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

February 15, 2012

UNITED STATES OF AMERICA, Complainant, v. H & H SAGUARO SPECIALISTS, Respondent.	))))))))	8 U.S.C. § 1324a Proceeding OCAHO Case No. 11A00004

ORDER GRANTING PARTIAL SUMMARY DECISION, PROVIDING 15 DAYS IN WHICH TO SUPPLEMENT THE EVIDENTIARY RECORD, AND RESERVING THE ISSUE OF PENALTIES

I. PROCEDURAL HISTORY

This is an action pursuant to the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a (2006), in which the United States is the complainant and H & H Saguaro Specialists (H & H or the company) is the respondent. The Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a two count complaint alleging that H & H committed 27 violations of 8 U.S.C. § 1324a(b) and 8 C.F.R.§ 274a.2(b), the same counts as were charged in a Notice of Intent to Fine (NIF) it issued to the company after an inspection that began on or about July 1, 2009. H & H made a timely request for a hearing and all conditions precedent to the institution of this proceeding have been satisfied.

Count I alleges that H & H hired 13 named individuals and either failed to ensure that each of them properly completed section 1 of Form I-9, or failed itself to properly complete sections 2 or 3 of the form. Count II alleges that H & H hired 14 named individuals and failed altogether to prepare or present an I-9 form for any of them. A penalty of $935.00 was sought for each violation, for a total civil money penalty of $25,245.00.

H & H is not represented by counsel. Kendra Ellens, the president and owner of H & H, answered the complaint in letter format, with attachments. The letter said Ellens didn't really know what was wrong with the paperwork and that she had asked each employee for 2 pieces of

ID and had them complete the forms attached, which consisted of an Arizona New Hire Reporting Form, a W-4 Employee's Withholding Allowance Certificate, and a form I-9. Ellens' letter concluded by stating that she had closed the business on December 22, 2009, had lost her house, and "couldn't come up with $25,000 in the rest of my lifetime."

Both parties filed their respective prehearing statements, after which the government filed a motion for summary decision as to both liability and penalty. H & H made no response to the motion and the time for doing so has now passed.[1] The motion is ripe for decision.

II. BACKGROUND INFORMATION

H & H Saguaro Specialists is an Arizona corporation established in May 1999. The record reflects that H & H is owned by its president, Kendra J. Ellens, whose father, Kenneth Hindman, is both an employee and vice-president of H & H. The company's business involves the selling of saguaros[2] and other desert plants and is located at an address in Phoenix, Arizona that also appears to be a personal residence. The most recent state Unemployment Tax and Wage Report in the record is for the calendar quarter ending on June 30, 2009 and reflects a total of $14,766 in wages paid to five employees during that quarter, not including Ellens herself, who evidently stopped taking a salary in the quarter ending September 30, 2008. There are no wage reports subsequent to mid-2009 and the current status of H & H as an entity is unclear. The government's motion is silent as to this question.

The motion asserted only that H & H was a corporation in good standing in the State of Arizona as of December 3, 2009. All the government's exhibits about the company predate its alleged dissolution. No affidavit or other evidence elaborates on the assertion in Ellens' answer that the company has been dissolved, and Ellens continued as recently as July 13, 2011 to sign her filings as owner and president of the company. The record nevertheless reflects that attempts by this office to serve the complaint on the company by mail in October, 2010 were ineffective and the complaint package was returned unclaimed, after which ICE was requested to attempt service. The government's first status report said that ICE was investigating whether the corporation had been dissolved. The second status report said only that service had been made upon Kendra Ellens personally, but made no reference to the status of H & H. The government thereafter on July 15, 2011 filed a "Notice of Respondent's Chapter 7 Bankruptcy Case" together with a "Notice of Chapter 7 Bankruptcy Case, Meeting of Creditors, & Deadlines" from the U.S.

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[1] The government's motion was served by mail October 25, 2011. OCAHO rules allow ten days for response to a motion, and an additional five days when service was made by ordinary mail. 28 C.F.R. §§ 68.8(c), 68.11(b). H & H's response was thus due no later than November 9, 2011.

[2] A saguaro is a species of cactus.

Bankruptcy Court for the District of Arizona. Examination of the Court's Notice reflects, however, that it was Kendra Ellens herself who filed individually for bankruptcy protection, not the respondent H & H Saguaro Specialists.

Because the automatic stay provision of the Bankruptcy Code, 11 U.S.C. § 362(a)(1), does not apply to an action by a governmental unit enforcing its police or regulatory powers, *see* 11 U.S.C. § 362(b)(4), the bankruptcy proceedings, whether personal to Ellens or on behalf of the company, have no bearing on the resolution of the issues presented, s*ee generally United States v. Garcia*, 7 OCAHO no. 950, 468, 470-72 (1997)[3]; *In re Universal Life Church, Inc.*, 128 F.3d 1294, 1297-99 (9th Cir. 1997), although the bankruptcy may be considered in assessing a penalty. The filing accordingly does not present an obstacle to the resolution of this case.

Because the current status of H & H may have bearing on the penalty issue, either party having evidence respecting that status will be provided the opportunity to submit it.

III. EVIDENCE CONSIDERED

The government's motion was accompanied by exhibits G-1) the complaint (13 pages); G-1A) Notice of Intent to Fine (2 pages); G-2) Notice of Inspection dated July 1, 2009 (3 pages); G-7)[4] Receipt for Property for the delivery of H & H's I-9 forms; G-8) Affidavit of Special Agent Earnestine Hardaway dated October 12, 2011; G-9) Affidavit of Auditor Jackie Czarzasty dated October 7, 2011 (3 pages); G-10) 13 I-9 forms produced by H & H (13 pages); G-11) Arizona Department of Economic Security (DES) Quarterly Unemployment Tax and Wage Reports for H & H covering the 14 quarters from January 1, 2006 through June 30, 2009 (27 pages); G-12) Arizona Corporation Commission (ACC) records regarding H & H (14 pages); G-14) Kendra Ellens' letter-answer (2 pages); G-15) Spreadsheets prepared by ICE (2 pages); and G-16)

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[3] 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.

[4] The government's prehearing statement also listed exhibits G-3 through G-6 and exhibit G-13, but copies of those exhibits were not included either with ICE's motion or with the prehearing statement.

Handbook for Employers (rev. 7/31/09) (11 pages).

In addition to the materials submitted in connection with the pending motion I have also considered the record as a whole, including pleadings, exhibits, and all other materials of record.

IV. APPLICABLE LAW

A. Summary Decision Standards

OCAHO rules provide that a complete or partial summary decision may issue if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that the moving party is entitled to summary decision. 28 C.F.R. § 68.38(c). This rule is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure (FRCP), which provides for the entry of summary judgment in federal cases. Accordingly OCAHO jurisprudence looks to federal case law interpreting that rule for guidance in determining when summary decision is appropriate. *See United States v. Candlelight Inn*, 4 OCAHO no. 611, 212, 222 (1994).

In assessing a motion for summary decision, the facts must be viewed in the light most favorable to the nonmoving party, *United States v. Primera Enterprises, Inc.*, 4 OCAHO no. 615, 259, 261 (1994), and all reasonable inferences must be drawn in that party's favor, particularly where the nonmoving party is not represented by counsel. *United States v. Jonel, Inc.*, 7 OCAHO no. 967, 733, 736 (1997). Summary decision accordingly does not issue just because the nonmoving party fails to respond to a motion, *United States v. Sourovova*, 8 OCAHO no. 1020, 283, 284 (1998); the moving party still must show not only that there is no genuine issue of material fact, but also that the party is entitled to judgment as a matter of law. 28 C.F.R. § 68.38(c).

B. The Employment Eligibility Verification System

The INA imposes an affirmative duty upon employers to prepare and retain certain forms for employees hired after November 6, 1986 and to make those forms available for inspection on three days notice. 8 U.S.C. § 1324a(b)(1)(A). Regulations designate the I-9 form as the employment eligibility verification form to be used by employers. 8 C.F.R. § 274a.2(a)(2) (2009). An I-9 form must be completed for each new employee within three business days of the hire, 8 C.F.R. § 274a.2(b)(1)(ii), and each failure to properly prepare, retain, or produce the form upon request constitutes a separate violation. 8 C.F.R.§ 274a.10(b)(2). An employer is obligated to retain the original I-9 for a former employee for three years after that employee's hire date or for one year after that employee's termination date, whichever is later. 8 U.S.C. § 1324a(b)(3); 8 C.F.R. § 274a.2(b)(2)(i).

The form has two parts; section 1 consists of an employee attestation, in which the employee

provides information under penalty of perjury about his or her status in the United States, 8 C.F.R. § 274a.2(a)(3), (b)(1)(i)(A), and section 2 consists of an employer attestation under penalty of perjury that specific documents were examined to establish the individual's identity and eligibility for employment. 8 C.F.R. § 274a.2(a)(3), (b)(1)(i)(A). Failure to prepare an I-9 at all is among the most serious of paperwork violations, and case law reflects that the absence of the employer's attestation in section 2 is always a serious violation as well. *See United States v. Reyes*, 4 OCAHO no. 592, 1, 10 (1994) ("[F]ailure to prepare I-9s [is] serious because that failure frustrates the national policy ... intended to assure that unauthorized aliens are excluded from the workplace."); *United States v. J.J.L.C., Inc.*, 1 OCAHO no. 154, 1089, 1098 (1990) ("failure to attest on Part 2 of Form I-9 is a serious violation, implying avoidance of liability for perjury").

V. THE GOVERNMENT'S MOTION CONSIDERED

The record reflects that the Notice of Inspection directed H & H to produce its I-9 forms "for all current employees and all former employees in accordance with mandatory retention requirements of 8 U.S.C. § 1324a(b)(3) (three years after date of hire, or one year after termination of employment, whichever is later)." The government also requested copies of documents employees presented, wage and hour reports, tax statements and other company records. H & H provided 13 I-9 forms with supporting documentation, as well as the other documents requested.

The government finds fault with all 13 of the forms H & H produced and contends that there were 14 other I-9 forms H & H should have, but did not, produce.

A. Count I

Count I asserts that the respondent hired Refujio R. Alcantar, Ramiro Barajas, Juan L. Fishback, Jason P. Forte, Everado Garcia Payan, Kenneth Gillespie, Eugene A. Guerra, DeRenda D. Hill, Stanley F. Howell, Ted L. Kresbach, