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

December 30, 2014

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 14A00002
DR. ROBERT SCHAUS, D.D.S., Respondent.	)	

Appearances:

Marvin Muller III
For complainant

Michael Berger
For respondent

FINAL DECISION AND ORDER

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 (2012). The United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government), filed a complaint alleging that Dr. Robert Schaus, D.D.S. (Schaus or the practice) violated 8 U.S.C. § 1324a(a)(1)(B) by failing to timely prepare and/or present I-9 forms for eleven employees. Schaus filed a timely answer denying the allegations and asserting ten affirmative defenses. The complaint seeks $10,030 in civil money penalties.

The parties filed their prehearing statements in which they agreed to certain stipulations that have been adopted and are set forth as the first nine findings of fact in this matter. Presently pending is the government's motion for summary decision, to which Schaus filed a response combined with the practice's own cross-motion for summary decision. Both motions are ripe for resolution.

II. BACKGROUND INFORMATION

Dr. Robert Schaus, D.D.S. is a dental practice located in Clarence, New York, where it operates as a sole proprietorship. ICE served Schaus with a Notice of Inspection (NOI) on April 23,[1] 2013 requesting, inter alia, a list of the practice's current employees and former employees terminated since January 1, 2012, together with the dates of their employment. Schaus provided a list identifying hire dates for eight current employees, Cindy Scannapieco, Mary Wacker, Danielle Primerano, Michele Schaus, Betty Lavery, Stefanie Ferraraccio Melendez, Sue Andrews, and Paula Bigelow. The practice also identified three former employees, Emma Schaus, Laura Casey, and Carol Castellana, and provided the start and end dates of their employment. Schaus presented I-9 forms for five of the current employees, Cindy Scannapieco, Mary Wacker, Danielle Primerano, Michele E. Schaus, Betty R. Lavery, and for one former employee, Emma (Rose) Schaus. The parties dispute whether these I-9 forms were prepared before or after service of the NOI.

The government served the practice with a Notice of Intent to Fine on July 29, 2013. Schaus made a timely request for hearing on August 9, 2013, and the government filed a complaint with this office on October 21, 2013. All conditions precedent to the institution of this proceeding have been satisfied.

III. LIABILITY

A. The Government's Motion

ICE says that the names of eleven individuals appear on the employee list Schaus presented in response to the NOI, but that Schaus failed to present I-9 forms upon request for five of them, Stefanie Melendez,[2] Sue Andrews,[3] Paula Bigelow, Laura Casey, and Carol Castellana.[4] Schaus

[1] The parties stipulate that the NOI was served on this date, but the NOI reflects that it was served on April 24, 2013.

[2] The complaint identifies this employee as Stefanie Ferraraccio.

subsequently presented another copy of the same employee list with its prehearing statement, but this time the list had various handwritten annotations, including one indicating that Melendez, Andrews, and Bigelow "[a]re on an as needed basis (temp help)." Additional entries for Melendez indicate "in Reserves/Army" and "has not worked here since 9/2010."

ICE points out that Schaus initially identified all the named individuals as either current employees or individuals terminated since January 1, 2012, as specified in the NOI, and that Schaus did not provide any additional evidence to contradict its initial list. ICE also asserts that the seasonal or temporary character of a person's employment does not vitiate the employer's responsibility for completing an I-9 where the employer does not actually rehire the person as a new employee when he or she returns to service. The government cites *United States v. Ketchikan Drywall Servs., Inc.*, 10 OCAHO no. 1139 (2011)[5] in support of the proposition that an employee may be "continuing in his or her employment" if temporarily laid off for lack of work or if engaging in seasonal work (citing 8 C.F.R. § 274a.2(b)(1)(viii)(A)(3),(8) (2014)).

The government says in addition that visual inspection of the six I-9 forms Schaus presented shows not only that Schaus failed to complete section 2 of the forms within three business days of the employees' respective dates of hire, but also that the practice did not even prepare these I-9s at all until after the NOI was issued. The government says that the sample I-9 form it provided to Schaus on the date of service of the NOI was surreptitiously marked by filling in the "o" appearing in the phrase "Form I-9" in the top right side of the form, and that all six of the I-9s Schaus presented contain this same marking.

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[3] The complaint uses the spelling Andrusz.

