. Tri Component Product Corp.*, 5 OCAHO 821, at 3 (1995), 1995 WL 813122 at *2 (noting that "[t]he purpose of summary adjudication is to avoid an unnecessary hearing when there is no genuine issue as to any material fact, as shown by the pleadings, affidavits, discovery, and any other judicially noticed matters"). Because Complainant's Motion relies on matters outside the pleadings, including affidavits and payroll records, the appropriate rules to use in deciding the present motion are the rules governing summary decision, rather than the rules controlling judgment on the pleadings. *See* Fed. R. Civ. P. 12 (c); *United States v. Corporate Loss Prevention*, 6 OCAHO 908, at 4–5 (1997), 1997 WL 131365 at *6, *modified on other grounds* 6 OCAHO 908 (1997); *Walker v. United Air Lines*, 4 OCAHO 686, at 21 (1994), 1994 WL 661279 at *12, (citing Civil Procedure 12(c) in treating party's motion to dismiss as a motion for summary decision where ALJ considered matters outside the pleadings).

The OCAHO Rules of Practice and Procedure that govern this proceeding permit the Administrative Law Judge (ALJ or Judge) to "enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed 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) (1996). Although OCAHO has its own procedural rules for cases arising under its jurisdiction, the ALJs may reference analogous provisions of the Federal Rules of Civil Procedure (F.R.C.P.) and federal case law interpreting them for guidance in deciding issues based on the rules governing OCAHO proceedings. The OCAHO rule in question is similar to F.R.C.P. 56(c), which provides for summary judgment in cases before the federal district courts. As such, Rule 56(c) and federal case law interpreting it are useful in deciding whether summary decision is appropriate under the OCAHO rules. *United States v. Aid Maintenance Co.*, 6 OCAHO 893, at 3 (1996), 1996 WL 735954 at *3 , (citing *Mackentire v. Ricoh Corp.*, 5 OCAHO 746, at 3 (1995), 1995 WL 367112 at *2, and *Alvarez v. Interstate*

Highway Constr., 3 OCAHO 430, at 7 (1992)); *Tri Component*, 5 OCAHO 821, at 3 (citing same).

Only facts that might affect the outcome of the proceeding are deemed material. *Aid Maintenance*, 6 OCAHO 893, at 4 (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986)); *Tri Component*, 5 OCAHO 821, at 3 (citing same and *United States v. Primera Enters., Inc.*, 4 OCAHO 615, at 2 (1994), 1994 WL 269753 at *2); *United States v. Manos & Assocs., Inc.*, 1 OCAHO 877, at 878 (Ref. No. 130) (1989), 1989 WL 433857.[10] An issue of material fact must have a "real basis in the record" to be considered genuine. *Tri Component*, 5 OCAHO 821, at 3 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986)). In deciding whether a genuine issue of material fact exists, the court must view all facts and all reasonable inferences to be drawn from them "in the light most favorable to the non-moving party." *Id.* (citing *Matsushita*, 475 U.S. at 587 and *Primera*, 4 OCAHO 615, at 2). The court must resolve any doubts in favor of the non-moving party.

The party requesting summary decision carries the initial burden of demonstrating the absence of any genuine issues of material fact. *Id.* at 4 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). Additionally, the moving party has the burden of showing that it is entitled to judgment as a matter of law. *United States v. Alvand, Inc.*, 1 OCAHO 1958, at 1959 (Ref. No. 296) (1991), 1991 WL 717207 at *1–2 (citing *Richards v. Neilsen Freight Lines*, 810 F.2d 898 (9th Cir. 1987)). After the moving party has met its burden, "the opposing party must then come forward with 'specific facts showing that there is a genuine issue for trial.'" *Tri Component*, 5 OCAHO 821, at 4 (quoting F. R. C. P. 56(e)). The party opposing summary decision may not "rest upon conclusory statements contained in its pleadings." *Alvand*, 1 OCAHO 1958, at 1959 (citing *Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec*, 854 F.2d 1538 (9th Cir. 1988)). The OCAHO Rules of Practice specifically provide:

> [w]hen a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allega-

[10]Citations to OCAHO precedents in bound Volume I, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Laws*, reflect consecutive decision and order reprints within that bound volume; pinpoint citations to pages within those issuances are to specific pages, seriatim, of Volume I. Pinpoint citations to OCAHO precedents in volumes subsequent to Volume I, however, are to pages within the original issuances.

> tions or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing.

28 C.F.R. §68.38(b) (1996).

Under F. R. C. P. 56(c), the court may consider any admissions as part of the basis for summary judgment. *Tri Component*, 5 OCAHO 821, at 4 (citing Fed. R. Civ. P. 56(c)). "Similarly, summary decision issued pursuant to 28 C.F.R. Section 68.38 may be based on matters deemed admitted." *Id.* (citing *Primera*, 4 OCAHO 615, at 3 and *United States v. Goldenfield Corp.*, 2 OCAHO 321, at 3–4 (1991), 1991 WL 531744 at *2–3).

Where a party has moved for summary decision and supported its motion by affidavits, the opposing party may not merely rest on the denials in its pleadings or briefs but must respond, by affidavits or other extrinsic evidence, to set forth specific facts showing that there is a genuine issue for trial. *See* 28 C.F.R §68.38; Fed. R. Civ. P. 56(e). If a movant demonstrates an absence of material issues of fact, a limited burden of production shifts to the non-movant, which must "demonstrate more than some metaphysical doubt as to the material facts . . . [and] must come forward with specific facts showing that there is a genuine issue for trial." *Aslanidis v. United States Lines, Inc.*, 7 F.3d 1067, 1072 (2d Cir. 1993) (internal citations, emphasis, and internal quotation marks omitted). If the adverse party fails to do so, summary decision, if appropriate, shall be entered against the adverse party, F. R. C. P. 56(e).

IV. *Findings*

A. *Findings as to Respondent's business*

Complainant has supported its Motion for Judgment with a Declaration by Special Agent Joseph A. Palmese of the INS, fourteen affidavits by certain individuals listed in Count I of the Complaint, payroll records, and the Admissions. In opposition to the motion, Respondent, by contrast, has not supplied any counter affidavits or any records or extrinsic evidence, but merely briefs with attachments of memoranda written to the Internal Revenue Service on the issue of whether Respondent's delivery people are independent contractors or employees. "Mere conclusory allegations or denials" in legal memoranda or oral argument are not evidence and cannot by themselves create a genuine issue of material fact where none would otherwise exist. *Quinn v. Syracuse Model Neighborhood Corp.*, 613 F.2d 438, 445 (2d Cir. 1980) (quoting *SEC v. Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978)) (internal quotation marks omit-

ted). Moreover, Respondent has not supplied any evidence to refute the information supplied by Complainant as to Counts II & III of the Complaint. Therefore, the evidence presented by Complainant in the form of affidavits, as well as the payroll records, are undisputed.

Complainant also supports its Motion with Respondent's Admissions. The OCAHO Rules of Practice, which are in accord with the Federal Rules of Civil Procedure, provide, in pertinent part, that "[a]ny matter admitted under this section is *conclusively established* unless the Administrative Law Judge upon motion permits withdrawal or amendment of the admission." 28 C.F.R §68.21(d) (emphasis added).[11] Respondent has neither filed any such motion, nor has any relief from such admissions been granted. Therefore, I must treat Complainant's requests as having been conclusively established for purposes of this case.

Hudson Delivery Service Inc. does business as Hudson Delivery Service, Home Delivery Service and York Delivery Service. Admis. 1; PHC Tr. 4. Scott Weinstein was owner of Respondent on April 26, 1995, and remains owner of Respondent. Admis. 6. One purpose for which Respondent was formed is to deliver packages, and Respondent hires individuals to deliver such packages. Admis. 19 and 20. As of February 23, 1995, Respondent was providing home delivery service of groceries to customers of several grocery stores, including Food Emporium, Gristedes, and Sloan's. Admis. 21–24; PHC Tr. 38. Respondent uses delivery personnel to provide such delivery service, and Respondent pays each delivery person according to the deliveries made each day, which, as of March 2, 1995, was eighty cents per delivery. Admis. 25–27. Respondent financially compensated each individual listed in Count I of the complaint, Admis. 40, but Respondent does not have a contract for delivery services with any of the individuals listed in Count I. Admis. 39.[12] In providing its services to Food

[11]Rule 36(b) of the F.R.C.P. similarly provides that any matter admitted under that rule is conclusively established unless the Court on motion permits withdrawal or amendment of the admission.

