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

May 24, 2013

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 12A00030
ANODIZING INDUSTRIES, INC., Respondent.	)	

FINAL DECISION AND ORDER

Appearances: Kristin Piepmeier, Esq.
for the complainant

Henry Haddad, Esq.
for the respondent

I. PROCEDURAL HISTORY

This is an action pursuant to 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 (2006). The United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a complaint alleging that Anodizing Industries, Inc. (Anodizing or the company) violated 8 U.S.C. § 1324a(a)(1)(B) by hiring twenty-six employees for whom it failed to timely prepare and/or present I-9 forms. Anodizing filed an answer admitting that it hired the individuals named in the complaint, but otherwise denying the material allegations and pleading affirmative defenses pursuant to 8 U.S.C. § 1324a(b)(6) and § 1324a(b)(3)(B). The company asserted that it complied in good faith with all the requirements of the law, and contended that the fines proposed were excessive.

Presently pending are the parties' cross-motions for summary decision. Anodizing filed a response to the government's motion, but ICE did not respond to the company's motion and the time for doing so has expired.[1]

II. BACKGROUND INFORMATION

Anodizing is a California corporation that has been in business for almost thirty-five years. Eugene Golling is the company's owner and president, and Edward P. Andrews is the general manager. The company operates a metal-finishing factory located at 5222 Alhambra Ave., Los Angeles, California, 90032, and during the period relevant to this case Anodizing had twenty-six employees. ICE served Anodizing with a Notice of Inspection (NOI) on July 30, 2010, and in response the company presented twenty-six I-9 forms with attachments, an employee contact list, a business entity questionnaire, and a quarterly report of wages. During the course of its inspection, ICE served Anodizing with a Notice of Discrepancies and Employee Discrepancy Notice on January 21, 2011, followed by a Notice of Intent to Fine (NIF) on June 30, 2011. Anodizing filed a timely request for hearing on July 7, 2011, after which ICE filed a complaint with this office on February 9, 2012. All conditions precedent to the institution of this proceeding have been satisfied.

The government's complaint asserts that the company hired Amir Afshar, Edward P. Andrews, Maria Luz Capones, Rosa Cardenas, Jose Eduardo Contreras, George Dominguez, Fernando Espanta, Raul Estrada, Luis A. Flores, Gilberto Luna Fuentes, Jose Godines, Nora Golling, Patrick Golling, Stephen Golling, Ruben C. Gomez, Rene A. Hernandez, Claudine Ha Le, Gabriela Linares, Philamie B. Martinez, Gloria Maya, Cynthia Piazza, Cesar Salamanca, Sonia C. Salguero, Socorro Vargas, Trinidad Vargas, and Dora Vargas de Salamanca, and failed to timely prepare and/or present I-9s for them. The government seeks a total of $25,525.50 in civil money penalties for the violations alleged.

Anodizing's answer asserted as the company's first affirmative defense that it complied in good faith with the requirements of 8 U.S.C. § 1324a(a)(1)(B) pursuant to 8 U.S.C § 1324a(b)(6)(A); as its second defense that it complied in good faith with the requirements of 8 U.S.C. § 1324a(b)(3)(B); as its third defense that it complied in good faith pursuant to 8 U.S.C. § 1324a(b)(6)(A); and as its fourth defense that even if it violated any regulation, the penalties proposed are excessive and fail to consider the statutory penalty factors set forth at 8 U.S.C. § 1324a(e)(5).

[1] The parties were given until May 6, 2013 to respond to each other's motions.

III. STANDARDS TO BE APPLIED

A. Summary Decision

A motion for summary decision is granted under OCAHO regulations if the evidence in record demonstrates that there is no genuine issue of material fact and that the moving party is entitled to summary decision as a matter of law. 28 C.F.R. § 68.38(c). This rule is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which permits the entry of summary judgment in federal cases. Accordingly, OCAHO jurisprudence looks to federal case law interpreting that rule for guidance in determining when summary decision is appropriate. *See United States v. Candlelight Inn*, 4 OCAHO no. 611, 212, 222 (1994).[2]

The filing of cross motions does not necessarily mean that summary decision should issue in favor of either party; each motion must be considered on its own merits. *United States v. Ronning Landscaping, Inc.*, 10 OCAHO no. 1149, 9 (2012). The party seeking summary decision bears the initial burden of showing the absence of a material factual dispute. *See Celotrex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *see also United States v. Primera Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994). Once the moving party satisfies its burden, the burden shifts to the nonmoving party to come forward with evidence that a genuine issue of material fact does exist. *See Primera Enters.*, 4 OCAHO no. 615 at 261 (citing Fed. R. Civ. P. 56(e)).

B. The "Good Faith" Defense Provided by § 1324a(b)(6)

Section 1324a(b)(6) significantly changed the enforcement of the employer sanctions provisions by adding a potential defense to certain technical or procedural violations that occur under circumstances where an employer made a good faith attempt to comply with the recordkeeping requirements. With respect to such violations, an employer must be given a period of not less than ten days to correct the failure voluntarily. 8 U.S.C. § 1324a(b)(6)(B)(ii). The defense has no application, however, to substantive violations.

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[2] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

The distinction between substantive violations and those that are technical and procedural is elaborated in a memorandum from Paul W. Virtue, INS Acting Executive Commissioner of Programs, *Interim Guidelines: Section 274A(b)(6) of the Immigration & Nationality Act Added by Section 411 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (Mar. 6, 1997) (the Virtue Memorandum or Interim Guidelines), *available at* 74 Interpreter Releases 706 app. 1 (Apr. 28, 1997). Pursuant to the Interim Guidelines, 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. Virtue Memorandum, *supra*, at app. A; *see also United States v. DJ Drywall, Inc.*, 10 OCAHO no. 1136, 3-4 (2010). As explained in *United States v. LFW Dairy*, 10 OCAHO no. 1129, 4 (2009), the defense provided in § 1324a(b)(6) relieves employers from liability for minor, unintentional violations of the verification requirements; it does not provide a shield to avoid the basic requirements of the Act.

The defense thus applies only to technical or procedural failures to comply with a partial verification requirement rather than to failures to comply with the verification requirements as a whole. The principal verification requirements not covered by the rule include completion of the I-9 form for each new employee at the time of hire, and the maintenance of the form for the periods specified. The rule thus does not alter or affect the necessity of completing I-9 forms within three business days of hire, or of retaining them thereafter. Each failure to properly prepare, retain, or produce the forms in accordance with the requirements of the employment verification system is a separate violation of the Act. 8 U.S.C. § 1324a(a)(1)(B); s*ee also United States v. Occupational Res. Mgmt., Inc.*, 10 OCAHO no. 1166, 5 (2013) (citing 8 C.F.R. § 274a10(b)(2)).

Failure to prepare an I-9 in a timely fashion, moreover, is not only a substantive violation but also a serious one, because an employee could potentially be unauthorized for employment during the entire time his or her eligibility remains unverified. *See United States v. Sunshine Bldg. Maint., Inc.*, 7 OCAHO no. 997, 1122, 1182 (1998) (citing *United States v. El Paso Hospitality, Inc.*, 5 OCAHO no. 737, 116, 123 (1995)). The longer an employer delays in preparing an I-9 form, the more serious is the violation. *See, e.g.*, *United States v. Fortune E. Fashion, Inc.*, 7 OCAHO no. 992, 1075, 1080-81 (1998) (finding failure to prepare I-9 within three business days as serious, but distinguishing between delays of a few days and those of a few months). Among the other violations that the Interim Guidelines characterize as substantive rather than technical or procedural are the lack of an employee signature in the section 1 attestation, the lack of a signature by a representative of the employer in the section 2 attestation, and the omission of proper documents to establish identity or employment eligibility, or the listing of improper documents. Virtue Memorandum, *supra*, at apps. A & B.

C. Rehiring, the Grandfather Clause, and Continuing Employment

An employer who rehires a former employee is not necessarily required to complete a new Form I-9 for that employee. 8 C.F.R. § 274a.2(c)(1). If the individual is rehired within three years of the date of the initial execution of the previous I-9 form and, upon inspection of the I-9 the employer determines the individual is still eligible to work, the previous I-9 form is sufficient. 8 C.F.R. § 274a.2(c)(1)(i). In such a case, however, the employer is required to update Section 3, the Updating and Reverification section of the form, to reflect the date of rehire, and to sign and date the employer attestation. *Id.*

Because the employment eligibility verification requirements apply only to employees hired on or after November 7, 1986, an employer is not obliged to prepare an I-9 form for an employee hired prior to that date. 8 C.F.R. § 274a.7(a)(1); *see United States v. Gaspar*, 1 OCAHO no. 218, 1472, 1473 (1990). Such an employee will, however, lose his or her pre-enactment status under the so-called "grandfather clause" if, inter alia, the individual quits, is terminated, is excluded or deported, is no longer continuing his or her employment, or does not have a reasonable expectation of employment at all times. 8 C.F.R. § 274a.7(b) (1) – (4); *see, e.g., United States v. Halshan, Inc.*, 1 OCAHO no. 278, 1806, 1809 (1990) (finding grandfather status forfeited).

Regulations provide that an employer will not be deemed to have hired an individual for employment if the individual is continuing in his or her employment despite an interruption, and has a reasonable expectation of employment at all times. 8 C.F.R. § 274a.2(b)(1)(viii). Under such circumstances the employer is not obligated to complete a new I-9 or reverify the individual's eligibility, and will not have violated 8 U.S.C. § 1324a(b) by failing to do so. An employer claiming that an individual is continuing in employment bears the burden to show both that the individual expected to resume employment at all times and that the individual's expectation is reasonable. 8 C.F.R. § 274a.2(b)(1)(viii)(B). Whether an individual's expectation is reasonable is determined on a case-by-case basis taking into consideration several factors. *See United States v. Ketchikan Drywall Servs., Inc.*, 10 OCAHO no. 1139, 12 (2011). These may include the employer's past history of recalling absent employees (which suggests that the individual in question will resume employment within a reasonable time), the employer's financial condition (which may show that the employer is able to have the individual resume employment within a reasonable time), and any communication between employer, its supervisors, and the individual (which may show how likely it is that the individual can expect to resume employment within a reasonable time). 8 C.F.R. § 274a.2(b)(1)(viii)(B)(1)-(7); *id.*

D. Assessment of Penalties

Civil money penalties are assessed for paperwork violations according to the parameters set forth in 8 C.F.R. § 274a.10(b)(2): the minimum penalty for each individual with respect to whom the violation occurred after September 29, 1999, is $110, and the maximum penalty is $1100. In assessing an appropriate penalty, the following factors must be considered: 1) the size of the business of the employer, 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 previous violations. 8 U.S.C. § 1324a(e)(5). The statute neither requires that equal weight be given to each factor, nor rules out consideration of additional factors. *See United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000).

IV. THE MERITS OF ANODIZING'S DEFENSES

A. The Company's Motion

Because Anodizing's motion is predicated upon affirmative defenses as to which it has the burden of proof, the company's motion is considered first. The company states initially that because two employees, Amir Afshar and Edward P. Andrews, were hired prior to the effective date of IRCA, they do not come within the terms of the statute and the allegations relating to them should be dismissed. Second, the company contends that the violations alleged as to all twenty-six employees named in the complaint are not substantive and that it is entitled to a defense of good faith pursuant to 8 U.S.C § 1324a(a)(3)[3] as well as pursuant to 8 U.S.C § 1324a(b)(6). Anodizing contends that,

> many of the violations alleged by Complainant relate to the failure of employees to provide the date on the I-9 forms . . . . The employees signed the form but forgot to provide the date . . . . This is the type of technical error for which the good faith defenses of the applicable code sections were meant to apply.

Anodizing argues that no substantive violations are alleged, and that because the company provided timely responses to ICE's requests and did not engage in a pattern of violations, neither

[3] Section 1324a(a)(3) was not actually pleaded in the answer. The defense in that section is available only with respect to a knowing hire violation; it has no relevance or application to the paperwork violations presented in this case. While the answer did plead a defense pursuant to § 1324a(b)(3)(B), that section is not addressed in Anodizing's brief. That section sets out the I-9 retention requirements and it too has no apparent relevance or application to the violations alleged in this case.

of the exceptions set out in §1324a(b)(6)(B) and (C) apply to it.

The accompanying declaration of Edward P. Andrews states that Andrews first became involved with Anodizing when he acquired a five percent stock ownership in the company, and that he began working full-time for the company in 1981. Andrews says he took a leave of absence in 2002 but returned to his position at Anodizing in 2006. He states that when he completed his I-9 form, he wrote that his employment began on April 3, 2006, "when in reality that was [his] return date and not the initial hiring date." Andrews states that during his absence he maintained a reasonable expectation in his continuing employment with Anodizing at all times because he was a part-owner of the company. The declaration of Amir Afshar states that Afshar is a shareholder of Anodizing and began working for the company as an operations manager in 1985, "and continue[s] to do work, on and off until the present time." Afshar says he became a shareholder of Anodizing in 1993 and that when he completed his I-9 form he "must have been confused" about when he became a shareholder and when he began his employment.

The Andrews declaration asserts further that although Anodizing complied promptly with all of ICE's requests the company made some technical errors in completing the forms. It says that for Cynthia Piazza, Philamie B. Martinez, Claudine Ha Le, Stephen Golling, Gilberto Luna Fuentes, Luis A. Flores, Raul Estrada, Amir Afshar, Cesar Salamanca, Dora Vargas de Salamanca, and Socorro Vargas, the only error on the face of the I-9 is that the form was not dated when the employee signed it, and that for the other employees Andrews is unaware of any violations on the face of the forms. The Andrews declaration says further that the eligibility verification for these employees was initially done "through the IRS (sic) website," but the company was subsequently informed that ICE prefers it to be done through e-verify. Andrews avers that "the actual eligibility verification for all listed employees was done using the IRS (sic) website on or near the actual hire date as indicated on the I-9 form," and the date on the form reflects only when the I-9 was generated, not when the verification took place. The verification just wasn't recorded correctly.

Finally, Anodizing suggests that because it is a small business with twenty-six employees and $2 million in revenue in 2010, reduction of the penalties is appropriate. The company says it acted in good faith, and that its errors were procedural or technical, not substantive, and should not be considered "serious." The company says that no unauthorized workers were found and that it has no history of previous violations. Anodizing contends that no liability should be found, but says in the alternative that the penalties should be no more than the minimum provided by law. Anodizing's motion was accompanied by exhibits consisting of: R-A)[4] Memorandum of Law

[4] Both parties identified their exhibits alphabetically. In order to distinguish between them, the letter G has been used to precede the government's designations and the letter R to precede the respondent's.

(10 pp.); R-B) Notice of Inspection (2 pp.); R-C) Notice of Intent to Fine (4 pp.); R-D) the Declaration of Edward P. Andrews (2 pp.); and R-E) the Declaration of Amir Afshar.

B. Discussion and Analysis

While I take the facts alleged in the Andrews and Afshar declarations as true, as I must, I do not accept the opinions, conclusions, or characterizations contained therein, such as the suggestion in the Andrews declaration that having a five percent interest in a company is sufficient to create "a reasonable expectation in the continuation of my employment at all times." The vague assertion in the Afshar declaration, moreover, that the declarant has engaged in "on and off" work since 1985 with no specifics as to when he was actually employed, no dates for his departures and returns, no indication of whether the work was in the same or different jobs, no suggestion of the circumstances under which the interruptions took place, and no evidence of any agreements or arrangements that were made with the company itself, is simply insufficient to establish grandfathered status. Neither of the declarations indicates whether the declarant was previously retired or whether he received severance benefits or other forms of compensation. No other information about the facts and circumstances surrounding the individuals' current status is provided.

Words have meaning. Anodizing cites no objective standard under which a four-year gap in employment or intermittent on and off employment can be characterized as continuous, and the facts asserted in these declarations fail in each instance to make a sufficient showing of the continuity required to claim coverage under the grandfather clause. Regulations define the kinds of interruptions of and absences from a job that do not necessarily terminate employment, including approved leave for study; illness or disability of a family member; illness or pregnancy; maternity or paternity leave; vacation, union business, or other approved temporary leave; promotion, demotion or pay raise; temporary layoff for lack of work; strike or labor dispute; reinstatement after wrongful termination; transfer to other unit, successor, or location; or being engaged in seasonal employment. 8 C.F.R. § 274a.2(b)(1)(viii)(A)(1)-(8). No such scenario is asserted in either declaration, and no specific facts are provided in either declaration that would establish the existence of a leave of absence from the company for any such purpose. Unlike the showing made in *United States v. Ketchikan Drywall Services, Inc.* — that some of the company's employees were routinely laid off at the end of a project and recalled later when new contracts were obtained—there was no showing here of any policy or practice on the part of the company to grant leaves of absence for up to four years, or to treat intermittent employment as continuous. 10 OCAHO no. 1139 at 12-13. There was no showing that Anodizing had any history of recalling absent employees or that the former positions of these employees had not been filled by others. *See* 8 C.F.R. § 274a.2(b)(1)(viii)(B)(4). There was not even a showing of any oral or written communications between Anodizing and either of these individuals about any

period of leave.

Notwithstanding the suggestion in the Andrews declaration that his departure in 2002 and return in 2006 constituted a leave of absence, moreover, the company's own Employee Contact List, exhibit G-I, shows that Andrews' date of hire was April 3, 2006. Similarly, while Afshar's declaration says he must have written the wrong date on his I-9, Anodizing's own Employee Contact List reflects that Afshar's hire date was February 4, 1993. As observed in *United States v. Mester Manufacturing Co.*, 1 OCAHO no. 18, 53, 72 (1988), "[a]n employer cannot impeach its own system of records without presenting a persuasive explanation that its records are in error. No persuasive explanation having been offered, I accept at face value the entries on the personnel records made in the ordinary course."

Similarly, in the absence of any explanation whatsoever of why Anodizing's own Employee Contact List is in error, both the contact list and the I-9 forms for these employees will be accepted at their face value. Grandfathered status is an affirmative defense upon which the employer bears the burden of proof. *Gaspar*, 1 OCAHO no. 218 at 1473. That burden has not been met here and no affirmative defense has been established with respect to the failure to prepare timely I-9s for Edward P. Andrews and Amir Afshar.

While Anodizing is correct in pointing out that the omission of a date on an employee's I-9 form may be a technical or procedural violation, the company fails to acknowledge that the complaint in this matter did not charge Anodizing with omitting dates on otherwise compliant I-9s. The allegations made in the complaint involve failure to timely prepare I-9 forms, not the omission of dates on timely prepared forms. Thus as to the twenty-six I-9 forms in issue, this is not, as Anodizing's motion attempts to portray it, a case in which Anodizing or its employees accidently left dates off timely prepared I-9s. While the Andrews declaration asserts that the only error on the face of the I-9 forms for Cynthia Piazza, Philamie B. Martinez, Claudine Ha Le, Stephen Golling, Gilberto Luna Fuentes, Luis A. Flores, Raul Estrada, Amir Afshar, Cesar Salamanca, Dora Vargas de Salamanca, and Socorro Vargas is that the forms were not dated when the employees signed them, examination of the I-9 forms reflects that these employees, with the sole exception of Dora Vargas de Salamanca, were all hired on or before February 24, 2010, and the date of completion shown in section 2 of their I-9s is August 12, 2010, thirteen days after service of the Notice of Inspection and one day before the forms were delivered to ICE.

Although Andrews says that he is unaware of any violations on the face of the forms for the other employees, the fact that he was unable to perceive them does not mean that errors may not be discerned by others. Visual examination of the forms for these other employees reflects that Edward P. Andrews, Maria Luz Capones, Rosa Cardenas, George Dominguez, Jose Godines, Ruben C. Gomez, Rene A. Hernandez, Gabriela Linares, Gloria Maya, Sonia Salguero, and Trinidad Vargas were also hired prior to February 24, 2010 and that their I-9s were completed on

August 12, 2010. Jose Eduardo Contreras's I-9 reflects that Contreras was hired on November 3, 2005 and that the form was not prepared until sometime after August 7, 2009; Anodizing's employee contact list shows that Fernando Espanta was hired on October 31, 2005, but section 1 of his I-9 is dated October 20, 2010; Nora Golling was hired on November 28, 2007 and her I-9 was not prepared until after August 7, 2009; and Patrick Golling's I-9 reflects that Golling was hired on October 31, 2005, and that the date entered in section 1 is August 10, 2010. As ICE also points out, the I-9s for Jose Eduardo Contreras and Nora Golling reflect that it is simply impossible that Anodizing prepared the forms in a timely fashion because these employees were hired on November 3, 2005 and November 28, 2007, respectively, and the version of the form Anodizing used to prepare their I-9s is the 2009 revision — a version that did not exist at the time Contreras and Golling were hired. In all, Anodizing's delays in preparing I-9s ranged from a matter of weeks to twenty-two years. Nothing in the Virtue Memorandum suggests that § 1324a(b)(6) was intended to provide a safe harbor for such delays.

Because the violations alleged are not technical or procedural, they are not susceptible to an affirmative defense pursuant to 8 U.S.C. § 1324a(b)(6). Anodizing thus has not established any affirmative defense to liability in this matter. The statutory penalty factors set out in 6 U.S.C. § 1324a(e)(5), raised as an affirmative defense in Anodizing's answer, must be considered before setting any penalty, but they do not provide an affirmative defense to liability; they will be considered in connection with the government's motion. Anodizing's motion for summary decision is denied.

V. THE GOVERNMENT'S MOTION CONSIDERED

A. ICE's Motion

ICE's motion asserts that visual inspection of the company's I-9s reflects that they were not timely completed. The government points out that the twenty-six employees named in the complaint had hire dates ranging from October 10, 1988 to July 26, 2010, and that the twenty-one I-9s that actually did have a completion date entered in section 2 reflect a date of August 12, 2010, thirteen days after service of the Notice of Inspection and one day before the forms were delivered to ICE. The government says further that the other I-9s show discrepancies ranging from a few weeks to about five years between the dates of hire and the dates of completion of the forms for Jose Eduardo Contreras (hired November 3, 2005 and I-9 prepared sometime after August 7, 2009); Fernando Espanta (hired October 31, 2005 and section 1 of form dated October 20, 2010); Nora Golling (hired November 28, 2007 and form prepared after August 7, 2009); Patrick Golling (hired October 31, 2005 and section 1 dated August 10, 2010); and Dora Vargas de Salamanca (hired July 26, 2010 and I-9 prepared August 12, 2010). ICE also notes the impossibility that the forms for Jose Eduardo Contreras and Nora Golling

were prepared on November 3, 2005 and November 28, 2007 as they purport to have been, because the version of the form on which they were prepared did not even exist at the time these employees were hired.

ICE points to other substantive violations in Anodizing's I-9s as well, and asserts that visual examination of Nora Golling's I-9 reflects that she failed to sign the section 1 attestation, and that Anodizing thus failed to ensure that she properly completed section 1. The section 2 attestations for Jose Eduardo Contreras, Fernando Espanta, Patrick Golling, and Dora Vargas de Salamanca are not signed by any company representative, thus Anodizing failed to properly complete section 2 for these employees. ICE notes in addition that the I-9s for Amir Afshar, Patrick Golling, and Steven Golling all lacked information pertaining to a List A, B, or C document necessary for the verification process.

ICE says that because it demonstrated the violations unequivocally, there is no genuine issue of material fact as to liability and it is therefore entitled to summary decision for twenty-six violations. The government's motion also addresses the statutory penalty factors, observing first that there is no genuine issue as to Anodizing being a small employer in terms of its annual sales and workforce size. ICE says that it treated the good faith factor neutrally because there was no evidence of culpable conduct sufficient to establish bad faith. ICE urges, however, that the penalties be aggravated based on the seriousness of all the violations, and also on the presence of an unauthorized alien in the workforce because database searches revealed that one employee, Jose Eduardo Contreras, was unauthorized to work. Finally, the government says the lack of history of previous violations should be treated neutrally. Although the government's *Guide to Administrative Form I-9 Inspections and Civil Monetary Penalties* is included as an exhibit, ICE's motion does not explain its penalty calculations. Since ICE is seeking $25,525.50 in civil money penalties for twenty-six violations, it appears that the penalty requested for each violation is $981.75.

The government motion's was accompanied by exhibits consisting of: G-A) Memorandum of Law (14 pp.); G-B) Notice of Inspection (2 pp.); G-C) Notice of Intent to Fine (4 pp.); G-D) Request for Hearing (2 pp.); G-E) Business Entity Detail; G-F) Employment Verification Forms (Forms I-9) and Attachments (54 pp.); G-G) Notice of Discrepancies and Employee Discrepancy Notice, January 21, 2011 (5 pp.); G-H) Business Entity Questionnaire Signed by Owner Eugene Golling; G-I) Employee Contact List Signed by Owner Eugene Golling; G-J) Guide to Administrative Form I-9 Inspections and Civil Monetary Penalties, November 25, 2008 (49 pp.); G-K) California Employment Development Department, Wage and Withholding Report, July 31, 2010 (4 pp.); G-L) Cortera, Company Profile for Anodizing Industries, Inc., December 6, 2012 (2 pp.); G-M) Manta, Company Profile for Anodizing Industries, Inc., March 1, 2013 (3 pp.); G-N) CBP Form 6051R, Receipt for Property, August 13, 2010 (2 pp.); and G-O) Certificate of Service.

B. Anodizing's Response

Anodizing's response to the government's motion asserts first that Amir and Andrews were hired prior to November 6, 1986 so IRCA does not apply to them and they should not be included in the calculation of penalties. Alternatively, the company suggests that there is a genuine issue of material fact with respect to their grandfathered status. Second, Anodizing says that it was given ten days to correct all twenty-six violations, which it characterizes as technical or procedural. The company asserts that it timely verified the employment eligibility of each employee using the IRS website, and that the dates on the I-9 forms "reflect only the date the I-9 form was generated." Anodizing says that although Nora Golling did not sign her I-9 form, there was no question as to her authorization because she is the boss's wife. Similarly, the company says its omission of documents on the I-9s for Patrick and Steven Golling is inconsequential because these two individuals are the boss's sons and their verification was "less formal." As to the four employees for whom Anodizing failed to sign the section 2 attestation, Anodizing says that it "did not have intent to avoid liability for perjury" and that its lack of attestation for these four employees was merely a "clerical oversight."

Finally, the company says the fines should be reduced because the company is small, it acted in good faith because it made every effort to remain knowledgeable of the law, and it had no unauthorized workers or history of previous violations. Anodizing argues that ICE has not shown Contreras to be unauthorized for employment because the government's own exhibit G, the Notice of Discrepancies and Employee Discrepancy Notice, expressly stated that the notices did not mean the individual was found to be unauthorized. Anodizing's response was accompanied by exhibits consisting of: R-A) Memorandum of Law (11 pp.); R-B) Notice of Inspection (2 pp.); R-C) Notice of Intent to Fine (4 pp.); R-D) Declaration of Edward P. Andrews (3 pp.); and R-E) Declaration of Amir Afshar.

C. Discussion and Analysis

Visual examination of Anodizing's I-9 forms confirms, with one exception, the accuracy of the government's contention that the timeliness violations are apparent on the face of the forms. Each form reflects its completion more than three days after the employee was hired. The exception is the I-9 form for Dora Vargas de Salamanca. ICE asserts that this employee was hired on July 26, 2010 and her I-9 was not prepared until August 12, 2010, but there is, in fact, no date of completion in section 2 of the form. What the form does show, however, is that the section 2 attestation is not only undated, it is also unsigned, a substantive violation.