[4] Schaus' answer was accompanied by an I-9 form for this employee, but the practice did not suggest that it had presented the form to ICE in response to the NOI.

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

The government's motion was not accompanied by exhibits, but its prehearing statement included exhibits consisting of G-1) Notice of Inspection dated April 23, 2013 (4 pp.); G-2) Dr. Robert Schaus' employee list dated June 24, 2013; G-3) Dr. Robert Schaus' quarterly tax report for 2012 and 2013 (2 pp.); and G-4) I-9 forms presented by Schaus (6 pp.).

B. Schaus' Response and Cross Motion

Schaus says first that Stephanie[6] Ferraraccio Melendez should not have been included on the initial list because she was outside the scope of the NOI request. Schaus says Melendez was terminated September 20, 2010, and neither worked nor received wages at any time in 2011, 2012, or 2013. Schaus says further that to the extent the government disputes that Melendez was terminated on September 20, 2010, this assertion should be construed against the government because ICE failed to meet its burden of proof as to the employees' termination dates.

Schaus next argues that it was not obligated to present I-9s for Sue Andrews, Michele Schaus, Danielle Primerano, Mary Wacker, and Cindy Scannapieco either, because its duty to retain their I-9s had already expired by the date of the NOI. Schaus prepared a chart to illustrate how it arrived at this conclusion. The chart sets out the names of the employees, their hire dates, and their termination dates, where applicable. It also reflects columns stating the number of years Schaus contends it was required to retain the I-9 and the practice's conclusion as to when the retention period expired. The chart lists no termination dates for Sue Andrews, Michele Schaus, Danielle Primerano, Mary Wacker, or Cindy Scannapieco. Under the heading "Duty to Retain," the entries for these employees show in each instance three years, and the expiration date for each of these current employees is a date three years after the individual's date of hire.

With respect to violations on the I-9 forms for Cindy Scannapieco, Mary Wacker, Danielle Primerano, Michele Schaus, Betty Lavery, and Emma Schaus, moreover, the practice contends that the violations alleged are technical or procedural and that, pursuant to 8 U.S.C. § 1324a(b)(6), the government was obligated to give the practice a ten-day opportunity to correct the errors on these forms. Because the government did not provide this opportunity, Schaus says the allegations relating to these employees should be withdrawn. The difference between technical or procedural violations and those that are substantive is explained in a memorandum authored by Paul W. Virtue, *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 No. 16 Interpreter Releases 706 (Apr. 28, 1997). Schaus points out that the

[6] The complaint uses the spelling Stefanie. Schaus' employee list and federal tax reports use the spelling Stephanie.

Virtue Memorandum expressly identifies the failure to date section 2 of the I-9 form within three business days of the date of the individual's hire as a technical or procedural violation.

Schaus argues in addition that ICE put forth no evidence that the practice's I-9s were backdated or created after the NOI. Schaus notes that the government does not say specifically who made the surreptitious marks on the forms or provide other evidence regarding the marks. The practice argues that ICE did not even state which of the I-9s were backdated, nor did it provide evidence that the business intended to purposefully mislead the government as to when the I-9s were actually created. Schaus says in conclusion that it attempted in good faith to comply with the regulations, that it did not correct the I-9s in bad faith, and that the government failed to meet its burden of proof as to why or when Dr. Schaus signed section 2 of the I-9 forms.

Schaus' response and motion were not accompanied by exhibits, but the practice's prehearing statement included: R-1) Dr. Robert Schaus' quarterly tax report for 2011, 2012, and 2013 (19 pp.); R-2) Dr. Robert Schaus' employee list dated June 24, 2013 with notations; R-3) Notice of Inspection dated April 23, 2013 (4 pp.); R-4) Operations message released July 13, 2009 (49 pp.); R-5) U.S. Small Business Administration: Table of Small Business Size Standards (46 pp.); and R-6) 2012 individual income tax return filed jointly by Dr. Robert Schaus and Michele Schaus (40 pp.).

