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

April 19, 2017

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| UNITED STATES OF AMERICA,<br>Complainant,<br><br>v.<br><br>AGRI-SYSTEMS D/B/A ASI INDUSTRIAL,<br>Respondent. | ) | 8 U.S.C. § 1324a Proceeding<br>OCAHO Case No. 16A00047 |

DECISION AND ORDER GRANTING PARTIAL SUMMARY DECISION AND SETTING A SCHEDULE FOR FURTHER PROCEEDINGS

## I. INTRODUCTION

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, as amended, 8 U.S.C. § 1324a (2012). The Department of Homeland Security, Immigration and Customs Enforcement (ICE, the government, or Complainant) alleges that Agri-Systems d/b/a ASI-Industrial (ASI, the company, or Respondent) failed to comply with the employment verification system of 8 U.S.C. § 1324a(b). The company has denied in part and admitted in part these allegations. Pending is ICE's Motion for Summary Decision, to which ASI filed a response. For the reasons provided below, ICE's Motion will be **GRANTED, IN PART,** as to liability.

## II. PROCEDURAL HISTORY

On July 18, 2011, ICE personally served ASI, which is authorized to conduct business in the State of Montana, with a Notice of Inspection (NOI). The NOI advised ASI that a review of its Employment Eligibility Verification Forms I-9 was scheduled for July 21, 2011, and that the purpose of the review "is to assess [ASI's] compliance with the provisions of the law." ICE also served the company with an Immigration Enforcement Subpoena, which directed it to present Forms I-9 "for all current and terminated employees, to include copies of any documents submitted . . . , for the period January 1, 2011 to July 1, 2011," a list of its employees in

Montana, payroll data, and documents related to its corporate structure. On August 19, 2011, ASI submitted 159 Forms I-9, its employee list and wage report, and its business information to ICE.

On July 30, 2013, ICE served ASI with a Notice of Suspect Documents (NSD), a Notice of Discrepancies, and a Notice of Technical Violations. The NSD advised ASI that according to the records checked by Homeland Security Investigations (HSI), which is a division of ICE, forty-six of its employees appeared, at that time, to not be authorized to work in the United States. The NSD further stated, "The documents submitted to you were found to pertain to other individuals, or there was no record of the alien registration numbers being issued, or the documents pertain to the individuals but the individuals are not employment authorized or their employment authorization has expired." ICE also warned that unless these listed employees provide "valid identification and employment eligibility documentation acceptable for completing the Form I-9," other than what they had previously submitted, HSI would consider these employees to be unauthorized to work in the United States. The NSD also notified ASI that it was incumbent for it to "take reasonable actions to verify the employment eligibility of the employee," and provided the contact information for the HSI special agent in the event that ASI or an employee wanted to challenge HSI's findings.

The Notice of Discrepancies stated that "according to the records checked by ICE, the identity and employment eligibility of . . . [twenty-eight] individuals were unable to be verified." However, the notice also stated that ICE did not determine that these employees were not authorized to work, as there "are many reasons that discrepancies may appear in a work authorized employee's record." The Notice of Discrepancies requested that ASI assist and cooperate with ICE to resolve the discrepancies, including completing attached certification notices and providing them to the named employees. ICE stated that it would then reverify the information provided about the employees, including any new information provided by the employees or ASI.

The Notice of Technical Violations advised that based on a review of the 159 Forms I-9 ASI had provided in response to the NOI, there were technical or procedural failures on these forms that are considered violations of 8 U.S.C. § 1324a(b) if they remain uncorrected. The notice further set forth that additional failures of the employment verification system may have been discovered, are not included in this notice, and may result in the issuance of a Notice of Intent to Fine (NIF).

In a letter dated August 23, 2013, ASI informed ICE that it terminated the forty-six individuals named in the NSD. ASI also notified ICE that it terminated twenty-two of the twenty-eight individuals named in the Notice of Discrepancies and provided new Forms I-9, as well as signed Employee Discrepancy Notices, for the remaining six employees listed in the latter notice.

On February 2, 2016, ICE personally served ASI with a NIF, setting forth two counts. Count I contends that Respondent failed to prepare and/or present Forms I-9 for twenty-nine employees, eleven of who are allegedly unauthorized for employment in the United States. Count II contends that Respondent failed to ensure that eighty-two employees properly completed Section 1 of their Forms I-9 and/or that Respondent failed to properly complete Sections 2 or 3 of their forms. ICE further contends that thirteen of these eighty-two named individuals are not eligible for employment in the United States.[1] The NIF further asserted that all the named individuals were hired by Respondent after November 6, 1986, and assessed a civil monetary penalty amount of $104,907 for the 111 alleged violations.

Respondent timely requested a hearing before an Administrative Law Judge (ALJ) in a letter dated February 22, 2016. In another letter to ICE dated February 22, 2016, and entitled "Series of Events Agri-Systems dba Asi-Industrial Subpoena 2/2/2016," Respondent stated that after receiving the NIF, "it came to our intention that [HSI] was missing the original I-9 Forms for 29 employees that were listed on our employee list supplied to [HSI] in the July 2011 request." Respondent indicated it was submitting to ICE another copy of the Forms I-9 for the Count I employees and that it was "unclear if this was an oversight of Agri-Systems, if these items were lost in transit, or misplaced at destination."

On July 7, 2016, ICE filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO), fully incorporating the NIF, including the proposed civil monetary penalty. On August 16, 2016, Respondent filed an answer, denying the material allegations of the complaint and asserting as an affirmative defense its good faith efforts to comply with the requirements of 8 U.S.C. § 1324a(b).