Twenty-one of the I-9s[5] Anodizing presented show that they were prepared on August 12, 2010. Others reflect that they were untimely completed and that two were completed using a version of the form that was not even in existence until well after the employees were hired. The company is seeking here to blur the distinction between the inadvertent omission of a date, or a delay in entering a date on an existing form that was actually prepared at the appropriate time, and a failure to prepare the form at the time of hire, a substantive violation. That an inadvertent failure to complete certain specific entries in a timely manner may be technical or procedural does not operate to extinguish the duty to prepare the I-9 in the first instance. Waiting to prepare an I-9 for up to twenty-two years after an employee is hired is not a technical or procedural violation. Nor does this delay demonstrate that Anodizing "made every effort to remain knowledgeable of the law," as it contends, or reflect a good faith attempt to comply with the recordkeeping requirements.

Even assuming for purposes of this motion that Anodizing was able to verify the employment eligibility of its employees using the IRS[6] website as the Andrews declaration asserts, this would not establish that the company prepared I-9 forms at the time the employees were hired, as it is required by law to do. The company implicitly acknowledges that it did not complete the forms promptly but seeks to trivialize the violations by insisting that preparing the I-9 paperwork is merely a technicality. It is not; timely and proper completion of I-9 forms is precisely what the law and regulations require: the form must be completed for each new employee within three business days of the individual's commencement of employment, 8 C.F.R. § 274a.2(b)(1)(ii), and each failure to properly prepare, retain, or produce the form upon request constitutes a separate violation, 8 C.F.R. § 274a.10(b)(2). The employer is responsible for ensuring that the employee properly completes section 1 on the date of hire, 8 C.F.R. § 274a.2(b)(1)(i)(A), as well as for completing section 2 within three business days, § 274a.2(b)(1)(ii)(B). This was not done, and

[5] Amir Afshar, Edward P. Andrews, Maria Luz Capones, Rosa Cardenas, George Dominguez, Raul Estrada, Luis A. Flores, Gilberto Luna Fuentes, Jose Godines, Stephen Golling, Ruben C. Gomez, Rene A. Hernandez, Claudine Ha Le, Gabriela Linares, Philamie B. Martinez, Gloria Maya, Cynthia Piazza, Cesar Salamanca, Sonia C. Salguero, Socorro Vargas, and Trinidad Vargas.

[6] No specific facts were provided to elaborate on the curious suggestion that the Internal Revenue Service has the capacity or willingness to perform this function, and ICE did not address the point. The company might be understood to have meant to refer to the Immigration and Naturalization Service (INS) but for the fact that the INS was abolished by the Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135 (Nov. 25, 2002), which transferred its functions to the Department of Homeland Security as of March 1, 2003. Since at least 2003, if not before, it has not been possible to verify an individual's employment eligibility at an INS website.

Anodizing is liable for twenty-five timeliness violations as well as a violation for failure to properly complete section 2 of Dora Vargas de Salamanca's I-9.

VI. PENALTY ASSESSMENT

Although Anodizing insists that it committed no substantive violations and that any errors it made were not serious, OCAHO case law holds to the contrary. Failure to prepare an I-9 in a timely manner is a serious violation. *See, e.g.*, *Fortune E. Fashion*, 7 OCAHO no. 992 at 1080-81. Anodizing is correct, however, in contending that the evidence is insufficient to demonstrate that Jose Eduardo Contreras was unauthorized to work. The Notice of Discrepancies (exhibit G-G), to which the government cites in support of its allegation, expressly states that although the individual's eligibility had not been verified, "[t]his letter does not mean that ICE has determined that this employee is not authorized to work." The Employee Discrepancy Notice similarly advises the employee that "this does *not* mean that the information you provided was wrong or that you are not authorized to work."

Our case law makes clear that the government has the burden of proof with respect to liability and the penalty, *United States v. Am. Terrazzo Corp*., 6 OCAHO no. 877, 576, 581 (1996) (citing *United States v. Skydive Acad. of Haw. Corp*., 6 OCAHO no. 848, 235, 239-40 (1996)), and that the government must prove the existence of any aggravating factor by a preponderance of the evidence. *See United States v. Carter*, 7 OCAHO no. 931, 121, 159 (1997). While the notices do suggest that this individual's documents are suspect, they are insufficient, without more, to show by a preponderance of the evidence that Jose Eduardo Contreras was an unauthorized alien. Any aggravation of the penalty based on this assertion is unsupported in the record.