C. Discussion and Analysis

Two substantive affirmative defenses were asserted in Schaus' answer. The second[7] of these defenses asserts that only ten, not eleven, employees were within the scope of the audit window and that the name of Stephanie Ferraraccio Melendez should be removed from the list because Schaus' duty to retain an I-9 for her had already expired by the time the NOI was served. Schaus' motion asserts that Melendez had not worked at the practice since September 2010. The chart indicates she was hired on April 19, 2010 and that her termination date was September 20, 2010. Handwritten notations on the employee list indicate she was in the Army reserve and last worked at the practice in September 2010. Although Melendez' name appears in the practice's quarterly tax reports for 2011 and 2012, no wages at all are reported for her during this time period. Her name does not appear on the employee lists for bereavement, holiday, regular, or vacation absences, nor on the lists for bonus, holiday, regular, severance, sick, or vacation pay, and it is entirely absent as well from the quarterly tax report for 2013. If Melendez was hired on April 19, 2010 and terminated on September 20, 2010, the practice's duty to retain an I-9 form

[7] The first affirmative defense was failure to state a claim upon which relief may be granted. The defenses numbered four through nine are addressed to the penalty factors and do not constitute defenses to liability.

for her ended on the three-year anniversary date of hire, April 19, 2013,[8] four days before the NOI was issued.

Regulations define the varieties 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; 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). But no evidence is offered here to support a finding with respect to any such factual scenario, and there is no basis upon which to justify a finding like that in *Ketchikan* of intermittent or seasonal employment.

ICE's reliance on *Ketchikan* is accordingly misplaced. In *Ketchikan*, the evidence clearly demonstrated that many employees were routinely laid off at the end of a particular construction project, then recalled later when the company obtained new contracts for additional projects. 10 OCAHO no. 1139 at 12-13. No factual showing is made here to support the government's conclusion with respect to Melendez, and ICE simply points to the outcome in *Ketchikan* totally stripped of its contextual analysis.

The term "employee" means a person who provides services or labor for an employer for wages or other remuneration. 8 C.F.R. § 274a.1(f). The mere presence of an individual's name on a list, or even on an I-9 form, without a scintilla of evidence that the individual actually provided any services or labor to an employer or ever actually received any wages or other forms of remuneration from the employer during the period at issue, is insufficient to make a prima facie showing that the person was an employee. *See United States v. Speedy Gonzalez Constr., Inc.*, 11 OCAHO no. 1228, 8 (2014). The only evidence that Melendez was ever an employee is that her name appears on Schaus' list. Schaus has no need to prove an affirmative defense as to Melendez because there is no prima facie showing that she was ever actually an employee during the period considered.

With respect to its contentions about the retention period for the I-9s of the remaining employees, however, Schaus either misrepresents or fundamentally misunderstands both the statute and the regulation governing the duty to retain I-9 forms. Neither offers the employer a choice; both clearly state that an employer is required to retain a former employee's I-9 for three years after the employee is hired, or one year after the employee is terminated, *whichever is later*. 8 U.S.C. § 1324a(b)(3)(B) (emphasis added); 8 C.F.R. §274a.2(b)(2)(i)(A) (emphasis added). Schaus

[8] Schaus' chart miscalculates this date as September 20, 2011, one year after her alleged termination.

simply chooses to ignore the qualifying condition, but until an individual has both a hire date and a termination date, the retention period continues to run. That is to say, where an employee has no termination date and remains a current employee, the employer is still required to retain an I-9 form for that individual for the duration of his or her employment and for a set period thereafter. The retention period for an I-9 form comes into play only after an individual actually becomes a former employee. 8 C.F.R. §274a.2(b)(2)(i)(A); *cf. United States v. H & H Saguaro Specialists*, 10 OCAHO no. 1147, 2 (2012). Schaus' employee list says Sue Andrews, Michele Schaus, Danielle Primerano, Mary Wacker, and Cindy Scannapieco are current employees, and the practice's chart contains no termination dates for any of them. Schaus' contention that the I-9s for these current employees are outside the retention period is simply wrong as a matter of law, and Schaus was obligated to prepare and retain their I-9s.

Schaus asserts that the alleged violations involving the I-9s for Cindy Scannapieco, Mary Wacker, Danielle Primerano, Betty Lavery, and Emma Schaus[9] involve only technical and procedural violations, and that ICE's allegations involving them should be dismissed because the government failed to provide a ten-day opportunity for the practice to correct the errors. Schaus says that the only violations on these forms consist of the omission of a date on the section 2 attestations for Cindy Scannapieco and Mary Wacker, or the entry of an untimely date on the section 2 attestation for Danielle Primerano, Betty Lavery, and Emma Schaus.

