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

February 15, 2023

UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	8 U.S.C. § 1324c Proceeding
v.	)	OCAHO Case No. 2021C00033
	)	
BRIAN DE JESUS CORRALES-HERNANDEZ	)	
Respondent.	)	

NOTIFICATION OF ADMINISTRATIVE REVIEW

This case arises under the document fraud provisions of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324c. The United States Department of Homeland Security, Immigration and Customs Enforcement (DHS or Complainant) filed a complaint against the Respondent on May 19, 2021, charging Respondent with two counts of violating 8 U.S.C. § 1324c. Count I of the complaint alleged that the Respondent violated 8 U.S.C. § 1324c(a)(2), which renders it unlawful to knowingly use, attempt to use, possess, obtain, accept, receive, or provide a forged, counterfeit, altered, or falsely made document in order to satisfy an immigration requirement or obtain an immigration benefit, by presenting a fraudulent permanent resident card on March 21, 2013, in order to obtain employment and to complete the employment authorization verification Form I-9. Count I further alleged that Respondent continued working for the employer to whom he presented the fraudulent document until December 2017. Count II of the complaint alleged that the Respondent violated 8 U.S.C. § 1324c(a)(5), which renders it unlawful to knowingly prepare, file, or assist another in filing an application for benefits under the INA, a document required by the INA, or a document submitted in connection with such application or document, with knowledge or in reckless disregard of the fact that such application or document was falsely made or does not relate to the person on whose behalf it was or is being submitted, by making false statements in an application for adjustment of status he filed in 2018.

On February 9, 2023, Administrative Law Judge (ALJ) Andrea Carroll-Tipton issued an Order on Complainant's Motion for Summary Decision ("Order")[1] finding Respondent liable for both violations, assessing a total civil penalty of $888 for the two violations and ordering the Respondent to cease and desist from further violations of 8 U.S.C. §§ 1324c(a)(2) and (5). The undersigned has reviewed the ALJ's Order and has determined that such order is appropriate for administrative review pursuant to 5 U.S.C. § 557, 8 U.S.C. § 1324c(d)(4), and 28 C.F.R. § 68.54.

[1] The Order is scheduled to be published as *United States v. Corrales-Hernandez*, 17 OCAHO no. 1454b (2023), but has not yet been published as of the date of this Notification.

Therefore, the undersigned hereby issues this Notification of Administrative Review, in accordance with 28 C.F.R. § 68.54(a)(2). The issue to be reviewed is outlined below.

After finding the Respondent liable for the two violations charged, the ALJ assessed civil money penalties for the two violations based on the adjusted penalty amounts in 28 C.F.R. § 85.5, which apply to violations that occurred after November 2, 2015. For the Count I violation, the ALJ determined that the applicable penalty range was a minimum of $481 and a maximum of $3,855. For the Count II violation, the ALJ determined that the applicable penalty range was a minimum of $407 and a maximum of $3,251. The ALJ assessed the minimum penalty for each count.

Regarding the penalty assessment for the Count I violation, the ALJ noted in a footnote that the Respondent presented the fraudulent document at issue to his employer on March 21, 2013; thus, there was a "question as to whether . . . the violation in Count I occurred prior to November 2, 2015." Order at 10, n. 10. The ALJ acknowledged the absence of briefing from the parties on the issue but also noted the fact that Respondent continued to work for that employer until December 2017. *Id*. As a result, the ALJ "treat[ed] the violation as occurring after November 2, 2015." *Id.* However, the ALJ did not cite any evidence of record or applicable caselaw in reaching that determination.[2]