Most of the statutory factors are favorable to Anodizing in that the company is a small business with no unauthorized workers or history of previous violations. The government did not challenge the company's good faith and the principal factor weighing against the company is the seriousness of the violations, particularly in light of the lengthy delays in preparing some of the forms. While Congress mandated only five specific factors that must be considered in setting penalties, 8 U.S.C. § 1234a(e)(5), it did not rule out considering other factors, and among the additional factors I have considered in this case is the general public policy of leniency to 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).

The permissible penalties for the twenty-six violations shown in this case range from $2860 to $28,600, and the government seeks a total of $25,525.50. The penalties in this case will be adjusted as a matter of discretion to an amount closer to the upper mid-range, and will be assessed at the rate of $600 for each violation, for a total penalty of $15,600.

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Anodizing Industries, Inc. is a California corporation engaged in the business of metal-finishing and is located at 5222 Alhambra Ave., Los Angeles, California, 90032.

2. The Department of Homeland Security, Immigration and Customs Enforcement served Anodizing Industries, Inc. with a Notice of Inspection on July 30, 2010.

3. The Department of Homeland Security, Immigration and Customs Enforcement served Anodizing Industries, Inc. with both a Notice of Discrepancies and an Employee Discrepancy Notice on January 21, 2011.

4. The Department of Homeland Security, Immigration and Customs Enforcement issued Anodizing Industries, Inc. a Notice of Intent to Fine on June 30, 2011.

5. Anodizing Industries, Inc. filed a request for hearing before the Office of the Chief Administrative Hearing Officer on July 7, 2011.

6. The Department of Homeland Security, Immigration and Customs Enforcement filed a complaint with this office on February 9, 2012.

7. Anodizing Industries, Inc., hired Amir Afshar, Edward P. Andrews, Maria Luz Capones, Rosa Cardenas, Jose Eduardo Contreras, George Dominguez, Fernando Espanta, Raul Estrada, Luis A. Flores, Gilberto Luna Fuentes, Jose Godines, Nora Golling, Patrick Golling, Stephen Golling, Ruben C. Gomez, Rene A. Hernandez, Claudine Ha Le, Gabriela Linares, Philamie B. Martinez, Gloria Maya, Cynthia Piazza, Cesar Salamanca, Sonia C. Salguero, Socorro Vargas, and Trinidad Vargas, and failed to timely prepare I-9 forms for them.

8. Anodizing Industries, Inc. hired Dora Vargas de Salamanca and failed to properly complete section 2 of her Form I-9.

B. Conclusions of Law

1. Anodizing Industries, Inc. is an entity within the meaning of 8 U.S.C. § 1324a(a)(1) (2006).

2. All conditions precedent to the institution of this proceeding have been satisfied.

3. An Employment Eligibility Verification Form (Form I-9) is timely prepared when section 1 of the I-9 form is completed at an employee's time of hire, and section 2 is completed within three business days of an employee's hire date. 8 C.F.R. § 274a.2(b)(1)(i)(A), (ii)(B).

4. The good faith defense provided by 8 U.S.C. §1324a(b)(6) has no application to substantive violations.

5. Failure to prepare an I-9 in a timely manner is a serious violation. *See United States v. Fortune E. Fashion, Inc.*, 7 OCAHO no. 992, 1075, 1080-81 (1998).

6. When an employee takes a break in employment and subsequently returns to work, an employer is responsible for filling out a new I-9, updating the form by including the rehire date, or re-verifying the employee *unless* the individual was continuing in his or her employment. *See* 8 C.F.R. § 274a.2(b)(1)(viii), (c)(1)(i) – (ii).

7. OCAHO case law takes a common sense approach to whether an employee's expectation of continued employment is reasonable. *See United States v. Ketchikan Drywall Servs., Inc.*, 10 OCAHO no. 1139, 13 (2011).

8. Anodizing Industries, Inc. is liable for twenty-six violations of 8 U.S.C. § 1324a(a)(1)(B).

9. In assessing the appropriate amounts of civil money penalties for violations of 8 U.S.C. § 1324a(b), due consideration must be given to the following factors: 1) the size of the business of the employer, 2) the good faith of the employer, 3) the seriousness of the violation, 4) whether or not the individual was an unauthorized alien, and 5) the history of previous violations. 8 U.S.C. § 1324a(e)(5) (2006).

10. The statute neither requires that equal weight be given to each factor, nor does it rule out consideration of additional factors. *See United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000).

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

ORDER

Anodizing is liable for twenty-six separate violations of 8 U.S.C. § 1324a(a)(1)(B) and is ordered to pay a civil money penalty of $15,600.

SO ORDERED.

Dated and entered this 24th day of May, 2013.

_____
Ellen K. Thomas
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.