The omission of a date on a timely prepared I-9 form is a technical or procedural violation. Failure to promptly prepare the I-9 form itself is not. Schaus seeks to blur this distinction. The good faith defense provided by 8 U.S.C. § 1324a(b)(6) is available only for technical or procedural violations and has no application to substantive violations. The complaint in this matter did not charge Schaus with omitting dates on otherwise compliant I-9s. The allegations in the complaint involve failure to prepare the I-9 forms at the time of hire, not the omission or late entry of certain dates on timely prepared forms. Thus this is not, as Schaus attempts to portray it, a case in which the practice or its employees inadvertently omitted or belatedly entered dates on timely prepared I-9s.

OCAHO case law has long held that failure to timely prepare an I-9 is a substantive violation. *See, e.g., United States v. Platinum Builders of Cent. Fl., Inc.*, 10 OCAHO no. 1199, 8 (2013); *United States v. New China Buffet Rest.*, 10 OCAHO no. 1132, 4 (2010). 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, app. A; *see also United States v. DJ Drywall, Inc.*, 10 OCAHO no. 1136, 3-4

[9] The third affirmative defense in Schaus' answer is addressed to the I-9s for Cindy Scannapieco, Mary Wacker, Danielle Primerano, and Betty Lavery. The practice's motion includes Emma Schaus in this group as well, but Schaus is not named in the affirmative defense.

(2010). As explained in *United States v. LFW Dairy Corp.*, 10 OCAHO no. 1129, 4 (2009), the defense provided in § 1324a(b)(6) only excuses an employer,

> 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); *see United States v. Occupational Res. Mgmt. Inc.*, 10 OCAHO no. 1166, 14-15 (2013).

Failure to timely prepare an I-9 form for a new employee accordingly cannot be characterized as a technical or procedural violation, and such a failure is not cured or "corrected" by a subsequent belated or partial completion of the form. *New China*, 10 OCAHO no. 1132 at 4-5. While the omission of a particular date on a form that is actually timely prepared is a technical or procedural violation, that fact may not be construed to allow an employer to avoid timely preparing I-9s or to wait for an NOI before preparing them.

While Schaus asserts that there is no evidence that its I-9s were backdated or prepared after the NOI, visual inspection of the practice's I-9s belies this assertion. Not only do all the I-9s Schaus presented contain the surreptitious mark placed on the form by the government, all were prepared using the version of the I-9 form that was issued on August 7, 2009, although some of the hire dates go back as far as 1996, long before the 2009 version of the form even came into existence. The hire date entered on the form for Cindy Scannapieco, for example, is September 4, 1998. The 2009 version of the form could not have been completed in 1998. While the undated section 2 reflects that the List A document examined for Scannapieco was a passport expiring on December 13, 2017, that passport obviously could not have been issued prior to December 14,

2007 and obviously was not examined by anyone at the practice in 1998.[10] Similarly, the I-9 form for Mary Wacker reflects a hire date of May 27, 1999, but the date of expiration entered for the passport that was purportedly examined is June 18, 2018. Wacker's passport could not have been examined by anyone prior to June 19, 2008, and the 2009 version of the form could not have been completed in 1999. No attestation dates appear in either section 1 or section 2 of these I-9s.

The I-9 for Danielle Primerano contains no section 1 attestation date. The hire date is shown as November 15, 2007, and the section 2 attestation date is January 3, 2012. The form is clearly untimely. For Michele Schaus, the hire date is shown as March 11, 1996. There is no attestation date in section 1, but section 2 also purports to be signed on January 3, 2012. The I-9 for Betty Lavery shows a hire date of March 26, 2013 and a section 2 attestation date of April 24, 2013, the day after the NOI. The form for Emma Schaus shows a hire date of May 25, 2012 and a section 2 attestation date of April 25, 2013, two days after the NOI. These forms were also not prepared at the time of hire.

Schaus' own exhibits, moreover, corroborate the other evidence that these I-9s were not completed at the time of hire. A Business Entity Questionnaire that Schaus completed at the time of the ICE inspection asked the preprinted question, "Does your business entity have any internal guidelines or policies with respect to compliance with employment eligibility verification process?" Schaus' handwritten answer was, "No." In response to the preprinted question, "What is your business standard operating procedure when requesting identification and employment eligibility documents from new/potential new hires?" Schaus' handwritten answer was, "N/A I don't ask." Dr. Schaus does not explain how he was able to complete I-9 forms for new employees if he did not ask the employees for their identification and employment eligibility documents.

I conclude that Schaus not only failed to prepare the I-9s of Michele Schaus, Cindy Scannapieco, Mary Wacker, Danielle Primerano, Emma Schaus, and Betty Lavery at the time of their respective dates of hire, it did not prepare them until after service of the NOI. These violations are substantive, contrary to Schaus' assertion that they are technical or procedural. Timely completion of the I-9 is crucial to the employment verification process because the longer an employer delays in completing an individual's I-9, the longer that individual could be working without authorization. *See United States v. Siam Thai Sushi Rest.*, 10 OCAHO no. 1174, 4 (2013); *see also United States v. Fortune E. Fashion, Inc.*, 7 OCAHO no. 992, 1075, 1080-81 (1998) (finding that failure to prepare an I-9 within three business days is serious, but

[10] U.S. passports are generally valid only for a period of ten years. *See U.S. Passports & Int'l Travel: Frequently Asked Questions*, U.S. Department of State, http://travel.state.gov/content/passports/english/passports/FAQs.html.

distinguishing between delays of a few days and those of a few months). ICE met its burden of proving that Schaus failed to timely prepare I-9s for these six employees. The government is thus entitled to summary decision as to these violations.

The record also reflects that Schaus is liable for failing to present I-9s for four employees: Carol Castellana, Laura Casey, Sue Andrusz, and Paula Bigelow. Sue Andrews and Paula Bigelow were current employees, and Laura Casey and Carol Castellana were former employees whose termination dates are within the retention period.[11] Schaus does not contend, and the record does not reflect, that I-9s for these individuals were presented in response to the NOI. The government is entitled to summary decision in its favor as to these violations.

IV. PENALTIES

A. Standards Applied

Civil money penalties are assessed for paperwork violations according to the parameters set forth at 8 C.F.R. § 274a.10(b)(2): the minimum penalty for each individual with respect to whom a violation occurred before September 29, 1999 is $100 and the maximum is $1000. The minimum penalty for each individual with respect to whom a violation occurred after September 29, 1999 is $110, and the maximum is $1100. Because the government has the burden of proof with respect to the penalty, *United States v. March Construction, Inc.*, 10 OCAHO no. 1158, 4 (2012), it must prove the existence of any aggravating factor by a preponderance of the evidence, *United States v. Carter*, 7 OCAHO no. 931, 121, 159 (1997).

In assessing an appropriate penalty, the following factors must be considered: 1) the size of the employer's business, 2) the employer's good faith, 3) the seriousness of the violations, 4) whether the individual was an unauthorized alien, and 5) the employer's 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).

B. The Government's Motion

ICE says it followed internal agency guidance to set a baseline penalty of $935 for each of the employees hired before September 29, 1999 and $850 for each of the employees hired after

[11] Laura Casey was hired on September 11, 2012 and terminated on February 20, 2013, and Schaus was therefore required to retain her I-9 until September 11, 2015. Carol Castellana was hired on March 3, 2003 and terminated on May 16, 2012, and Schaus was therefore required to retain her I-9 until May 16, 2013.

September 29, 1999. The government says it then mitigated the penalty by five percent based on the small size of Schaus' business and by another five percent based on the absence of unauthorized workers. ICE aggravated the penalty by five percent based on the business's alleged bad faith in backdating the I-9s it presented and by another five percent for the seriousness of the violations. The government treated the practice's lack of any history of previous violations as a neutral factor.

The government points out that the practice had a profit in excess of $150,000 in 2012 and that the proposed penalty of $10,030 is less than seven percent of this amount. It says further that no reduction in the penalty should be considered unless the shareholders submit their tax returns for review.[12]

C. Schaus' Response

Schaus argues in response that the government's explanation of how it calculated the penalties contradicts its own internal guidelines and is arbitrary and capricious, and that the government's calculation errors warrant a de novo determination of the penalty. Schaus also argues that the government's proposed penalty is neither proportionate nor reasonable because ICE does not distinguish in any way between the seriousness of failing to prepare I-9s on time and failing to present the forms at all.

Schaus says that failing to prepare I-9s is more serious than failing to properly complete both parts of the form, and that none of the violations is sufficiently egregious to warrant a baseline penalty so close to the maximum. Schaus also argues that the penalty should have been further mitigated based on the practice's lack of previous violations and by another five percent because the practice has only five active, fulltime employees and Schaus was not aware of all the I-9 form requirements.

The practice says further that the government failed to meet its burden to show that Schaus acted in bad faith, and that ICE's allegation of backdating the forms is not alleged in the complaint or supported by the evidence. The government's statement that a "few Forms I-9s" were backdated is also imprecise and does not indicate which forms were actually backdated. Schaus says the penalties should not be aggravated across the board if only a few forms were backdated, and that the general public policy of leniency toward small entities as set out in the Small Business Regulatory Enforcement Fairness Act of 1996 favors leniency in this case.

[12] Dr. and Mrs. Schaus' joint return for 2012 appears in the record as exhibit R-6.

D. Discussion and Analysis

The parties agree that Schaus is a small employer with no history of previous violations and that the practice had no unauthorized workers. They disagree, however, as to the seriousness of the violations and whether Schaus acted in good faith. All the violations at issue are serious. Failure to present an I-9 at all is one of the most serious violations. *See United States v. Symmetric Solutions, Inc.*, 10 OCAHO no. 1209, 11 (2014) (citing *United States v. Reyes*, 4 OCAHO no. 592, 1, 10 (1994)). Although somewhat less serious, failure to prepare a timely I-9 is also a very serious violation because the longer the employer delays in preparing an individual's I-9, the higher the chance of unauthorized employment. *See United States v. Two for Seven, L.L.C.*, 10 OCAHO no. 1208, 9, 13 (2014) (citing *United States v. Anodizing Indus., Inc.*, 10 OCAHO no. 1184, 4 (2013)); *see also United States v. Siam Thai Sushi Rest.*, 10 OCAHO no. 1174 at 4. Many of the delays in this case were long. While serious, however, they are not so egregious as to call for a maximum penalty.

Bad faith requires a showing of culpable conduct that goes beyond the employer's failure to comply with the verification requirements. *United States v. Metropolitan Warehouse, Inc.*, 10 OCAHO no. 1207, 6 (2013). Despite the practice's equivocation and artful omissions on some of the I-9s, Schaus has never actually claimed that the I-9s were timely prepared; it simply argues that the government failed to prove they weren't. While a few I-9s are backdated, there is no evidence as to what, if anything, the government actually told Schaus at the time of the NOI about backdating. *Compare United States v. Kobe Sapporo Japanese, Inc.*, 10 OCAHO no. 1204, 5 (2013) (evidence showed that ICE forensic auditor specifically instructed restaurant manager not to backdate forms), *with Metropolitan*, 10 OCAHO no. 1207 at 6-7 (blank I-9s and Handbook for Employers given to regular worker in manager's absence, with no evidence that any instructions at all were given to employee). While the evidence here certainly does not support a finding of good faith, it is sufficiently ambiguous not to require a finding of bad faith.

The parties spend an inordinate amount of time discussing whether particular violations occurred before or after September 29, 1999. To the extent the government's case is predicated on the failure to complete I-9s for individuals within three days of a date of hire, such violations are frozen in time when the deadline passes for completing the relevant section, *see United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1061, 11-12 (2000), and would long since be barred by limitations pursuant to 28 U.S.C. § 2462. Because the duty to prepare an I-9 does not terminate on the third day, however, the failure to prepare an I-9 for an employee continues until such time as the form is actually completed, and thereafter until the retention period expires. This case rests upon the continuing failure to prepare I-9s, and the penalties assessed are for contemporaneous violations; no penalties are predicated on stale violations that were already complete before September 29, 1999.

Permissible penalties for the violations in this case range from $1100 to $11,000. Considering the record as a whole and the statutory factors in particular, *see United States v. Century Hotels Corp.*, 11 OCAHO no. 1218, 8 (2014), the penalties imposed will be adjusted to an amount closer to the midrange of permissible penalties and more in line with those imposed on other small family businesses with similar violations. For each of the six violations involving failure to timely prepare I-9s, the penalty will be $500. For each of the four violations involving failure to present I-9s, the penalty will be $600. The total penalty is $5400.

V. STIPULATIONS AND ADDITIONAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Stipulations

1. Dr. Robert Schaus, D.D.S. is a legal entity within the meaning of 8 U.S.C. § 1324a(a)(1) that is authorized to do business in the State of New York.

2. A Notice of Inspection (NOI) was served on the respondent on April 23, 2013.

3. The respondent was requested to present all documentation to DHS no later than May 3, 2013.

4. The NIF was served on the respondent on July 29, 2013 alleging eleven violations of INA § 274A(a)(1)(B) and seeking a total of $10,030 in civil money penalties.

5. The respondent filed a timely request for hearing on August 9, 2013.

6. The respondent hired all employees listed in the complaint after November 6, 1986.

7. The respondent should be considered to be a small business for the purpose of calculating the penalties imposed.

8. The respondent was not found to be employing unauthorized aliens.

9. The respondent has no history of previous violations of INA § 274A(a)(1)(B).

B. Additional Findings of Fact

10. Dr. Robert Schaus, D.D.S. is a sole proprietorship operating as a dental practice in Clarence, New York.

11. On October 21, 2013, the Department of Homeland Security, Immigration and Customs Enforcement filed a complaint against Dr. Robert Schaus, D.D.S. with the Office of the Chief Administrative Hearing Officer.

12. Dr. Robert Schaus, D.D.S. hired Carol Castellana, Laura Casey, Sue Andrusz, and Paula Bigelow and failed to present I-9 forms for them upon request by the Department of Homeland Security, Immigration and Customs Enforcement.

13. Dr. Robert Schaus, D.D.S. hired Michele Schaus, Cindy Scannapieco, Mary Wacker, Danielle Primerano, Emma Schaus, and Betty Lavery and failed to timely prepare I-9 forms for them.

14. Dr. Robert Schaus, D.D.S.'s duty to retain Stefanie Ferraraccio Melendez' I-9 terminated prior to April 23, 2013.

C. Conclusions of Law

1. Dr. Robert Schaus, D.D.S. is liable for ten violations of 8 U.S.C. § 1324a(a)(1)(B) (2012).

2. An employer is required to retain an employee's I-9 three years after the employee is hired, or one year after the employee is terminated, whichever is later. 8 C.F.R. § 274a.2(b)(2)(i)(A) (2014).

3. Analysis of how long an employer maintains a duty to retain an I-9 form for an employee pursuant to 8 C.F.R. § 274a.2(b)(2)(i)(A) (2014) is triggered only when both the hire date and the termination date for the employee are known. *Cf. United States v. H & H Saguaro Specialists*, 10 OCAHO no. 1147, 2 (2012).

4. Employers are required to complete an I-9 form for a new employee within three business days of the individual's date of hire. 8 C.F.R. § 274a.2(b)(1)(ii)(A)-(B) (2014).

5. In assessing an appropriate penalty, the following factors must be considered: 1) the size of the employer's business, 2) the employer's good faith, 3) the seriousness of the violations, 4) whether the individual was an unauthorized alien, and 5) the employer's 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).

6. Whether a penalty is reasonable is determined based on the record as a whole and the statutory factors in particular. *See United States v. Century Hotels Corp.*, 11 OCAHO no. 1218, 8 (2014).

7. Bad faith requires a showing of culpable conduct that goes beyond the employer's failure to comply with the verification requirements. *See United States v. Metropolitan Warehouse, Inc.*, 10 OCAHO no. 1207, 6 (2013).

8. Failure to prepare an I-9 at all is one of the most serious violations. *See United States v. Symmetric Solutions, Inc.*, 10 OCAHO no. 1209, 11 (2014) (citing *United States v. Reyes*, 4 OCAHO no. 592, 1, 10 (1994)).

9. Although slightly less serious than failure to prepare an I-9 at all, failure to timely prepare an I-9 is a serious violation because the longer the employer delays in preparing an individual's I-9, the higher chance there is of unauthorized employment. *See United States v. Two for Seven, L.L.C.*, 10 OCAHO no. 1208, 9, 13 (2014) (citing *United States v. Anodizing Indus., Inc.*, 10 OCAHO no. 1184, 4 (2013)); *see also United States v. Siam Thai Sushi Rest.*, 10 OCAHO no. 1174, 4 (2013).

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

Dr. Robert Schaus, D.D.S. is liable for ten violations of 8 U.S.C. § 1324a(a)(1)(B) and is ordered to pay a total civil penalty of $5400.

SO ORDERED.

Dated and entered this 30th day of December, 2014.

_____

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.