[2] The ALJ did note that DHS appeared to base its proposed penalty on regulations addressing violations occurring after November 2, 2015. Order at 10, n. 10. However, relying on OCAHO caselaw from 2020, the ALJ determined that DHS's regulations do not apply in OCAHO proceedings and also provide penalties greater than those applicable to OCAHO. *Id*. The first half of that statement is arguably incorrect. *See United States v. Diversified Tech. & Servs. of Va., Inc*., 9 OCAHO no. 1095, 4 (2003) ("[DHS] regulations have the force of law not only as regards the regulated public, but also as to other agencies of government."). Thus, while DHS penalty *calculations* are not binding in OCAHO proceedings and OCAHO ALJs owe no deference to DHS's proposed penalties and supporting arguments, properly-promulgated DHS regulations which establish the relevant *range* of penalties have the force of law and may be binding. I need not decide that issue, however, because the second part of the ALJ's statement is inarguably incorrect because the penalty range is the same regardless of whether DHS or Department of Justice (DOJ) regulations apply. *Compare*, *e.g*., Civil Monetary Penalty Adjustments for Inflation, 88 Fed. Reg. 2,175, 2,178 (Jan. 13, 2023) (to be codified at 8 C.F.R. pt. 270) (DHS regulation establishing a penalty range of $557 to $4,465 for a first-offense violation of 8 U.S.C. § 1324c(a)(2) occurring after November 2, 2015, and assessed after January 13, 2023) *with* Civil Monetary Penalties Inflation Adjustments for 2023, 88 Fed. Reg. 5,776, 5,780 (Jan. 30, 2023) (to be codified at 28 C.F.R. pt. 85) (DOJ regulation establishing the same range for the same violation occurring at the same time assessed after January 30, 2023); *accord* Civil Monetary Penalty Adjustments for Inflation, 81 Fed. Reg. 42,987, 42,991 (July 1, 2016) ("Because both DHS and DOJ implement the three employment-related penalty sections in the INA, both Departments are codifying the civil penalty amounts in their implementing regulations. . . . *The minimum and maximum civil penalty amounts for each violation will necessarily be the same whether DHS or DOJ imposes the penalty*." (emphasis added)). Much of the confusion stems from the idiosyncratic way in which the agencies reference the relevant penalties through regulations. For example, DOJ regulations contain penalty ranges for violations of 8 U.S.C. § 1324c occurring prior to November 2, 2015, in both 8 C.F.R. § 1270.3(b)(1)(ii) and 28 C.F.R. § 68.52(e), but neither of those provisions is identical to the other or has been updated to account for specific recent adjustments. DHS's penalty ranges for violations of 8 U.S.C. § 1324c both before and after November 2, 2015, are found in 8 C.F.R. § 270.3(b)(1)(ii), but that provision's consideration of violations after November 2, 2015, reflects only the most recent update (*i.e.,* for assessments after January 13, 2023) rather than the historic progression based on different assessment times. In contrast, the DOJ regulation for violations occurring after November 2, 2015, is found in 28 C.F.R. § 85.5 and includes a chart broken down by different assessment dates. Parties, representatives, and ALJs are all urged to carefully review the appropriate regulation when addressing penalty issues for violations of 8 U.S.C. § 1324c. Nevertheless, despite some confusion, it appears that DHS's proposed civil money penalty for Respondent's violation of 8 U.S.C. § 1324c(a)(2) accurately reflected the minimum amount for such a violation if it occurred after November 2, 2015.

As with cases arising under 8 U.S.C. § 1324a, *see*, *e.g.*, *United States v. Ideal Transp. Co.*, 12 OCAHO no. 1290, 6 (2016) ("The government has the burden of proving both liability and an appropriate penalty."), DHS also bears the burden of proof regarding both liability and the reasonableness of a civil money penalty in cases arising under 8 U.S.C. § 1324c, *cf. United States v. Davila*, 7 OCAHO no. 936, 30 (1997) (finding the government's proposed penalty "very 'reasonable' pursuant to OCAHO jurisprudence" and the evidence of record); *United States v. Villegas-Valenzuela*, 5 OCAHO no. 784, 487, 496-97 (1995) (declining to bifurcate the issues of liability and penalty because the government's discussion and rationale were sufficient to assess a penalty). Due to changes in civil money penalty calculations required by the Federal Civil Penalties Inflation Adjustment Act of 1990 (Inflation Act), Pub. L. No. 101-410, 104 Stat. 890 (October 5, 1990), and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, sec. 701 of the Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584 (November 2, 2015), which substantially revised the Inflation Act, "[t]he applicable penalty range [for violations of 8 U.S.C. § 1324c] depends on the date of the violations and the date of assessment." *United States v. Bhattacharya*, 14 OCAHO no. 1380a, 4 (2021). For violations occurring after March 27, 2008 but prior to November 2, 2015, the range for a first-time violation of 8 U.S.C. § 1324c(a)(2) is not less than $375 and not exceeding $3,200 for each fraudulent document that is the subject of a violation. 28 C.F.R § 68.52(e)(1)(i). For violations occurring after November 2, 2015, and assessed after June 19, 2020, but before December 13, 2021, the range was a minimum of $481 and a maximum of $3,855. 28 C.F.R. § 85.5.

Because DHS proposed a civil money penalty for Count I consistent with a tacit allegation that the violation occurred after November 2, 2015, *see supra* note 2, it bears the burden of establishing that the violation of 8 U.S.C. § 1324c(a)(2) in Count I did, in fact, occur after that date. However, it is not self-evident from either the record or applicable caselaw that the presentation of the document at issue on March 21, 2013, in order to obtain employment and to complete the employment authorization verification Form I-9 constitutes a violation occurring after November 2, 2015, solely because Respondent continued with that employment until 2017. Although the ALJ appears to have determined that the Respondent's continued employment extended his violation of 8 U.S.C. § 13242c(a)(2) through the date his employment ceased in 2017, OCAHO caselaw is silent as to whether a violation in this context is a continuing violation. Rather, although OCAHO recognizes continuing violations in cases under 8 U.S.C. § 1324a, *e.g. United States v. Visiontron, Corp.*, 13 OCAHO no. 1348, 5 (2020) (noting that paperwork violations in completing Form I-9, other than timeliness violations, are generally continuing violations until corrected or until the employer is no longer required to retain the Form I-9), and under 8 U.S.C. § 1324b, *e.g., United States v. Robison Fruit Ranch, Inc.*, 6 OCAHO no. 855, 285, 335-36 (1996) (summarizing the continuing violation doctrine in the context of the 180-day statute of limitations in 8 U.S.C. § 1324b(d)(3) for filing complaints regarding unfair immigration-related employment practices), the issue of whether Respondent's conduct in Count I constitutes a continuing violation through the end of his employment in December 2017 such that it would qualify as a violation occurring after November 2, 2015, for purposes of assessing a civil money penalty appears to be one of first impression in a case arising under 8 U.S.C. § 1324c.[3]

[3] The issue of a continuing violation often arises with respect to the applicability of a statute of limitations. In the instant case, however, the ALJ found that the Respondent had waived any statute of limitations defense, Order at 3-4 n.5, and that issue is not encompassed within my administrative review.

Consequently, the undersigned will review whether DHS met its burden to establish that the Count I violation occurred after November 2, 2015, and, thus, whether the ALJ correctly assessed the civil penalty for this count. [4] More specifically, the undersigned will address whether a violation of 8 U.S.C. § 1324c(a)(2) for the knowing use of a forged, counterfeit, altered, or falsely made document in order to obtain employment and complete the employment eligibility verification Form I-9 constitutes a "continuing violation" for the duration of employment at the employer to whom the document was presented or, alternatively, whether the knowing use occurs only at the time the document is presented to obtain employment and complete the employment eligibility verification Form I-9. The undersigned is not reviewing any other issues related to the ALJ's Order.

This administrative review will be conducted in accordance with the provisions of 28 C.F.R. § 68.54(b)-(d). Accordingly, within twenty-one days of the date of entry of the ALJ's order, the parties may submit briefs or other written statements addressing the issues presented above. *See* 28 C.F.R. § 68.54(b)(1). The deadline for submitting such briefs or other written statements is **March 2, 2023**. The parties are reminded that all briefs and other filings related to administrative review must be filed and served by expedited delivery, in accordance with the provisions of 28 C.F.R. § 68.54(c) and § 68.6(c).

Additionally, because the issue of whether a violation of 8 U.S.C. § 1324c(a)(2) in the context of the instant case is a continuing violation appears to be an issue of first impression for OCAHO and because the Respondent is proceeding pro se, I have determined, in the exercise of discretion, that it is appropriate to invite amicus curiae to submit briefing on the issue outlined above. Although OCAHO's regulations expressly provide for amicus participation only before an ALJ, 28 C.F.R. § 68.17, its Practice Manual also contemplates amicus participation before the CAHO for a case under administrative review. *See* OCAHO Practice Manual, Chapter 2.8 (July 31, 2022), https://www.justice.gov/eoir/reference-materials/ocaho/chapter-2/8. Moreover, OCAHO regulations regarding administrative reviews by the CAHO provide, *inter alia*, that, "on the [CAHO's] own initiative, the [CAHO] may, at the [CAHO's] discretion, permit or require additional filings" during an administrative review. 28 C.F.R. § 68.54(b)(2). Thus, although the issue is not free from all doubt, I have determined that the CAHO possesses discretionary authority to invite briefing by amicus curiae in appropriate cases under administrative review. Accordingly, I am exercising that discretionary authority and inviting additional filings by amicus curiae in the instant case. A copy of that invitation is enclosed with this Notification and is also available on the Executive Office for Immigration Review's website for Agency Invitations to File Amicus Briefs, https://www.justice.gov/eoir/amicus-briefs. The specific invitation is available on that website at https://www.justice.gov/eoir/page/file/1568616/download.

In order to provide the parties with an opportunity to respond to any amicus briefs and to comply with the statutory timeframe for administrative reviews, 8 U.S.C. § 1324c(d)(4), amicus briefs must be submitted by **February 27, 2023**, using one of the expedited delivery methods outlined in 28 C.F.R. § 68.54(c) and § 68.6(c). If amicus briefs are received by OCAHO by this deadline, a copy of the briefs will be provided to both parties, who shall then have an opportunity

[4] If the Count I violation occurred before November 2, 2015, the penalty ranges set forth in 28 C.F.R. § 85.5 would not apply; rather, the penalty for the Count I violation would be assessed under the parameters of 28 C.F.R. § 68.52(e)(1)(i), which apply to violations of 8 U.S.C. § 1324c(a)(2) that occurred on or after March 27, 2008, and before November 2, 2015.

to file a response to the amicus briefs. The deadline for the parties to file responses to amicus briefs is **March 7, 2023.** As with the parties' original briefs, all responses to the amicus briefs must be filed and served using one of the expedited delivery methods set forth in 28 C.F.R. § 68.54(c) and § 68.6(c).

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James McHenry
Chief Administrative Hearing Officer