On September 14, 2016 Complainant filed its prehearing statement, which proposed twenty-six factual stipulations. The proposed factual stipulations generally relate to the procedural history of the case. Notably, proposed factual stipulation number sixteen stated, "On February 22, 2016, in response to the NIF, Respondent for the first time provided Forms I-9 for the below identified 24 employees. These employees comprised 24 of the 29 employees who had been identified in Count I of the NIF . . . ." In addition, according to ICE, Respondent produced a spreadsheet that "noted that a Form I-9 was not located for 4 employees identified in Count I of the NIF, and identified errors in the Form I-9 for employee [James Barrigan] although no Form I-9 was provided for him."

On September 28, 2016, Respondent filed its prehearing statement, which set forth thirteen proposed factual stipulations. Proposed factual stipulation number five indicated, "On February 22, 2016, in response to the NIF, ASI, for the second time, provided the Forms I-9 for the

[1] The employees identified in the NIF and incorporated in the complaint are named in the attached Appendix.

individuals listed in Count I of the NIF. Copies of these Forms I-9 were originally provided in response to the original Notice of Inspection in 2011."

On December 6, 2016, ICE filed a Notice to Amend Count I of the Complaint, removing one violation with respect to an individual named Allen Ball. Amended Count I therefore alleges 28 violations and seeks an adjusted civil monetary penalty of $26,367, resulting in a total civil monetary amount of $103,644.75. On this date, ICE also filed its Motion for Summary Decision and Memorandum of Law in Support of Motion for Summary Decision (ICE's Motion). On January 17, 2017, ASI filed its Response to Complainant's Motion for Summary Decision (ASI's Response).

## III. EVIDENCE CONSIDERED

ICE's Motion was accompanied by the following proposed exhibits: Ex. G-1) Notice of Inspection, served July 18, 2011; Ex. G-2) Immigration Enforcement Subpoena, served July 18, 2011; Ex. G-3) Department of Homeland Security (DHS) Receipt for Property; Ex. G-4) Respondent's employee list, January 1-July 1, 2011; Ex. G-5) Montana Secretary of State, Business Entity Search of Respondent; Ex. G-6) NSD, dated July 30, 2013; Ex. G-7) Notice of Discrepancies, dated July 30, 2013; Ex. G-8) Notice of Technical Violations, dated July 30, 2013; Ex. G-9) Letter from Respondent listing employees who were terminated in response to the NSD, dated August 23, 2013; Ex. G-10) Letter from Respondent listing employees who were terminated in response to the Notice of Discrepancies, dated August 23, 2013, and new Forms I-9 with attached documentation and Employee Discrepancy Notices for the remaining six employees identified in the Notice of Discrepancies; Ex. G-11) NIF, served February 2, 2016; Ex. G-12) Count I of the NIF; Ex. G-13) Count II of the NIF; Ex. G-14) Forms I-9 for the employees named in Count II; Ex. G-15) Respondent's Request for a Hearing, dated February 22, 2016; Ex. G-16) Respondent's letter entitled "Series of Events Agri-Systems dba Asi-Industrial Subpoena 2/2/2016"; Ex. G-17) Respondent's spreadsheet regarding the Count I violations; Ex. G-18) Forms I-9 and attached documentation pertaining to the Count I employees; Ex. G-19) Respondent's spreadsheet regarding the Count II violations; Ex. G-20) Respondent's E-Verify Memorandum of Understanding, signed April 2, 2013; Ex. G-21) Respondent's received copy of the NIF, stamped February 2, 2016; Ex. G-22) Five HSI Reports of Investigation regarding Respondent; Ex. G-23) Respondent's Employment History, State of Montana, 2011 First and Fourth Quarters; Ex. G-24) Sworn declaration of Trevor Wheatley, HSI Special Agent; Ex. G-25) U.S. Citizenship and Immigration Services (USCIS), Certificate of Nonexistence of Record for Israel Arredondo, Natividad Cervantes Cruz, Daniel de la Cruz Guerrero, Juan Delgado Lopez, Jose Gallegos, Marcos Hernandez Rivas, Jesus Loredo, Fernando Moreno, Salvador Pimentel Barriga, and Isidro Vasquez; and Ex. G-26) Form I-213, Record of Deportable/Inadmissible Alien for Isidro Vasquez-Vasquez and I-213 Narrative from ICE,

Enforcement and Removal Operations (ERO) (ERO Form)[2] for Natividad Cervantes-Cruz and Isidro Vasquez-Vasquez.

ASI attached two proposed exhibits to its response: Ex. R-1) Affidavit of Nelson Miller, controller for ASI; and Ex. R-2) Affidavit of Robert Hamlin, president of ASI.[3]

## IV. POSITIONS OF THE PARTIES

### A. ICE's Position on Liability

According to the government, Respondent employed the twenty-eight individuals named in amended Count I but failed to present Forms I-9 on their behalf. The government explains that after it served Respondent with the NOI on July 18, 2011, it granted Respondent an extension of time to deliver the documents requested in the Immigration Enforcement Subpoena until August 21, 2011. ICE's Motion at 8. On August 19, 2011, the government received a FedEx package from Respondent that contained 159 Forms I-9, an employee list and wage report, business owner information, and a tax identification number. On February 22, 2016, after ICE served Respondent with the NIF, Respondent submitted for the first time the Forms I-9 for 24 of the Count I individuals. *Id.* HSI Special Agent (SA) Trevor Wheatley reviewed the 159 Forms I-9 that were delivered on August 19, 2011, and determined that these forms did not include the 24 Forms I-9 submitted on February 22, 2016. The twenty-four Forms I-9 pertain to the following individuals: Allen Ball, Richard Bushyhead, Joshua Clifton, James Cooper, Roy Crakaal, James Gardner, Ronald Harriss, Wade Hudson, Dale Jackson, Jolene Johnson, Chase Keierleber, Harold Klundt, Jesus Magdaleno, Nelson Miller, Angelo Moreno, Richard Olsen, Julie Persson, Jose Pimentel, Ruben Pimentel, Neale Sikveland, Alok Singh, Caleb Swarthout, Michael Todd, and Ronald Wiley. According to ICE, these Forms I-9 "should have been presented upon three days' notice as required by law or on the agreed upon extension date," and Respondent is liable for failure to timely present these forms because pursuant to OCAHO case law, a "belated presentation does not alter such a conclusion." *Id.* at 9, 10 (citing *United States v. A&J Kyoto Japanese Rest., Inc.*, 10 OCAHO no. 1186 (2013)).[4]

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[2] The form number is redacted.