[12]Although Mr. Weinstein, Respondent's owner, made assertions contrary to the admissions during the prehearing conference, PHC Tr. 40–44, 48–52, these statements were not made under oath and are not testimony. *See* PHC Tr. 83. Such unsworn statements cannot undo the admissions incurred as a result of Respondent's failure to respond to Complainant's requests for admissions and which were deemed admitted by my February 4, 1997 Order. Pursuant to 28 C.F.R. §68.21(d) any matter deemed admitted is conclusively established for the purpose of the proceeding unless the Judge, upon motion, permits withdrawal or amendment of the admission. Since Respondent has not filed any such motion, the admissions are conclusively established, and therefore Mr. Weinstein's assertions to the contrary are given no weight.

Emporium, Gristedes, and Sloan's, Respondent informs delivery persons when and where to report to work. Admis. 29–30. Respondent does not require the delivery persons to have a high school degree, to have completed any training, to hold any special licenses or certificates for such work, to be fluent in English, or to provide any tools or equipment. Admis. 33–37. Respondent's delivery persons perform low skill level duties. Admis. 38.

With respect to Count II of the complaint, Respondent admitted that Luis Martinez began his employment with Respondent on August 11, 1991, that it did not verify his employment eligibility until August 31, 1994, and that Respondent failed to ensure that Martinez properly completed section 1 of the I–9 form. Admis. 50–52. With respect to Count III of the Complaint, Respondent admitted that Benedicto Ewerton, who also is known as "Ben"or "Benny," began working on May 21, 1994, but Respondent did not verify his employment eligibility until August 31, 1994 (Admis. 41–43); that Heriberto Ortiz began working on April 7, 1993, but Respondent did not verify employment eligibility until August 31, 1994 (Admis. 44–45); that Steven Pilavin began working on January 4, 1992, but Respondent did not verify his employment eligibility until March 5, 1992 (Admis. 46–47); and that Julio Velez began working on June 8, 1990, but Respondent did not verify his employment eligibility until January 1, 1991. Admis. 48–49.

B. *Count II Liability*

Count II alleges one violation of the INA, based on Respondent's failure to ensure that employee Luis Martinez completely filled out the I–9 form; namely, Mr. Martinez failed to date section 1 of the form. The I–9 form for Martinez was attached to the request for admission, and Respondent has been deemed to have admitted the genuineness of the document. See Ex. 6, Req. for Admiss. Respondent has admitted that Martinez was an employee. PHC Tr. 19. It is clear from the I–9 form that Mr. Martinez did not date section 1 of the I–9 form. Also, Respondent has admitted that it failed to ensure that Martinez completed section 1 of the I–9 form. Admis. 50. An employer is required to ensure that an employee complete section 1 of the I–9 form on the day has begins employment. 8 C.F.R. §274a.2(b). Therefore, I find that Respondent violated §274A(a)(1)(B)

of the INA, 8 U.S.C. §1324a(a)(1)(B) by failing to ensure that Luis Martinez dated section 1 of his I–9 form.

C. *Count III Liability*

Complainant alleges that Respondent failed to complete section 2 of four I–9 forms within three days of the hiring of the four subject employees, as required by 8 C.F.R. §274a.2(b). The four forms on their face each evidence a late certification by Respondent. As was the case with Count II, Respondent does not contest the Complainant's charges and, in fact, Respondent has admitted that it did not prepare the I–9 forms for these four employees within three days of the employees' hiring. Admis. 41–49; PHC Tr. 20, 30–31. Therefore, I find that Respondent violated §274A(a)(1)(B) of the INA, 8 U.S.C. §1324a(a)(1)(B), by failing to complete section 2 within three days of the hiring of Benedicto Ewerton, Heriberto Ortiz, Steven Pilavin, and Julio Velez.

D. *Count I Liability*

Count I of the complaint asserts that Respondent hired the listed ninety-nine individuals for employment in the United States after November 6, 1986, and failed to prepare an I–9 form for the individuals, or in the alternative, that Respondent failed to make such forms available for a previously scheduled INS inspection. In its answer to the complaint, Respondent denied the allegations of Count I in their entirety and asserted in the first affirmative defense that the individuals were independent contractors for whom an I–9 form did not have to be prepared. During the prehearing conference in this case, Respondent acknowledged that it had not prepared an I–9 form for any of these individuals because Respondent considered them to be independent contractors. PHC Tr. 17–19. Respondent agreed with Complainant that there are no disputed factual issues, but rather a legal issue as to whether the individuals are employees or independent contractors. PHC Tr. 21–22. As noted previously, if there are no disputed factual issues, this question is appropriate for summary adjudication. Respondent admitted all other charges of Count I, basing its defense solely on the characterization of the status of the individuals. Therefore, if I find that these individuals were employees, and not independent contractors, Respondent surely has violated the law by failing to prepare I–9 forms for these individuals.

There are two questions pertaining to the employment status of the ninety nine individuals listed in Count I:

1.Did they perform any work for Respondent, whether as employees or independent contractors?

2. Assuming the record shows that they performed work for Respondent, were they acting as employees or independent contractors?

1. *Performance of work for Respondent*

With respect to the first question, Respondent does not deny, and the payroll records attached as exhibits to the Complainant's Supplemental Brief establish, that all but thirteen of the ninety-nine individuals listed in Count I did perform work for Respondent and were issued 1099 forms.[13] See Supp. Br., Exs. V-W. The only issue with respect to these eighty-six individuals is whether they were employees or independent contractors.

With respect to the thirteen for whom payroll records have not been produced, during the prehearing conference Respondent's owner, Scott Weinstein, suggested that these individuals did not even perform work for Respondent.[14] PHC Tr. 55–57, 69. Further, the names of these thirteen individuals do not appear in either the payroll records or the W–2 or 1099 forms attached as exhibits to Complainant's motion. See Complainant's Response to Order of March 17, 1997.

[13]In its Supplemental Brief, Complainant has provided a cross-reference to the payroll or 1099 information for eighty-five of the ninety individuals, C. Supp. Br. at 7, and in its March 20, 1997 Response to the Order of March 17, 1997, Complainant provided the reference to the payroll and 1099 form for one additional person, Mamadou Camara. Response at 2. Camara also provided an affidavit in which he explicitly stated that he began working for Hudson Delivery Service in January 1995. C. Sup. Br., Ex. M.

[14]The thirteen individuals, listed by name and complaint paragraph, are as follows: Amadou Bah (¶9); Saliou Marmadou Barry aka Mamadou Saliou Barry (¶13); Djibril Doumbia (¶26); Theady Gahunga (¶34); Titi Souleymane Meite (¶55); Jean Nsabmana (¶66); Diane Sadibou aka Sadibou Daime (¶81); Amisi Shabini (¶86); Asumani Kangeta Shabani (¶87); Burgos Sissoko aka Bougos Sissoko (¶88); Monguehy Fanzy Taha (¶93); Sekou Traore (¶95); and Diane Youssouf (¶99).

Despite the fact that payroll records have not been produced for these individuals, I find that Weinstein's assertions are not credible, and I conclude that these thirteen individuals performed services for Respondent. First, I would note that Respondent has admitted that it financially compensated each of the individuals listed in Count I of the Complaint. Admis. 40. Why would it compensate these individuals if they had not performed services for Respondent? Furthermore, even though payroll records have not been produced for these thirteen individuals, all thirteen individuals furnished sworn statements or affidavits to the INS on the same day they were apprehended by the INS,[15] and eight of the individuals explicitly state in their affidavits that they were working for Hudson Delivery Service or York Delivery Service.[16] For example, in a sworn statement dated February 23, 1995, Diane Youssouf states that she worked for Hudson Delivery Service and was hired by Benny, a supervisor.[17] See C. Supp. Br., Ex. H. Bougos Sissoko avers that he began working for Hudson Delivery Service delivering groceries at the Food Emporium, was hired by Steve, and paid by Ben.[18] C. Supp. Br., Ex. I. Thus, not only does Mr. Sissoko state that he was working for Hudson, but he specifies who hired him and who paid him. Souleymane Meite states that he started working at Food Emporium in November 1994, but the "name of the company that I work for is Hudson Delivery Service." C. Supp. Br., Ex. K. Amisi Shabani swears that he started working for Hudson Delivery Service in February 1994, that he was hired by Brian, that his supervisor's name is Benny, and that the owner's name is Scotty.[19] C. Supp. Br., Ex. J. He correctly references three people, all of whom were either the owner or employees of Respondent. Similarly, the other four affiants, Jean Nsabmana, Saliou Marmadou Barry, Asumani Shabini, and Sekou Traore, either explicitly reference Hudson or York Delivery Service. See C. Supp. Br., Exs. F, L, M, N and O, respectively. Eight individuals stated in their affidavits that they were unauthorized aliens, and

[15]Eleven of the affiants were apprehended on February 23, 1995, and two were apprehended on March 2, 1995.

[16]It has been established that Respondent does business both as Hudson Delivery Service and York Delivery Service. Admis. 1.

[17]Unlike the other twelve, Youssouf's statement is entitled a Record of Sworn Statement in an Administrative Proceeding, rather than an affidavit, but it is signed and sworn before an INS officer.

[18]Benedicto Ewerton, who was also known as "Ben" or "Benny," and Steven Pilavin began working for Respondent in 1994 and 1992, respectively. Admis. 41–47; C. Supp. Br., Ex. U–1–2.

[19]Brian Lillianthal was an employee of Respondent, C. Supp. Br., Ex. U–2, and Scott Weinstein is Respondent's owner.

that they were paid in cash. *See* C. Supp. Br., Exs. B, D, E, F, G, H, K, and N. Several affiants stated that the person hiring them knew they were unauthorized, *see* C. Supp. Br., Exs. D, F, N, and others stated that they were not asked for work authorization papers. *See* C. Supp. Br, Exs. B, E, G, H, K, and M. While the affidavits of the remaining five individuals do not expressly reference either Hudson or York, several of the affiants reference the names of individuals who were employed by Respondent. For example, Theady Ghunga states that he worked at the delivery service and was hired by "Steve the Supervisor." C. Supp. Br., Ex. B. Further, Diane Sadibou refers to "Scotty, the owner." C. Supp. Br., Ex. D.

Respondent has not submitted any counter affidavits, or other extrinsic evidence, which refute these affidavits. Considering that the affidavits are unrefuted, combined with the admission that all the individuals were financially compensated by Respondent, Admis. 40, and the Palmese Declaration which states that all of these individuals were working for Hudson, Palmese Declaration, ¶¶14, 16, 18–19, 21, I find that all of these individuals did perform work for Hudson. Weinstein's unsworn statements during the prehearing conference are contrary to the record evidence and are not credible.

2. *Status of workers as employees or independent contractors*

Having determined that all of the ninety-nine individuals did perform work for Respondent, the issue is whether they were employees or independent contractors. In its affirmative defense, Respondent asserts that the New York State Department of Labor has determined that the individuals listed in Count I are independent contractors. In an Order issued on February 10, 1997, Respondent was ordered to provide a copy of the New York State Department of Labor's determination referenced in the affirmative defense. Respondent did not do so, and during the prehearing conference on March 17, 1997, Respondent's counsel acknowledged that it had not done so and stated that he did not have a copy of the determination. PHC Tr. 16. To date, Respondent still has not furnished the New York State determination letter. Respondent has had several months to comply with my Order. It is Respondent's obligation to support its affirmative defense and to comply with the Orders of this tribunal. Since Respondent has failed to comply with the discovery order, for the purpose of this proceeding I make an adverse ruling against Respondent and conclude that New York State has not issued a fa-

vorable determination concerning the independent contractor status of these individuals. *See* 28 C.F.R. §68.23(c)(1) and (2).

There is a three level inquiry a court may conduct in determining whether individuals are employees or independent contractors: (a) regulatory factors, (b) OCAHO case law, and (c) general principals of agency law as discussed in federal cases.

a. *Regulatory factors*

8 C.F.R. §274a.1(j) provides that independent contractors include individuals or entities "who carry on independent business, contract to do a piece of work according to their own means and methods, and are subject to control only as to results." This determination is to be made on a case-by-case basis. The regulation provides that factors to be considered in determining whether an individual is an employee or independent contractor include, but are not limited to, whether the individual:

> —supplies the tools or materials;
>
> —makes services available to the general public;
>
> —works for a number of clients at the same time;
>
> —has an opportunity for profit or loss as a result of labor or services provided;
>
> —invests in the facilities for work;
>
> —directs the order or sequence in which the work is to be done;
>
> —determines the hours in which the work will be done.

Id.

b. *Case specific determinations regarding independent contractors*

To determine if an individual is more properly characterized as an independent contractor or an employee, the United States Supreme Court has utilized an "economic realities" test which has been referenced in OCAHO decisions. See *United States v. Bakovic*, 3 OCAHO 482 at 7 (1993); 1993 WL 404247 at *3; *United States v. Robles*, 2 OCAHO 309 (1991), 1991 WL 531738. The test states that the "economic factors which are related to the purposes of the [relevant] act [meaning the act of Congress the statute is promulgated under]

should be controlling rather than factors concerned with the physical performance of the work. *United States v. Silk*, 331 U.S. 704, 705 (1947). In essence, the test looks to the amount of dependence the worker has towards the employer. A high degree of dependence suggests an employer-employee relationship. The Supreme Court has also employed a similar test based on the common law of agency. *See Nationwide Mut. Ins. Co. v. Darden*, 112 S.Ct. 1344, 1348 (1992) (using the "common law test" where a statute containing the term "employee" does not helpfully define it). The Supreme Court in *Darden* warned, however, that the common law test contains "no shorthand formula or magic phrase that can be applied to find the answer . . . all factors must be assessed and weighed." *Darden*, 112 S.Ct. at 1349 (internal citation omitted).

The Supreme Court is not the only forum that has offered precedent on this subject. A leading federal circuit court decision is *Frankel v. Bally, Inc.*, 987 F.2d 86, 89 (2d. Cir. 1993). [20] In *Frankel*, the plaintiff's complaint under the Age Discrimination in Employment Act (ADEA) was dismissed at the summary judgment stage. *Frankel*, 987 F.2d at 87. The lower court found the plaintiff was not an "employee" within the meaning of the ADEA or analogous state laws. In reviewing the rationale of the lower court, the *Frankel* Court reviewed the various tests employed by various circuit courts of appeal. *Id.* at 89–90 ("[i]n different contexts, courts have developed three separate tests to analyze whether an individual's status is that of independent contractor or an employee"). The *Frankel* court determined that the Supreme Court's decision in *Nationwide Mut. Ins. Co. v. Darden*,112 S.Ct. 1344 (1992) was helpful in applying the appropriate test. *Frankel*, 987 F.2d at 89–90. Specifically, *Darden* mandated that where a statute does not define the term "employ," the common law test must be applied, although "in practice there is little discernible difference between the hybrid test and the common law agency test [as] [b]oth place their greatest emphasis on the hiring party's right to control the manner and means by which the work is accomplished and consider a non-exhaustive list of factors" as determinative.[21] *Frankel*, 987 F.2d at 90.

[20]Since *Hudson* arises in New York, decisions of the U.S. Court of Appeals for the Second Circuit are the controlling circuit case law.

[21]Other federal circuit courts have recognized a "hybrid" test which combines both the economic realities and common law tests. *See*, *e.g.*, *Oestman v. Nat'l Farmers Union Ins. Co.*, 958 F.2d 303, 305 (10th Cir. 1992); *Garrett v. Phillips Mills, Inc.*, 721 F.2d 979, 981 (4th Cir. 1983); *E.E.O.C. v. Zippo Mfg. Co.*, 713 F.2d 32, 38 (3d Cir. 1983); *see also Hickey v. Arkla Indus., Inc.*, 699 F.2d 748, 751–52 (5th Cir. 1983)

Thus, *Frankel* makes clear that the central factor, albeit not the dispositive one, is the degree of control an employer has over the manner and means by which the work is accomplished. *Frankel*, 987 F.2d at 90.

Likewise, OCAHO cases have not relied exclusively on the regulatory factors, *Bakovic* 3 OCAHO 482 at 5, and have cited both the Supreme Court "economic realities" test and the *Frankel* decision. *See*, *e.g.*, *United States v. Power Operating Co., Inc.*, 3 OCAHO 580, at 18–21 (1993), 1993 WL 597398 at *13–15 (discussing "economic reality" test); *Bakovic*, 3 OCAHO 482 at 7 (discussing same); *United States v. General Dynamics Corp.*, 3 OCAHO 517 at 32–35 (1993), 1993 WL 403774 at *18–19 (discussing *Frankel*). Indeed, OCAHO cases have looked to the common law developed in non-IRCA areas. *Robles*, 2 OCAHO 309 at 9; *United States v. Mr. Z Enterprises, Inc.*, 1 OCAHO 1871, 1908–1913 (Ref. No. 288) (1991), 1991 WL 531710 at *28–31. OCAHO case law holds that "no single factor is determinative, although it does appear that the degree of control is often given the greatest weight." *Id.* A review of specifics of some OCAHO decisions on the results of this balancing test is appropriate.

In *Robles*, the employment status of certain roofers was at issue. Concluding that the INS regulations were the aggregate of common law rules and the Supreme Court's "economic realities" test, the *Robles* court subsequently found the roofers to be employees. This was based on the Court's finding that the roofers did not have sufficient control over the work situation to determine their working hours, the employer or his representative was always present at the work site when the roofers were working, the work performed involved low level skills, and the roofers did not appear to be in business for themselves (they did not have business cards, offices, nor did they advertise their services).

Some OCAHO cases demonstrate that even where some factors may cut towards viewing an individual as an independent contractor, on balance the same individual may be nonetheless found to be an employee. For instance, in *Bakovic*, the Judge found that fishermen who provided some of their own tools and equipment, such as knives and foul-weather clothing, did *not* provide the most necessary equipment such as nets and bait. Crewmembers were also paid by the "lay" system, meaning their pay was contingent on performance

(amount of fish caught). However, the Court found that this was more due to industry custom than by employment design. Regarding the element of control, which "dominates independent contractor determination," the Captain of the fishing ship had the final word regarding which crewmembers would perform certain functions, acceptable behavior, work hours, and termination. These factors, as well as the crewmembers lack of separate business facilities and tools, weighed heavily in the Judge's determination that the crewmembers were employees. *Cf. United States v. Mr. Z Enterprises, Inc.*, 1 OCAHO 1871, 1908–13 (Ref. No. 288), *supra*, (finding that because the gardener in question set his own hours, used his own tools, paid his own social security taxes, and had a verbal agreement with the respondent, the INS had not shown that the gardener was an employee of the respondent).

c. *Analysis of the above determinative factors in light of the instant case*

Comparing the factual findings with the regulatory factors for determining if an individual is an employee or independent contractor yields compelling results that the Count I individuals are employees, and not independent contractors, especially since the evidence shows that Respondent had substantial control over these individuals. For example, the delivery personnel were told when and where to report for work. Admis. 29–30; Palmese Declaration, ¶22. Respondent supplied the necessary work tools for some of the delivery people. Palmese Declaration, ¶22. Delivery personnel were hired and supervised by Respondent, were paid by Hudson per delivery, and were required to maintain a delivery log. *Id*. Finally, some delivery personnel were provided with push carts, shirts, and hats, all bearing the name and logo of Respondent. *Id*.

Several affiants swore that they were employees of Respondent, and that they were informed where to work and what hours to work by Hudson representatives. *See* C.'s Supp. Br., Exs. I—L, N—O. None of the apprehended individuals stated that they worked for other delivery services at the same time as Respondent, and it is clear that the delivery people were not operating their own business. *Id.* Respondent has admitted it financially compensated all of the ninety-nine individuals in Count I, and that it did not have a contract for delivery services with any of those delivery people. Admis. 39–40. All of these facts indicate that these individuals were employees, not independent contractors. *Compare* 8 C. F. R. §274a.1(j).

The only factor that supports Respondent's position that the delivery people were independent contractors is that they have the opportunity for profits and losses as a result of their labor, to wit, the payment of 80 cents per delivery. As was the case with the fishermen/crew of *Bakovic*, *supra*, this appears to be more industry custom than a result of a concerted effort by the delivery people to engage in their own business. Finally, since, as was stated above, no single regulatory factor is conclusive, *Robles*, 2 OCAHO 309 at 9, *see also Mr. Z*, 1 OCAHO 1871, at 1909–10, this one factor would not justify considering them as independent contractors.

Upon taking OCAHO and general federal case law into account, I conclude that Respondent's delivery people are more properly characterized as employees than independent contractors. Respondent's admissions and other extrinsic, uncontroverted evidence offered by Complainant demonstrate that the instant facts are far more similar to those of *Robles* and *Bakovic*, *supra*, than that of the gardener in *Mr. Z*. The delivery people were instructed as to their hours and place of work by Respondent, as was admitted by Respondent. In *Robles*, the court also noted that there was little specialized skill needed by the workers, and Respondent has admitted the same here.

Since Complainant has supported its motion with affidavits and other extrinsic evidence, the burden shifts to Respondent. *See* 28 C.F.R §68.38 (where a party has moved for summary decision and supported its motion by affidavit, the opposing party may not merely rest on the denials in its pleadings or briefs, but must respond, by affidavit or other extrinsic evidence, to set forth specific facts showing that there is a genuine issue for trial). Respondent has offered nothing to bolster its case in the form of affidavits from Respondent's owner, or other Hudson delivery people, who might have stated that they consider themselves independent contractors and have signed contracts to that effect. Respondent submitted the filing of another law firm's arguments to the Internal Revenue Service. However, an unsworn memorandum in an action pending before a different agency carries no weight in this proceeding. Considering the admissions, affidavits, and other extrinsic evidence offered in support of Complainant's Motion, and considering the applicable case law and regulatory criteria, I conclude that the individuals listed in Count I of the Complaint are properly characterized as employees, rather than independent contractors.

Respondent has placed the central tenet of its defense on the proposition that the individuals listed in Count I are independent contractors, and not employees. As Respondent explained during the prehearing conference, Respondent does not contest any of the further charges of Count I. PHC Tr. 16–20. Therefore, I must conclude and find that the Respondent has violated §274A(a)(1)(B) of the INA, 8 U.S.C. §1324a(a)(1)(B) by failing to prepare an I–9 form for the ninety-nine employees listed in Count I of the Complaint.

V. *Assessment of Civil Penalty*

Complainant has the burden of proof not only as to liability, but also as to penalty. *United States v. Skydive Academy of Hawaii Corp. d/b/a Skydive Hawaii* (Skydive), 6 OCAHO 848 (1996), 1996 WL 312123. Because Complainant has the burden of establishing the allegations in the complaint, including its proposed civil penalty in its prayer for relief, Complainant also has the burden of proving the factors which it alleges justify an aggravated penalty. *United States v. American Terrazzo Corp. d/b/a John De Lallo Foods* (American Terrazzo), 6 OCAHO 877 at 14 (1995); *Skydive*, 6 OCAHO 848, at 4; *see also Sophie Valdez*, 1 OCAHO 685, 687 (Ref. No. 104) (1989). If Complainant does not meet its burden of proof as to a particular factor, I will not aggravate the civil penalty based on that factor. *American Terrazzo*, 6 OCAHO 877, at 14. The statute provides for a minimum penalty of $100, and a maximum penalty of $1,000, for each individual with respect to whom a violation occurred, and in determining the amount of the penalty, due consideration shall be given to the size of the employer's business, the employer's good faith, seriousness of the violation, whether the individual was an unauthorized alien, and any history of prior violations. 8 U.S.C. §1324a(e)(5). I have made it my practice to start with the minimum penalty of $100, and aggravate the penalty based on any statutory factors which Complainant establishes by a preponderance of the evidence. *See American Terrazzo*, *supra*; *Skydive*, *supra*.

Complainant contends that the civil money penalty in this case should be aggravated because of the size of Respondent's business, Respondent's lack of good faith, the seriousness of the violations, and involvement of unauthorized aliens. C. Supp. Br. at 12. Complainant does not contend that there is a history of a prior violation of IRCA by this Respondent. *Id*.

A. *Seriousness of the Violations*

Complainant failed to prepare an I–9 form for the ninety-nine individuals in Count I of the Complaint. I conclude, in accordance with prior case law, that failure to prepare I–9 forms is a serious violation. *United States v. Charles C.W. Wu*, Modification by the Chief Administrative Hearing Officer of the Administrative Law Judge's Decision and Order, 3 OCAHO 434, at 2 (1992), 1992 WL 535571 at *1; *United States v. Valladares*, 2 OCAHO 316 (1991), 1991 WL 531739 (holding that a serious violation is one which "render[s] ineffective the Congressional prohibition against employment of unauthorized aliens."); *American Terrazzo*, 6 OCAHO 877 at 15 (1996). Therefore, with respect to Count I, the penalty will be aggravated, based on the seriousness of the violations, for the ninety-nine failures to prepare an I–9 form.

With respect to Count II of the Complaint, Complainant asserts that the failure to date section 1 of the I–9 Form is a serious violation. The employee is required to complete section 1 on the first day of employment. The failure to list the correct date prevents a determination as to whether section 1 was completed on the first day. Furthermore, section 1 of the I–9 form contains an attestation clause that requires that he attest, under penalty of perjury, that the documents he presented as evidence of identity and employment eligibility are genuine and related to him, and that he is aware that federal law provides for imprisonment and/or a fine for any false statements or use of false documents. By failing to ensure that the correct date is listed in section 1, Respondent defeats the purpose of the legislation, which is to require that the employee attest to the validity of his documents and his eligibility for employment *on the day he first begins work*. Therefore, that omission is a serious violation.[22] *See United States v. Tri-Component Product Corp.*, 5 OCAHO 821 (1995), 1995 WL 813122; *United States v, Mid-Island Jericho Motel*, 3 OCAHO 468 (1992), 1992 WL 535626.

As to Count III, Complainant failed to complete the I–9 forms for four employees within three days of its hiring of the employees. The purpose of the three day requirement is to ensure quick verification of the employee's identification and work authorization documents.

[22]I have recently held, in another case, that an employer's failure to ensure that an employee dates section 1 of the I–9 form is a serious violation. *United States v. Mark Carter d/b/a Dixie Industrial Service Co.*, 7 OCAHO 931, at 39–40 (1997), review by CAHO pending.

While the failure to complete the forms within three days is marginally less serious than failing to prepare an I–9 form at all, nevertheless, it is still a serious violation, *Skydive*, 6 OCAHO 848, at 11; *United States v. Karnival*, 5 OCAHO 783 (1995), 1995 WL 626234, *modified* by the CAHO on other grounds, 5 OCAHO 783 (1995), especially when, as here, the employer waited several months to complete the section 2 verification process.[23] If the employer had failed to complete the process only by a few days, that might not be a serious violation. But when months intervene between the beginning of employment and the completion of the verification in section 2, that is a serious violation. Thus, the penalty will be aggravated with respect to the violations in Count III based on the seriousness of the offense.

B. *Lack of Good Faith*

Complainant also seeks to enhance the penalty based on Respondent's lack of good faith. The CAHO has stated that "it is well established that ALJs have wide latitude in the setting of civil money penalties." *United States v. Mathis*, 4 OCAHO 717, at 2 (1995), 1995 WL 93430 at *1 (internal citation omitted). *See also United States v. Banafsheha*, 3 OCAHO 525 at 2 (1993), 1993 WL 403095 at *2 (citing *United States v. M.T.S. Service Corporation*, 3 OCAHO 448 at 4 (1992), 1992 WL 535585 a t *2; *United States v. Pizzuto*, 3 OCAHO 447 at 6 (1992), 1992 WL 535584 at *3). "However, the factors [used by OCAHO judges in setting a penalty amount] have invariably been 'with respect to' the substantive IRCA violations charged in the complaint. The factors taken into account, particularly with regard to good faith, have related in some way to the egregiousness of the IRCA violation itself." *Banafsheha*, 3 OCAHO 525 at 2 (citing *United States v. O'Brien*, 1 OCAHO 1144, at 1145–46 (Ref. No. 166) (1990), 1990 WL 512061 at *4 (showing of lack of good faith requires some evidence of culpable behavior beyond mere ignorance); *United States v. Ulysses*, 3 OCAHO 449 at 7 (1992), 1992 WL 535586 at *5 (finding bad faith where respondents'

[23]The evidence shows that there was a considerable lapse between the date that the employees began working for Respondent and when the verification process was completed. For example, Benedito Ewerton began working on May 21, 1994, but the verification occurred on August 31, 1994. Steve Pilavin began work on January 4, 1992, but the verification was not completed until March 5, 1992. Julio Velez began his employment on June 8, 1990, but the verification did not occur until January 1, 1991. Heriberto Ortiz began his employment on April 7, 1993, but Respondent did not complete the verification until August 31, 1994, over a year later. *See* Admis. 41–49.

attitude concerning their responsibilities under IRCA was "less than cooperative," and they failed to make a good faith effort to comply with the statute even after an educational visit); *United States v. Widow Brown's Inn*, 2 OCAHO 399 at 40–41 (1992), 1992 WL 535540 at *30 (premising lack of good faith determination in substantial part on conclusion that employer had deliberately failed to prepare and present Forms I–9 even after educational visit); *United States v. Cafe Camino Real*, 2 OCAHO 307 at 16 (1991), 1991 WL 531736 at *12 (holding violations repugnant to claims of good faith where there was forgery of signatures on Forms I–9)). The knowing hire of unauthorized aliens "cannot be good faith." *United States v. Chacon*, 3 OCAHO 578, at 7 (1993); 1993 WL 597395 at *7. Indeed, knowingly hiring an unauthorized alien is "patently" serious, *id.*, and lends itself to a finding of bad faith. *United States v. Taco Plus, Inc.*, 5 OCAHO 775 at 4 (1995), 1995 WL 545439 at *4. One test of good faith is "whether the employer exercised reasonable care and diligence to ascertain what the law requires and to act in accordance with it." *United States v. Riverboat Delta King, Inc*, 5 OCAHO 738 at 5 (1995), 1995 WL 325252 at *3.

To support its argument that the civil penalty should be aggravated due to a lack of good faith, Complainant discusses Respondent's failure to cooperate in its investigation and its failure to prepare I–9 forms for any of the individuals listed in Count I. Regarding the first point, as is evidenced from Agent Palmese's Declaration and Respondent's Admissions, Respondent delayed the investigation and refused to cooperate in the INS investigation from beginning to end. Palmese Declaration, ¶¶7–13, Admis. 8–18. Complainant bitterly notes that Respondent even failed to comply with the INS' subpoena, until it was enforced by a U.S. District Court. C. Supp. Br. at 15.

While the INS' frustration is understandable, a party's refusal to provide documents on a voluntary basis, without a subpoena, or to provide documents pursuant to an administrative subpoena until it is enforced by a Court, is not per se an indication of lack of good faith. Indeed, the INS does not cite any CAHO decision so holding. In this case, Respondent declined to cooperate with the INS investigation, and INS was required to go to U.S. District Court to enforce the administrative subpoena. That is the procedure outlined by the statute. 8 U.S.C. 1324a(e)(2). While that may be an inconvenience for the INS, it is not proof that Respondent was acting in bad faith. An employer is entitled to rely on the protections provided by the law

and may not be punished for so doing. *Contra United State s v. Primera Enterprises, Inc.*, 4 OCAHO 692 at 4 (1994), 1994 WL 721941 at *3 (holding that failure to cooperate with an INS investigation is one sign of lack of good faith).

Complainant also references the fact that Respondent failed to prepare any I–9 forms for any of the individuals. However, the CAHO has made it clear that failure to prepare or complete I–9 forms, in and of itself, cannot be the basis for a finding of lack of good faith. *Karnival*, 5 OCAHO 783, at 3. As noted in that decision, there was no evidence in that case pointing to culpable behavior beyond the fact that a high number of I–9 forms were missing or contained deficiencies, information which seems more relevant to the seriousness of the violations factor. Thus, even though Respondent failed to prepare I–9 forms for a large number of employees, the mere fact of paperwork violations, though serious, is insufficient to show a lack of good faith for penalty purposes. The CAHO concluded that "[a] dismal rate of Form I–9 compliance alone should not be used to increase the civil money penalty sums based upon the statutory good faith criterion". *Id*. at 4. Therefore, Hudson's dismal rate of I–9 compliance cannot be used to increase the civil money penalty based on the statutory good faith criterion.

Although I reject Complainant's contentions on this issue, nevertheless, the record in this case does demonstrate lack of good faith. Complainant does not have to show that Respondent acted with evil intent or from bad motives to prove lack of good faith. Complainant only needs to present evidence of "culpable behavior beyond mere failure of compliance." *Karnival Fashion*, 5 OCAHO 783 at 2 (CAHO modification of the Administrative Law Judge's Final Decision and Order) (internal citation omitted); *Skydive*, 6 OCAHO 877, at 16. Gross negligence can constitute such culpable behavior. *United States v. Raygoza*, 5 OCAHO 729, at 4 (1995), 1995 WL 265080 at *2.

Here, the evidence shows that Respondent certainly was, at the very least, reckless or grossly negligent in its hiring process. Indeed, the affidavits submitted by several employees show that Respondent either knowingly hired unauthorized workers, or acted in reckless disregard of the law.[24] The term knowing includes not only actual

[24]Although Respondent has not been charged with a violation of 8 U.S.C. §1324a(a)(1), evidence that a company *knowingly* hired unauthorized aliens certainly constitutes a lack of good faith. *Cf. Chacon*, *supra*, 3 OCAHO 578, at 7 (noting that the knowing hire of unauthorized aliens "cannot be good faith."). Indeed, knowingly hiring an unauthorized alien is "patently" serious, *id.*, and lends itself to a finding of bad faith. *Taco Plus, Inc.*, *supra*, 5 OCAHO 775 at 4 (stating that the knowing hire of unauthorized aliens is "patently" serious).

knowledge, but also knowledge which may be ascertained through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition. 8 C.F.R. §274a.1(a)(l). Constructive knowledge can include situations where the employer acts with reckless and wanton disregard of the legal consequences. 8 C.F.R. §274a.1(a)(l)(iii).

The record here shows that Respondent knowingly hired some unauthorized workers and acted recklessly with repect to its hiring of other workers. As an example of a knowing hire, Diane Sadibou states that Scotty, the owner, knew she did not have permission to work, and Asumani Shabani states that he told Respondent he did not have permission to work, and was told not to worry because he would be given a job. *See* C. Supp. Br., Exs. D and N. As examples of reckless disregard of the law, Theady Gahunga states that he was hired by "Steve the Supervisor," who neither asked questions, nor prepared any documents for his employment; Amadou Bah states that he was never asked for any documents; Djibril Doumbia states that he was not asked if he had immigration documents that allowed him to work; Diane Youssouf states that she was not asked if she had permission to work in the United States; Souleymane Meite states that he was not asked if he was illegal; and Mamadou Camara states that "Benny" never asked him for any work papers. *See,* respectively, C. Supp. Br., Exs. B, E, G, H, K, and M.[25] These sworn statements strongly suggest that Respondent was not merely ignorant of the law, but was deliberately avoiding compliance and either knew these individuals were unauthorized or deliberately chose to remain ignorant to the employment status of these aliens. Thus, Respondent did not exercise reasonable care and diligence to ascertain what the law requires. *Williams*, 5 OCAHO 730 at 8.

Based on the record in this case, I find that Complainant has shown, by a preponderance of the evidence, culpable behavior beyond mere failure of compliance and, thus, the penalty should be aggravated based on lack of good faith with respect to the Count I violations. However, no lack of good faith has been shown with respect

[25]Moreover, most of the affiants also indicate they were paid in cash. While cash payments are not illegal, given the other evidence that Respondent knew the workers were unauthorized aliens, the cash payments suggest that Respondent was attempting to leave no paper record.

to the violations in Counts II and III. Although the I–9 forms were not properly completed for the employees listed in Counts II and III, as noted previously, the mere lack of compliance is not bad faith, and therefore the penalty for the paperwork violations in Counts II and III will not be aggravated based on lack of good faith.

C. *Size of Business*

Complainant seeks to aggravate the penalty based on the size of the business. Unless the Complainant can prove that the business is not a small business, the penalty will not be aggravated based on this factor. Although Complainant was allowed after the prehearing conference to conduct additional discovery on this issue, Complainant has failed to produce evidence that Respondent is anything other than a small business.

Neither IRCA nor its implementing regulations provide guidelines for determining business size. In past decisions, however, the Small Business Administration's (SBA) Standard Industrial Classification (SIC) Manual has been utilized as one factor in evaluating the size of the business. *See Skydive*, 6 OCAHO 848, at 5–6, 1996 WL 312123, at *5; *United States v. Tom & Yu*, 3 OCAHO 445, at 4 (1992), 1992 WL 535582, at *3. Respondent serves approximately four stores in Manhattan, with a limited amount of reach to other boroughs of New York City, and its gross receipts were $2.3 million in 1994 and 1995 and $2.6 million in 1996. Those figures are substantially below the $5 million in gross receipts which the SBA uses to define a small personal services company. *See* 13 C.F.R. §121.201. Thus, Complainant concedes that, based on the applicable SBA regulations, Respondent would be considered a small business. C. S. Supp. Br. at 5–6.

However, gross sales are not the only criteria to be utilized in evaluating whether a business should be considered small under 8 U.S.C. §1324a(e)(5). Other relevant criteria are the number of employees, the size of the payroll, and the value of its assets. While conceding that the SBA would consider Respondent as a small business based on its gross receipts, Complainant argues that Respondent should not be considered as small based on its number of employees and amount of payroll. According to Complainant, Respondent employed 261 employees in 1996, with a payroll of $354,683, and, based on prior OCAHO case law, a company with

that number of employees and payroll would not be considered to be a small business.

In reaching its calculation as to the number of employees, Complainant references the exhibits consisting of the W–2 statements and the 1099 forms, but does not explicitly explain how it reached its counts. See C. S. Supp. Br. at 4, n.4. Apparently Complainant combined the number of individuals listed in both the W–2 forms and the 1099 forms.[26] In 1996, Respondent issued W–2 Wage and Tax Statements for only nine employees, and the total wages paid for these nine employees was $354,682.50. C. S. Supp. Br., Ex. 9. Complainant asserts, and I have ruled, that the delivery persons listed in Count I of the Complaint also were employees. Therefore, at least some of the individuals for whom 1099 forms were issued should be counted as employees. Respondent issued 1099 forms for 254 individuals in 1996 and paid $1,219,881.40 in total compensation to these individuals. See C. S. Supp. Br., Ex. 8. However, it has not been established that all of these individuals to whom 1099 forms were issued were delivery persons or were employees. Moreover, Count I is not limited to calendar year 1996; it encompasses employees who were employed at different times for whom Respondent did not prepare an I–9 form.

Comparing the names of individuals in Count I of the Complaint with the names of the 254 individuals issued 1099 forms in 1996, only 47 of these are individuals listed in Count I of the Complaint. Since W–2 forms were issued to 9 individuals in 1996, see C. S. Supp. Br., Ex. 9, I conclude that Complainant has shown that Respondent employed fifty-six individuals in 1996 (the nine employees issued W–2 forms plus the forty-seven delivery persons listed in the complaint who were issued 1099 forms).[27] As to total payroll, I

[26]Although Complainant included all of the individuals for whom 1099 forms were issued as part of its total of 261 employees, for some unexplained reason, it did not include the compensation paid to these individuals as part of Respondent's gross payroll *See* C. S. Supp. Br. at 4–5.

[27]Records have been supplied showing the number of individuals issued W–2 forms and 1099 forms for 1994 and 1995 as well. Comparing the names in Count I with the names on the 1099 forms, it appears that in 1995 fifty-four individuals listed in Count I were issued 1099 forms, *see* C. S. Supp Br., Ex. 6. Since W-2 forms were issued to ten individuals, C. Supp. Br., Ex. U, I find that Respondent employed sixty-four individuals in 1995. In 1994, forty-three individuals listed in Count I were issued 1099 forms. *See* C. Supp. Br., Ex. V. Since W-2 forms were issued to twelve individuals, *see* C. S. Supp. Br., Ex. 5, I find that Respondent employed fifty-five individuals in 1994. Since some of the individuals worked in more than one year, the totals for the three year period from 1994–1996 obviously exceed ninty-nine.

find that the total payroll for the fifty-seven individuals was $950,553.50 (the total wages paid to the nine employees receiving W–2 statements was $354,682.50 and the compensation paid to the 47 delivery persons receiving 1099 forms was $595,871).

No bright line standard has been established as to the number of employees or amount of payroll that would transform a business from small to moderate or large, because these are among several factors in determining size of business. Nevertheless, in past cases the penalty has not been aggravated, based on the business size factor, even as to businesses that employed more than a hundred employees. *See, e.g.*, *United States v. Riverboat Delta King, Inc.*, 5 OCAHO 738, at 3–4 (1995), 1995 WL 325252, at *2 (120 employees); *United States v. Ulysses, Inc.*, 3 OCAHO 449, at 7 (1992), 1992 WL 535586, at *5 (166–168 employees). Also, companies with a work force of approximately ninety to a hundred employees have been considered to be small companies. *See United States v. Vogue Pleating, Stitching & Embroidery Corp.*, 5 OCAHO 782, at 3–4 (1995), 1995 WL 653357, at *3 (approximately a hundred employees); *United States v. Anchor Seafood Distribs., Inc.*, 5 OCAHO 758, at 5, 1995 WL 474129, at *3–4 (ninety-three employees), *appeal filed*, No. 95–4096 (2d Cir. 1995), *petition for review withdrawn*, No. 95–4096 (2d Cir. 1996).

Complainant has acknowledged that prior OCAHO decisions have held that a business of 100 employees is considered "small." *See* C.'s Supp. Br. at 13–14. In all three years from 1994 through 1996, Respondent employed fewer than 100 employees in each year at any one time. Moreover, even with respect to those employees, the amount of money paid to these individuals suggests that many of these employees were employed part time or on a temporary basis. For example, two of the nine employees to whom W–2 forms were issued in 1996 received less than $6000 each (one received $5,682.50 and the other $325).[28] That suggests they were either part time or temporary employees, or both. As to the individuals receiving 1099 forms, many of these received total annual compensation of less than $1,000. *See* C. S. Supp. Br., Ex. 8. Again, this suggests that they were temporary or part time. Given that the delivery personnel are working for very minimal amounts (80 cents a delivery), it is understandable that there would be considerable turnover in personnel.

[28]These were Marco Alonzo and Alimay Konate, respectively. *See* C. S. Supp. Br., Exs. 9.

Moreover, the amount of payroll, and wages per employee, supports Respondent's assertion that it is a small company.[29]

Other than the number of employees and the amount of payroll, Complainant does not seek to rely on other factors, such as the amount of Respondent's assets, the length of time it has been in business, etc. Consequently, considering the record as a whole, I conclude that Complainant has not proffered sufficient evidence to justify aggravating the civil penalty based on the size of the business.[30]

D. *Presence of unauthorized aliens*

OCAHO case law holds that employment of unauthorized aliens, once established by the INS, is a factor which warrants aggravation of the civil money penalty.[31] *United States v. Fox*, 5 OCAHO 756 at 6 (1995), 1995 WL 463979 at *5; *United States v. Reyes*, 4 OCAHO 592 at 7 (1994), 1994 WL 268183 at *6. Complainant does not allege that the individuals listed in Counts II and III were unauthorized aliens. Therefore, the civil penalty will not be aggravated with respect to those counts based on that factor.

As for the ninety-nine individuals in Count I of the Complaint, the original complaint sought a penalty of $470 per violation for eighty-six violations, but an aggravated penalty of $590 for thirteen violations. Complainant's counsel related that the greater penalty was being sought for these thirteen individuals because they were unauthorized aliens. PHC Tr. 77. However, Special Agent Palmese only

[29]Interestingly, if one deducts owner Scott Weinstein's total salary of $243,000 in 1996, the remaining total payroll amounts to $707,553.50, which, when divided by the other 56 employees, is an average of less than $1,400 per employee.

[30]On May 23, 1997, Respondent filed a Reply to Complainant's Second Supplemental Brief. While the one and a half page filing contained some cursory argument regarding the points in Complainant's Second Supplemental Brief, the Reply added nothing new to the question of Respondent's business size. However, as Complainant has not met its burden of proof regarding this penalty factor, the relative quality of Respondent's Reply is a moot point.

[31]This differs from the matter of knowingly hiring unauthorized aliens, which was discussed previously as one basis for a finding of lack of good faith. Case law holds that hiring unauthorized aliens, whether done knowingly or not, is a basis for aggravating the penalty for a paperwork violation. *United States v. Chef Rayko, Inc., d/b/a Chef Rayko's Cucina Italiana* 5 OCAHO 794 at 3 (1995), 1995 WL 714311 at *2–3 (CAHO modification stating that "OCAHO case law has consistently held that an employer's lack of knowledge of an employee's unauthorized status is irrelevant in determining whether to aggravate the civil money penalty based on this factor.")

identified ten individuals as unauthorized, Palmese Declaration, ¶¶14, 16, and during the prehearing conference Complainant's counsel agreed to amend the complaint to reflect that only eight individuals were unauthorized. PHC Tr. 78. However, when counsel submitted the amended complaint, she reduced the number for which the $590 penalty was sought from thirteen to ten, not eight, individuals, without explaining the discrepancy between the amended complaint and her statement during the prehearing conference that only eight employees were unauthorized. Moreover, two of the individuals for whom an aggravated penalty is sought in the amended complaint, Mamadou Barry (¶13) and Asumani Shabani (¶87), were specifically identified by Mr. Palmese as authorized. Palmese Declaration ¶16.[32] Consequently, Complainant's own evidence does not support its allegation that the penalty should be enhanced against Respondent on the ground that these two employees were unauthorized aliens.

The uncontroverted evidence supports Complainant's assertion that the other eight individuals were not authorized to work in this country at the time they were apprehended. Not only is Palmese's Declaration to that effect uncontroverted by Respondent, the affiants acknowledge that they were not authorized to work in the United States. *See* C. Supp. Br., Exs. B, C, D, E, F, G, H, and K. Thus, based on the evidence, including the affidavits and the Palmese Declaration, I conclude that Complainant has shown that Respondent hired eight unauthorized aliens, and the civil money penalty will be aggravated for those eight violations based on that factor.[33]

---

[32]Eight of the unauthorized employees were apprehended at a Food Emporium store on February 23, 1995. As listed by name and complaint paragraph, these are Amadou Bah (¶9); Djibril Doumbia (¶26); Theady Gahunga (¶34); Titi Souleymane Meite (¶55); Jean Nsabmana (¶66); Daime Sadibou (¶81); Monguehy Fanzy Taha (¶93), and Diane Youssouf (¶99). Palmese Declaration ¶14. Two other unauthorized individuals, Asumani Shabani (¶87) and Mamadou Saliou Barry (¶13), were apprehended at Gristedes and Sloan's supermarkets, respectively, on March 2, 1995, and were originally taken into custody because they could not produce certificates of alien registration or alien registration receipt cards. Palmese Declaration ¶16. Moreover, the affidavits signed by these individuals suggest that they were not authorized to work in this country at the time they were apprehended. See C. Supp. Br., Exs. N and O. Nevertheless, Palmese states that upon further investigation he determined that they were legally working in the United States. Palmese Declaration ¶16.

[33]In accord with other OCAHO case law, the penalty will be aggravated based on the hiring of unauthorized aliens only as to the violations involving the unauthorized aliens. *United States v. Giannini Landscaping, Inc.*, 3 OCAHO 73, at 8 (1993), 1993 WL 566130, at *5; *United States v. Camidor Properties*, 1 OCAHO 1978, at 1982 (Ref. No. 299) (1991), 1991 WL 531124 at *3–4.

E. *Calculation of Penalty*

With respect to the ninety nine violations in Count I, Complainant is seeking a $590 penalty for ten violations, and a $470 penalty for the remaining eight nine violations, for a total penalty of $47,730. Complainant seeks a penalty of $430 for the one Count II violation, and $410 for each of the four individuals listed in Count III of the Complaint. This brings Complainant's total proposed civil penalty to $49,800.[34]

All of the various violations in this case involve variations of paperwork violations, ranging from failing to complete the form to the more serious charge of not preparing a form at all. With respect to paperwork violations, the statute provides for a minimum penalty of $100 and a maximum penalty of $1,000 for each employee with respect to whom a violation occurred. In calculating a penalty, I start with the minimum amount as a baseline figure and consider the five statutory criteria as possible aggravating factors. *See Skydive*, 6 OCAHO 848, at 10–11, 1996 WL 312123, at *9; *United States v. Felipe, Inc.*, 1 OCAHO 626, 629 (Ref. No. 93) (1989), *aff'd by CAHO*, 1 OCAHO 726 (Ref. No. 108) (1989), 1989 WL 433964. I follow the line of cases that have applied a mathematical, rather than judgmental, approach to assessing penalties for paperwork violations. *See Skydive*, 6 OCAHO 848, at 10, 1996 WL 312123, at *9–10; *United States v. Davis Nurseries*, 4 OCAHO 694 (1994), 1994 WL 721954, at *11 *United States v. Felipe*, 1 OCAHO at 629. The approach in those cases is to divide $900, which is the difference between the statutory $1,000 maximum and statutory $100 minimum by five for the five statutory factors, arriving at a figure of $180 for each statutory factor. This formula is not rigidly applied, because certain penalty factors may justify a greater penalty amount than others (for example, the $180 amount per factor may be increased or reduced based on the factual circumstances of each case).

As discussed previously, Complainant does not allege that Respondent has committed prior violations, and I have rejected Complainant's assertion that the penalty should be aggravated based on the size of the business. However, Complainant has alleged and

[34]Complainant originally sought a total penalty of $50,160. However, as discussed previously, infra at section I, on April 28, 1997, Complainant amended its complaint to reflect, *inter alia*, a lower proposed civil penalty for Count I, which, in turn, reduced the total civil money penalty from $50,160 to $49,800.

proven the seriousness of all the violations, lack of good faith with respect to the Count I violations, and the hiring of eight unauthorized aliens among the ninety-nine employees in Count I. As discussed below, applying these statutory penalty factors in this case, I have applied, in most instances, a penalty for each violation less than that requested by the Complaint. However, in some instances, specifically with respect to the hiring of the unauthorized aliens in Count I of the Complaint, I have assessed a penalty per violation somewhat greater than that requested by the Complaint. The total assessed penalty in this Order is somewhat less than that sought in the Complaint.

Neither the Administrative Procedure Act (APA), the INA, nor the OCAHO Rules of Practice prohibit an Administrative Law Judge from assessing a penalty per violation, or even a total penalty, greater than that requested in a complaint. Moreover, in several cases Administrative Law Judges have assessed a penalty greater than that requested by the complaint. *See United States v. Anchor Seafood Distributors, Inc*., 5 OCAHO 758, at 8 (1995), 1995 WL 474129, at *6 (assessed penalty of $51,670 was 25 percent higher than requested penalty of $40,620 in the complaint); *United States v. Davis Nursery, Inc*., 4 OCAHO 694, at 21–22 (1994), 1994 WL 721954, at *15–16 (assessed penalty was $3,712.50, which was 61 percent higher than the requested penalty of $2,300.00); *United States v. Land Coast Insulation, Inc*., 2 OCAHO 379, at 28 (1991), 1991 WL 531891, at *22 ($4,500 assessed penalty was 28 percent higher than requested penalty of $3,500). The procedural rules require that the Judge's decision be based on the record and be supported by reliable and probative evidence, *see* 28 C.F.R. §68.52(b) (1996), which essentially is the standard required by the APA, *see* 5 U.S.C. §557(c). If the record justifies a penalty per violation greater than that sought in the complaint, then the greater penalty may be assessed, as long as it does not exceed the statutory maximum.

As to Count I, Complainant has proven the allegations of the Complaint, including the fact that all ninety-nine individuals were employees, and that Respondent did not prepare an I–9 form for these employees as required by law. Failure to prepare an I–9 form is the most serious paperwork violation, *United States v. Dodge Printing Centers*, 1 OCAHO 846, 852–53 (Ref. No. 125) (1990), 1990 WL 512168 at *6; *United States v. Business Teleconsultants, Ltd.*, 3 OCAHO 565 at 11–12 (1993), 1993 WL 544047 at *6; *United States v. Kurzon*, 4 OCAHO 637 at 12 (1994), 1994 WL 613163 at *7; *United States v. Gloria Fashions, Inc.*, 6 OCAHO 887 at 4 (1996), 1996 WL

790758 at *2 ("Obviously a total failure to prepare an I–9 form is a more serious violation than omission of some of the information.") (citing *Dodge*). Thus, I will aggravate the penalty for all the Count I violations by the full $180 allocated to the seriousness of the violations. Complainant also has proven, by a preponderance of the evidence, that eight of Respondent's employees named in Count I were unauthorized aliens. These eight are Amadou Bah (¶9); Djibril Doumbia (¶26); Theady Gahunga (¶34); Souleymane Meite (¶55); Jean Nsabmana (¶66); Diane Sabidou (¶81); Monguehy Taha (¶93); and Diane Youssouf (¶99). Hiring unauthorized aliens is a very serious offense and is the very harm the employment verification system was designed to prevent. Moreover, the record shows that Respondent acted recklessly with respect to hiring its delivery personnel. Therefore, for the eight violations, applying the aggravating factors of lack of good faith, seriousness of the violations, and hiring of unauthorized aliens, I will assess a penalty of $640 for each violation (the $100 minimum plus $180 for each of the three aggravating factors equals $640). As to the other ninety-one violations, I assess a penalty of $460 (the $100 minimum plus $180 each for the two aggravating factors equals $460), the seriousness of the offense) for each violation. Thus, the total penalty assessed for Count I is $46,980.

The one violation in Count II is aggravated based solely on one statutory factor, the seriousness of the violation. Although the failure to date section 1 of the I–9 form is serious, there are degrees of seriousness, and not all violations are as serious as others. See *Skydive*, 6 OCAHO 848, at 9. An employer's failure to ensure that the employee failed to date section 1 of the I–9 form is not as serious as the complete failure to prepare an I–9 form charged in Count I. *Id*. I will aggravate the penalty for the Count II violation by $150, and therefore assess a total penalty of $250 for this violation.

Finally, since failure to prepare section 2 of the I–9 form within three business days of the date of hire is a serious offense, the four violations in Count III will be aggravated based on that factor. The failure to complete section 2 in a timely manner is only marginally less serious than failure to prepare a form at all, and justifies aggravation of the penalty based on the seriousness of the offense almost to the same degree as failure to prepare. *See Skydive*, 6 OCAHO 848, at 11. As in *Skydive*, I will aggravate the penalty for failure to timely complete section 2 by $170. Thus, I assess a penalty of $270 (the $100 minimum plus $170 for the seriousness of the violation) for each of the four violations, for a total of $1,080.

VI. *Conclusions and Order*

Complainant has proven the charges in Count I of the Complaint, including the assertion that Respondent hired the individuals listed in Count I without complying with the requirements of §274A(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. §1324a(b) and 8 C.F.R. §274a.2(b), namely, that Respondent did not prepare a I–9 form for ninety nine employees. I assess a penalty of $460 for each violation, except that I assess a penalty of $640 for the eight violations involving the hiring of aliens who were not authorized to work in this country. I assess a civil money penalty of $46,980 for the Count I violations.

I find that Complainant has proven the charges of Count II of the Complaint, as amended. Specifically, by failing to ensure that Luis Martinez properly completed section 1 of the I–9 form, Respondent did not comply with the requirements of §274A(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. §1324a(b)(1) and 8 C.F.R. §274a.2(b)(1), and I find that this is a serious offense. I assess a penalty of $250 for this violation.

Finally, I find that Complainant has proven the charges of Count III of the Complaint; namely, that Respondent failed to complete section 2 of the I–9 form for four individuals within three days of their hiring in violation of §274A(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. §1324a(b)(1) and 8 C.F.R. §274a.2(b)(1)(ii). I assess a penalty of $270 each for a total of $1,080 for these four violations.

Therefore, I order Respondent to pay a total civil money penalty of $48,310.

ROBERT L. BARTON, JR.
Administrative Law Judge

Notice Regarding Appeal

Pursuant to the Rules of Practice, 28 C.F.R. §68.53(a)(1), a party may file with the Chief Administrative Hearing Officer (CAHO) a written request for review, with supporting arguments, by mailing

the same to the CAHO at the Office of the Chief Administrative Hearing Officer, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2519, Falls Church, Virginia 22041. The request for review must be filed within 30 days of the date of the decision and order. The CAHO also may review the decision of the Administrative Law Judge on his own initiative. The decision issued by the Administrative Law Judge shall become the final order of the Attorney General of the United States unless, within 30 days of the date of the decision and order, the CAHO modifies or vacates the decision and order. *See* 8 U.S.C. §1324a(e)(7); 28 C.F.R. §68.53(a).

Regardless of whether a party appeals this decision to the Chief Administrative Hearing Officer, a person or entity adversely affected by a final order issued by the Administrative Law Judge or the CAHO may, within 45 days after the date of the Attorney General's final agency decision and order, file a petition in the United States Court of Appeals for the appropriate circuit for the review of the final decision and order. A party's failure to request review by the CAHO shall not prevent a party from seeking judicial review in the appropriate circuit's Court of Appeals. *See* 8 U.S.C. §1324a(e)(8).