[3] ASI did not identify its exhibits with an "R," which the undersigned has added for consistency and clarity.

[4] 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

ICE also alleges that Respondent did not present at all Forms I-9 for James Barrigan, Daniel Eggar, Jeanne Fetch, Sean McDonald, and Nate Nielsen. *Id.* at 10. ICE contends it should be granted summary decision as to Count I because there is no genuine issue of material fact.

Regarding Count II, ICE argues that a simple visual examination reveals that the Forms I-9 pertaining to the eighty-two named individuals contain substantive violations. The government argues that Respondent's assertion that it electronically signed many of the Forms I-9 at issue misinterprets the regulation that permits electronic signature of an I-9. Specifically, 8 C.F.R. § 274a.2(b)(1)(ii)(B) allows for an employer to sign Section 2 of a Form I-9 "with a handwritten signature or electronic signature in accordance with paragraph (i) of this section." ICE's Motion at 13. Paragraph (i) of 8 C.F.R. § 274a.2 provides:

> (i) Electronic signatures for employer, recruiter or referrer, or representative. If a Form I-9 is completed electronically, the employer, the recruiter or referrer for a fee, or the representative of the employer or the recruiter or referrer, must attest to the required information in Form I-9. The system used to capture the electronic signature should include a method to acknowledge that the attestation to be signed has been read by the signatory. Any person or entity who has failed to comply with the criteria established by this regulation for electronic signatures, if used, and at the time of inspection does not present a properly completed Form I-9 for the employee, is in violation of section 274A(a)(1)(B) of the Act and 8 CFR 274a.2(b)(2).

ICE contends that these provisions are not applicable in the instant matter because the Count II Forms I-9 were not completed electronically but were handwritten. Furthermore, although several Forms I-9 for Count II contain a typed entry in Section 2 identifying the employer's name, these forms does not contain an electronic signature.

Moreover, ICE argues that ASI's assertion that many of the alleged violations are technical or procedural because it copied and attached its employees' identity and employment authorization documents is untenable because an employer must retain the copies of such documents, which nevertheless does not relieve an employer of its obligation to fully complete Section 2. In addition, ASI identified in one of its spreadsheets the type of violation present in the Count II Forms I-9, which ICE contends are all substantive, including failure to ensure an employee

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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.

completed the citizenship or immigration status attestation or signed the attestation in Section 1 and failure to sign the employer attestation in Section 2. *Id.* at 14 (citing Ex. G-19). For all these reasons, ICE seeks summary decision as to Count II.

B. ASI's Position on Liability

ASI states that the "government's recounting of the procedural history is largely undisputed" but that a factual contention surrounds when the government received twenty-four of the Forms I-9 at issue under Count I. ASI's Response at 2. ASI contends that it sent ICE the Forms I-9 for all the employees named in the complaint within the permitted time frame after service of the NOI, including the twenty-four forms it resent to ICE in February 2016. ASI claims it first became aware that ICE did not receive these twenty-four Forms I-9 when it was served with the NIF on February 2, 2016. ASI states, "This is made obvious by the fact that ASI, in response to the Notice of Discrepancy, submitted newly created I-9's for Nelson Miller, Joshua Clifton, James Gardner, Ronald Harriss, Chaise Keierleber, Harold Klunt, Angelo Moreno, and Julie Persson rather than sending the original I-9's which ASI believed [DHS] had already received." *Id.* at 2-3. Respondent avers that it is "unclear" how ICE purportedly received these forms for the first time in 2016, as "Nelson Miller sent these original I-9's to DHS along with the other 159 reported to have been received." *Id.* at 4 (citing Ex. R-1). ASI requests that summary decision be denied because "when viewed in the light most favorable to the non-moving party, ASI, Count I fails as a matter of law for the 24 of the 28 alleged violations." *Id.* at 5.

In addition, ASI argues that with respect to the Count II alleged violation of failure to sign the employer attestation in Section 2, it did review the employees' identity and work authorization documents and electronically affix its name to the Form I-9. ASI further indicates that it "provided its name in the attestation section of the form I-9's using word processing," which "efficiently demonstrates that the attestation was read as it comes immediately below the attestation itself." ASI's Response at 6. Therefore, because ASI's "electronically printed name" are on approximately sixty of the Forms I-9 under Count II, these are not violations of 8 U.S.C. § 1324a(b), including "some of the I-9's where the employee inadvertently signed the attestation section as well." *Id.*

## V. DISCUSSION AND ANALYSIS

### A. Applicable Legal Standards

#### 1. Summary Decision

OCAHO regulation 28 C.F.R. § 68.38(c) establishes that an ALJ "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." Relying on United

States Supreme Court precedent, OCAHO case law has held that "[a]n issue of material fact is genuine only if it has a real basis in the record" and that "[a] genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit." *Sepahpour v. Unisys, Inc.*, 3 OCAHO no. 500, 1012, 1014 (1993) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986)). "In determining whether there is a genuine issue as to a material fact, all facts and reasonable inferences to be derived therefrom are to be viewed in the light most favorable to the non-moving party." *United States v. Primera Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994) (citations omitted).

"Once the moving party satisfies its initial burden of demonstrating both the absence of a material factual issue and that the party is entitled to judgment as a matter of law, the nonmoving party must come forward with contravening evidence to avoid summary resolution." *United States v. Four Seasons Earthworks, Inc.*, 10 OCAHO no. 1150, 3 (2012) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)); *see generally* Fed. R. Civ. P. 56(e). OCAHO regulation 28 C.F.R. § 68.38(b) provides that the party opposing the motion for summary decision "may not rest upon the mere allegations or denials" of its pleadings, but must "set forth specific facts showing that there is a genuine issue of fact for the hearing."

2. Burdens of Proof and Production

In cases arising under 8 U.S.C. § 1324a, the government has the burden of proving by a preponderance of the evidence that the respondent is liable for committing a violation of the employment eligibility verification requirements. *See United States v. Nebeker, Inc.*, 10 OCAHO no. 1165, 4 (2013) (citing *United States v. Am. Terrazzo Corp.*, 6 OCAHO no. 877, 577, 581 (1996)). In addition to proving liability, "[t]he government has the burden of proof with respect to the penalty, *United States v. March Construction, Inc.*, 10 OCAHO no. 1158, 4 (2012), and 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)." *United States v. Niche, Inc.*, 11 OCAHO no. 1250, 6 (2015).

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

3. Employment Verification Requirements

Employers must prepare and retain Forms I-9 for employees hired after November 6, 1986, and are required to produce the Forms I-9 for inspection by the government upon three days' notice.

8 C.F.R. § 274a.2(b)(2)(ii); *United States v. Keegan Variety, LLC*, 11 OCAHO no. 1238, 2 (2014). The form must be prepared and retained for current employees and with respect to former employees "only for a period of three years after that employee's hire date, or one year after that employee's termination date, whichever is later." *United States v. H & H Saguaro Specialists*, 10 OCAHO no. 1144, 6 (2012) (quoting 8 U.S.C. § 1324a(b)(3) ("Retention of verification form"); 8 C.F.R. § 274a.2(b)(2)(i); *United States v. Ojeil*, 7 OCAHO no. 984, 982, 992 (1998)). Employers must ensure that an employee complete Section 1 of the Form I-9 and attest to his or her citizenship or immigration status in the United States by signing and dating the Form I-9 no later than the first day of employment. 8 C.F.R. § 274a.2(a)(3) (attestation under penalty of perjury), (b)(1)(i)(A). For employees employed for three business days or more, an employer must sign Section 2 of the Form I-9 within three days of the employee's first day of employment to attest under penalty of perjury that it reviewed the appropriate documents to verify the individual's identity and employment authorization. 8 C.F.R. § 274a.2(a)(3), (b)(1)(ii).

Failures to satisfy the requirements of the employment verification system are known as "paperwork violations," which are either "substantive" or "technical or procedural." *See* Memorandum from Paul W. Virtue, INS Acting Exec. Comm'r of Programs, *Interim Guidelines: Section 274A(b)(6) of the Immigration & Nationality Act Added by Section 411 of the Illegal Immigration Reform & Immigrant Responsibility Act of 1996* (Mar. 6, 1997) (Virtue Memorandum) *available at* 74 No. 16 *Interpreter Releases* 706 (Apr. 28, 1997). Relevant to the instant case, substantive violations include failure to prepare and/or present a Form I-9 and failure to timely present a Form I-9 to the government upon three days' notice. 8 C.F.R. § 274a.2(b)(2)(ii); Virtue Memorandum at 3; *see also United States v. Horno MSJ, Ltd., Co.*, 11 OCAHO no. 1247, 7 (2015) ("Absent an extension of time, an employer cannot avoid liability for failure to timely present I-9 forms by submitting the forms at some point later in the process, whether in the course of the inspection itself or later during the ensuing litigation.") (referencing *United States v. Liberty Packaging, Inc.*, 11 OCAHO no. 1245, 5-6 (2015); *A&J Kyoto*, 10 OCAHO no. 1186 at 7). The Virtue Memorandum also characterizes the following as substantive violations: (1) an employee's failure to check the appropriate box identifying his or her citizenship or immigration status in Section 1; (2) an employee's failure to sign the attestation in Section 1; (3) an employer's failure to record a proper List A document or proper Lists B and C documents in Section 2; and (4) an employer's failure to sign the attestation in Section 2. Virtue Memorandum at 3-4.

B. Analysis

ICE, as the moving party, has provided both arguments and evidence in order to meet its burden of proving by a preponderance of the evidence Counts I and II, its penalty assessment, and its entitlement to summary decision. Consequently, the burden of production shifted to Respondent to produce evidence and arguments to rebut the government's case and to rebut the evidence of

record supporting the government's case. ASI set forth arguments and evidence, in the form of two affidavits, to attempt to refute the government's showing.

ASI does not dispute that the 110 individuals named in amended Count I and in Count II were hired after November 6, 1986, as alleged in the complaint. As proof that these individuals were employees for whom ASI had to prepare and present Forms I-9, ICE presented a list of ASI employees who earned wages during January 1–July 1, 2011. *See* ICE's Motion, Ex. G-4. The list also identifies the hire date, rehire date, if any, and termination date, if any, for these individuals. All 110 individuals named in the complaint are included on ASI's employee list. *Id.* Accordingly, as these individuals earned wages, they qualify as employees of ASI. *See* 8 C.F.R. § 274a.1(f). Moreover, the list identifies these individuals as being current employees or former employees who, based on their hire and termination dates and with respect to the date of service of the NOI on July 18, 2011, fall within the applicable Form I-9 retention period. *H & H Saguaro Specialists*, 10 OCAHO no. 1144 at 6.

1. Count I

Although amended Count I sets forth that ASI failed to prepare and/or present Forms I-9 for twenty-eight individuals, based on the parties' recitation of the facts and their arguments, a more precise charge would have been failure to timely present to the government twenty-three Forms I-9 and failure to prepare and/or present five Forms I-9. *See, e.g., United States v. Super 8 Motel & Villella Italian Rest.*, 10 OCAHO no. 1191, 11 (2013) ("In order to establish liability for a particular violation, it is first necessary for the government to state with specificity what the violation is.") (citing *United States v. Stanford Sign and Awning, Inc.*, 10 OCAHO no. 1145, 7 (2012)). However, as I have been able to ascertain the nature of the Count I allegations, adjudication of the pending motion is still appropriate.

The twenty-eight individuals named in Count I are: (1) James Barrigan, (2) Richard Bushyhead, (3) Joshua Clifton, (4) James Cooper, (5) Roy Crakaal, (6) Daniel Eggar, (7) Jeanne Fetch, (8) James Gardner, (9) Ronald Harriss, (10) Wade Hudson, (11) Dale Jackson, (12) Jolene Johnson, (13) Chaise Keierleber, (14) Harold Klunt, (15) Jesus Magdaleno Rodriguez, (16) Sean McDonald, (17) Nelson Miller, (18) Angelo Moreno, (19) Nate Nielsen, (20) Richard Olsen, (21) Julie Persson, (22) Jose Pimentel-Gil, (23) Ruben Pimentel-Gil, (24) Neale Sikveland, (25) Alok Singh, (26) Caleb Swarthout, (27) Michael Todd, and (28) Ronald Wiley.

ICE has met its burden of proving there is no genuine issue of material fact with respect to five of the twenty-eight violations. ASI admitted, "No I-9 on file" for the following four employees: (1) Daniel Eggar, (2) Jeanne Fetch, (3) Sean McDonald, and (4) Nate Nielson. *See* ICE's Motion, Ex. G- 17. In addition, ICE correctly notes that although ASI identifies in its spreadsheet a substantive violation on the Form I-9 pertaining to James Barrigan, *see id.*, the record does not contain his Form I-9 and there is no evidence indicating that ASI prepared or presented his Form I-9. ASI has not demonstrated otherwise. ASI's Response, Exs. R-1; R-2.

Accordingly, ASI is liable for five violations of failing to prepare and/or present a Form I-9. *See also* Appendix, Count I.

However, the undersigned concludes that there is a genuine issue of material fact concerning when ASI submitted to ICE the Forms I-9 belonging to the remaining twenty-three Count I individuals. The government contends that it did not receive the forms for these employees upon three days' notice, as required by statue, or by the extended deadline of August 21, 2011, and that ASI tendered the twenty-four Forms I-9 for the first time on February 22, 2016.[5] HSI SA Wheatley compared these forms to the forms received on August 19, 2011, and averred that the twenty-four I-9s were not included in the August 2011 submission. *See* ICE's Motion, Ex. G-24. Respondent concedes that it presented these twenty-four Forms I-9 to ICE on February 22, 2016, but avers this was the second time it sent ICE the forms. *See* ASI's Response at 4-5; *see also* ICE's Motion, Ex. G-16 at 3. Respondent asserts that it timely provided these forms to ICE on August 19, 2011, in response to the NOI and presented the affidavits of Mr. Hamlin and Mr. Miller as corroborating evidence. Specifically, Mr. Miller states he prepared the shipment of the documentation requested in the NOI to ICE and explains, "It was not until 2016 that anyone at ASI became aware that DHS may have not received or recorded receiving certain I-9's. In fact, when these names appeared on the Notice of Discrepancy list, new I-9s were created for the remaining employees as ASI believed DHS had already received these." ASI's Response, Ex. R-1 at 2.

The Receipt for Property identifies that ICE received 159 Forms I-9 on August 19, 2011, from ASI. *See* ICE's Motion, Ex. G-3. The Count II violations are composed of eighty-two forms, which ASI unquestionably provided on August 19, 2011, but the remaining seventy-seven that ICE received on this date are unaccounted for. Moreover, ICE states that while Respondent listed as a proposed exhibit in its prehearing statement "I-9s for individuals provided in response to the 2011 [Immigration Enforcement Subpoena] but included in Count I of the NIF [] (66 pages)," *id.*, a "visual review of the 66 Forms I-9s clearly illustrates that none of the employee[s] identified in those 66 Form I-9s were the subject of the Complaint nor are they the subject of Amended Count I of the Complaint." *Id.* at 9-10. Neither party submitted these sixty-six Forms I-9. Finally, ASI contends that further proof of its timely submission of the Count I Forms I-9 is that it created new forms for six of the Count I individuals after they were listed on the Notice of Discrepancies "rather than sending the original I-9s, which ASI believed the [DHS] had already received." ASI's Response at 2-3.[6]

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[5] As mentioned above, ASI provided the Form I-9 and supporting documentation belonging to Allen Ball, who was listed in Count I of the NIF and original complaint. ICE subsequently removed him from the count and amended Count I now charges twenty-eight violations.

[6] ASI claims that in response to the Notice of Discrepancies, it created and presented to ICE new Forms I-9 for Joshua Clifton, James Gardner, Ronald Harriss, Chaise Keierleber, Harold Klunt, Nelson Miller, Angelo Moreno, and Julie Persson. *See* ASI's Response at 2-3. However, the

In short, the record as a whole does not necessarily substantiate nor disprove either party's position. Each party has attempted to support its position through affidavits, but those affidavits necessarily conflict. Moreover, viewing the facts and inferences derived therefrom most favorably to ASI, as I must regarding a motion for summary decision, the evidence shows a genuine issue of material fact, namely whether ASI presented the twenty-three Forms I-9 at issue in 2011 or in 2016. The affidavit of Special Agent Wheatley is not unworthy of credence at this stage, but neither are the written sworn allegations by ASI's president and controller that the twenty-three Forms I-9 at issue were part of the forms provided to ICE on August 19, 2011. ASI has accordingly presented specific facts showing there is a genuine issue of material fact. 28 C.F.R. § 68.38(b).[7] ICE, as the moving party, has not met its burden of showing there is no genuine issue of material fact with respect to the untimely submission of twenty-three Forms I-9, as charged under Count I. Because the Count I charge with respect to these I-9s is that ASI failed to *timely* present the forms to the government upon three days' notice, or by the extended deadline, whether ICE received them for the first time on August 19, 2011, or February 22, 2016, "may affect the outcome of the case" and "must be inevitably decided." *United States v. Split Rail Fence Co., Inc.*, 11 OCAHO no. 1216a, 13 (2015) (citing *Anderson*, 477 U.S. at 248; *De Araujo v. Joan Smith Enters., Inc.*, 10 OCAHO no. 1187, 6 (2013)), *aff'd*, 844 F.3d 880 (10th Cir. 2016) *amended by and reh'g denied*, No. 15-9561, 2017 WL 1034531 (10th Cir. Mar. 17, 2017). Therefore, summary decision will be denied as to those twenty-three Forms I-9 at issue. I will also schedule a conference call with the parties to discuss further steps and to set a pre-hearing schedule in anticipation of a potential evidentiary hearing, if necessary, on those Forms. *See* 28 C.F.R. § 68.38(e).

2. Count II

A visual examination of the eighty-two Count II Forms I-9 confirms ICE's allegations that each form contains at least one substantive violation. *See* ICE's Motion at 14-18; *see also* Appendix,

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evidence of record shows that ASI created new I-9s for Joshua Clifton, James Cooper, Wade Hudson, Jolene Johnson, Nelson Miller, and Michael Todd in response to the Notice of Discrepancies. *See* ICE's Motion, Ex. G-10.

[7] ASI has consistently asserted throughout these proceedings that it provided these forms to ICE for the first time on August 19, 2011, and that it presented them to ICE a second time in response to the NIF on February 22, 2016. *See Block v. City of L.A.*, 253 F.3d 410, 419 n.2 (9th Cir. 2001) I accordingly have no reason to believe that ASI is merely attempting to create a genuine issue of material fact. ("A party cannot create a genuine issue of material fact to survive summary judgment by contradicting his earlier version of the facts.") (citing *Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 544 (9th Cir.1975)).

Count II.[8] ASI is liable for the following substantive violations: (1) failure to ensure that the employee checked a box in Section 1 attesting to his/her citizenship or immigration status;[9] (2) failure to ensure that the employee signed the attestation in Section 1; (3) failure to record the proper List A or Lists B and C documents in Section 2; and (4) failure to sign the employer attestation in Section 2. *See* Appendix, Count II.

In addition, ASI is liable for one violation of "[f]ailure on the part of the employer of authorized representative to print their name in the attestation portion of Section 2." *See* Memorandum from Director of ICE Marcy Forman, *Revised Administrative Fine Policy Procedures* at 15 (Nov. 25, 2008); *see* ICE's Motion, Ex. G-14 at 15. The Virtue Memorandum does not identify this failure as technical or substantive. *See* Virtue Memorandum at 3-4. Although ICE's agency guidelines are not binding in this forum, *see United States v. Occupational Res. Mgmt., Inc.*, 10 OCAHO no. 1166, 24 n.18 (2013), I find that because this signature does not appear on any of the other Forms I-9 at issue and there is no indication who the signatory in Section 2 is, the classification of this kind of paperwork violation as substantive is reasonable. *See United States v. Corporate Loss Prevention Assocs.*, 6 OCAHO no. 908, 974, 999 (1997) (declining to hold that failure "to include a printed name or a title in the certification part of section two is never a law violation" and stating that "[i]n those instances where the signature is unclear, or a title for the employer's representative is not provided on any of the I-9 forms, it may very well constitute a violation.").

ASI responded to the numerous allegations that it failed to sign the employer attestation in Section 2 by stating that it actually "signed" many of these Forms I-9 electronically. *See* ASI's Response at 5-6. ASI explains that it used "word processing" to provide its name in the attestation in Section 2, which "efficiently demonstrates that the attestation was read as it comes

[8] Although many of the Forms I-9 contain more than one substantive violation, the company will only be held liable for one substantive violation per Form I-9. *See* Appendix, Count II.

[9] The undersigned notes that in the Forms I-9 belonging to Salvador Pimentel (#61) and Jesus Pimentel (#62), ICE alleged that ASI failed to ensure that these employees checked a box corresponding to their citizenship or immigration status attestation in Section 1. It is evident that no box was checked, but in both forms, a nine-digit number is written next to "Alien Number A" after an "alien lawfully admitted for permanent residence." *See* ICE's Motion, Ex. G-14 at 61, 62. OCAHO case law has previously held that "when the employee writes an Alien number on the line next to the words, 'A Lawful Permanent Resident,' and then signs the Section 1 attestation, the employee is attesting to being a Lawful Permanent Resident and has substantially complied with the requirements of the statute." *See United States v. Ketchikan Drywall Servs., Inc.*, 10 OCAHO no. 1139, 16 (2011), *aff'd sub. nom. Ketchikan Drywall Servs., Inc. v. Immigration and Customs Enforcement*, 725 F.3d 1103 (9th Cir. 2013). Neither Salvador Pimentel nor Jesus Pimentel signed Section 1 of their Forms I-9, and ASI will therefore remain liable for these violations.

immediately below the attestation itself." *Id.* at 6. ASI points out that 8 C.F.R. § 274a.2 permits electronic completion of the Form I-9, including electronic signature, and that many of the Forms I-9 at issue under Count II include ASI's name and address printed in Section 2.

A person or entity must attest under penalty of perjury on a Form I-9 that it has verified that an individual employee is not an unauthorized alien, and such attestation is manifested by either a handwritten or an electronic signature. 8 U.S.C. § 1324a(b)(1)(A). A Form I-9 can be electronically generated or retained, subject to several regulatory provisions, including compliance with 8 C.F.R. §§ 274a.2(e)-(i). 8 C.F.R. § 274a.2(a)(2). Further, the employer must sign Section 2 of the Form I-9 with either a handwritten signature or an electronic signature in accordance with 8 C.F.R. § 274a.2(i). 8 C.F.R. § 274a.2(b)(1)(ii)(B). In turn, 8 C.F.R. § 274a.2(i) requires that the "system used to capture the electronic signature should include a method to acknowledge that the attestation to be signed has been read by the signatory." Failure to comply with this criteria may result in a finding of a violation of 8 U.S.C. § 1324a(a)(1)(B). *Id*.

ASI's arguments regarding the printing of its company name and address in Section 2 of its Forms I-9 is spirited but contrary to both the law and evidence. First, the evidence does not show that ASI's Forms I-9 were completed or retained electronically in accordance with the applicable regulations. *See* 8 C.F.R. §§ 274a.2(a)(2), (e)-(i). To the contrary, the Forms I-9 were generally completed by hand, though many contained ASI's pre-printed name and address in Section 2. *See* ICE's Motion, Ex. G-14. ASI has not credibly explained why it would choose to complete all of the Form I-9 by hand except the attestation in Section 2, and there is no evidence that ASI actually completed or retained electronically the Forms I-9 at issue. Even assuming that the pre-printing by word processing of its name and address on the Forms I-9 somehow constituted completion of Section 2 by an electronic "signature," there is no evidence overall that ASI otherwise complied with the regulatory requirements for electronically signing an I-9. *See* 8 C.F.R. §§ 274a.2(a)(2), (e)-(i). Furthermore, for several Forms I-9, ASI did sign and complete the attestation in Section 2 by hand, and it has not convincingly explained why it would choose a handwritten signature for some Forms I-9 but not for others. Indeed, the best reading of the evidence as a whole is that ASI neither completed nor retained its Forms I-9 electronically and, thus, did not affix an electronic signature to them despite pre-printing or typing its business name and address.

Second, and perhaps more significantly, there is no actual *signature*, electronic or otherwise, in Section 2 for the Forms I-9 at issue. The relevant statute requires a signature in the attestation in Section 2, and merely pre-printing or typing the company's name is not the equivalent of a signature. *See* 8 U.S.C. § 1324a(b)(1)(A). ASI's argument that its printed name "immediately below" the attestation proves that the attestation was read misapprehends the pertinent requirement. ICE charged ASI with not signing, and, therefore, not attesting "under penalty of perjury" that it examined evidence of the new hire's identity and employment authorization. *See* 8 C.F.R. § 274a.2(a)(3). Without the employer's signature, the mandated attestation is patently

not complete. *See id*. § 274a.2(b)(1)(ii)(B) (requiring an employer to "sign" the attestation in Section 2 of a Form I-9 with either a handwritten or electronic "signature"). Furthermore, without an actual signature, the employer has not complied with the statutory requirement for verifying and attesting that an individual employee is not unauthorized. 8 U.S.C. § 1324a(b)(1)(A). In short, ASI did not sign Section 2 of the Forms I-9 at issue and, concomitantly, violated 8 U.S.C. § 1324a(b)(1)(A).[10]

ASI's argument that some of the Section 2 attestations that were "inadvertently signed" by the employee are not violations of the employment verification system is similarly meritless. *See* ASI's Response at 6. The attestation in Section 2 must be completed by the "employer, his or her agent, or anyone acting directly or indirectly in the interest thereof." 8 C.F.R. § 274a.2(b)(1)(ii)(B). ASI has neither alleged nor demonstrated that the individuals named in Count II were agents of ASI. *See, e.g., United States v. Jalisco's Bar and Grill, Inc.*, 11 OCAHO no. 1224, 9 (2014) ("Unless otherwise provided by law, an individual is not an employee of an enterprise if the individual through an ownership interest controls *all or a part of* the enterprise.") (quoting Restatement (Third) of Employment § 1.03 (Tentative Draft No. 2, revised, 2009). Moreover, as explained above, the record substantiates the conclusion that these individuals were in fact employees. Accordingly, ASI remains liable for failing to sign Section 2 for the Forms I-9 at issue.

Because ICE met its burden of demonstrating the absence of a genuine issue of material fact with respect to ASI's liability for the eighty-two Count II violations, ICE will be granted summary decision as to all of Count II.

## VI. CONCLUSION

ICE's Motion for Summary Decision is granted in part, pursuant to 28 C.F.R. § 68.38, and denied in part. ICE met its burden of proving that ASI is liable for eighty-seven violations of 8 U.S.C. § 1324a(a)(1)(B), as charged in Counts I and II of the complaint. However, ICE failed to meet its burden of proof as to twenty-three of the violations charged under Count I because it failed to show there is no genuine issue of material fact with respect to when ASI presented to ICE twenty-three Forms I-9 for the first time. Resolution of this material fact is required to decide liability for those twenty-three remaining violations under Count I.

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[10] Although, in certain circumstances, corporate attestation of Section 2 of a Form I-9 may be permissible, *see, e.g., Employer Solutions Staffing Group II, LLC v. OCAHO*, 833 F.3d 480 (5th Cir. 2016), *vacating United States v. Employer Solutions Staffing Group II, LLC*, 11 OCAHO no. 1242 (2015), such attestation nevertheless requires a signature. *See* 8 U.S.C. § 1324a(b)(1)(A). Thus, although ASI could attest to Section 2 of a Form I-9 as an entity, such attestation had to be manifested by a signature, and no signature was provided for the Forms I-9 at issue.

ASI did not meaningfully challenge ICE's showing that it is liable under Counts I and II, with the exception of the disputed twenty-three Count I violations. ICE has otherwise demonstrated through uncontroverted proof that no genuine issue of material fact exists with respect to ASI's liability for eighty-seven of the charged violations and will therefore be granted summary decision as to these eighty-seven violations. Accordingly, ASI is found liable for the eighty-seven violations discussed herein.

Although the parties have provided argument and some evidence regarding an appropriate civil monetary penalty in this case, the undersigned finds that it is appropriate to defer a final determination of the penalty amount until the remaining issues of liability surrounding Count I are resolved. Accordingly, the undersigned takes the parties' positions regarding the civil monetary penalty under advisement and will address the appropriate penalty amount in a final decision also addressing the remaining liability issues of the twenty-three outstanding violations charged under Count I. The undersigned will work with the parties in the scheduling of further proceedings in this matter as outlined below.

## VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

### A. Findings of Fact

1. Agri-Systems d/b/a ASI-Industrial is an entity authorized to conduct business in the State of Montana.

2. On July 18, 2011, the Department of Homeland Security, Immigration and Customs Enforcement served Agri-Systems d/b/a ASI-Industrial with a Notice of Inspection.

3. The Department of Homeland Security, Immigration and Customs Enforcement served Agri-Systems d/b/a ASI-Industrial with a Notice of Intent to Fine on February 2, 2016.

4. Agri-Systems d/b/a ASI-Industrial timely requested a hearing on February 22, 2016.

5. The Department of Homeland Security, Immigration and Customs Enforcement failed to demonstrate by a preponderance of the evidence that Agri-Systems d/b/a ASI-Industrial did not present twenty-three of the Forms I-9 upon three days' notice, or by the extended deadline, to the government.

6. The Department of Homeland Security, Immigration and Customs Enforcement, as the moving party, did not meet its burden of showing there is no genuine issue of material fact with respect to Agri-Systems d/b/a ASI-Industrial's liability for twenty-three of the Count I violations, therefore precluding a grant of summary decision as to these violations.

7. Agri-Systems d/b/a ASI-Industrial failed to prepare and/or present Forms I-9 for five employees.

8. Agri-Systems d/b/a ASI-Industrial failed to properly complete Forms I-9 for eighty-two employees.

B. Conclusions of Law

1. Agri-Systems d/b/a ASI-Industrial is an entity within the meaning of 8 U.S.C. § 1324a(a)(1) (2012).

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

3. Agri-Systems d/b/a ASI-Industrial is liable for 87 violations of 8 U.S.C. § 1324a(a)(1)(B).

4. OCAHO regulation 28 C.F.R. § 68.38(c) establishes that an Administrative Law Judge "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision."

5. "An issue of material fact is genuine only if it has a real basis in the record. A genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit." *Sepahpour v. Unisys, Inc.*, 3 OCAHO no. 500, 1012, 1014 (1993) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986)).

6. "Once the moving party satisfies its initial burden of demonstrating both the absence of a material factual issue and that the party is entitled to judgment as a matter of law, the nonmoving party must come forward with contravening evidence to avoid summary resolution." *United States v. Four Seasons Earthworks, Inc.*, 10 OCAHO no. 1150, 3 (2012) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)); *see generally* FED. R. CIV. P. 56(e).

7. OCAHO regulation 28 C.F.R. § 68.38(b) provides that the party opposing the motion for summary decision "may not rest upon the mere allegations or denials" of its pleadings, but must "set forth specific facts showing that there is a genuine issue of fact for the hearing."

8. "In determining whether there is a genuine issue as to a material fact, all facts and reasonable inferences to be derived therefrom are to be viewed in the light most favorable to the non-moving party." *United States v. Primera Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994) (citations omitted).

9. Employers must prepare and retain Forms I-9 for employees hired after November 6, 1986, and are required to produce the Forms I-9 for inspection by the government upon three days' notice. 8 C.F.R. § 274a.2(b)(2)(ii); *United States v. Keegan Variety, LLC*, 11 OCAHO no. 1238, 2 (2014).

10. Employers must ensure that an employee completes section 1 of the Form I-9 and attest to his or her citizenship or immigration status in the United States by signing and dating the Form I-9 no later than the first day of employment. 8 C.F.R. § 274a.2(a)(3), (b)(1)(i)(A).

11. For employees employed for three business days or more, an employer must sign section 2 of the Form I-9 within three days of the employee's first day of employment to attest under penalty of perjury that it reviewed the appropriate documents to verify the individual's identity and employment authorization. 8 C.F.R. § 274a.2(a)(3), (b)(1)(ii).

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

ICE's Motion for Summary Decision is **GRANTED, IN PART,** as to liability. Agri-Systems d/b/a ASI Industrial is liable for eighty-seven violations of 8 U.S.C. § 1324a(a)(1)(B). ICE's Motion is also **DENIED, IN PART,** as to liability because there is a genuine issue of material fact with respect to twenty-three of the Count I violations. A decision on ICE's Motion for Summary Decision regarding the assessment of a civil monetary penalty is taken under advisement and deferred pending further proceedings.

The parties are directed to confer by May 5, 2017, and to provide to the undersigned no later than May 12, 2017, a list of times and dates during which a telephonic pre-hearing conference may be conducted to address further proceedings in this matter. The dates provided should be as soon as is practicable and no later than May 26, 2017. A pre-hearing conference will then be scheduled for no later than May 26, 2017, in accordance with 28 C.F.R. § 68.13. The conference will address, *inter alia*, whether a hearing needs to be scheduled on the remaining violations alleged in Count I pursuant to 28 C.F.R. § 68.38(e) and if so, the dates and form of that hearing, as well as any pre-hearing matters to be considered. It will also address whether any further argument or evidence is needed regarding the appropriateness of a civil money penalty. Otherwise, the parties remain free to negotiate a settlement of this case in the interim, and should they do so, they are directed to file a joint motion with this office as soon as practicable.

SO ORDERED.

Dated and entered on April 19, 2017.

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James R. McHenry III
Administrative Law Judge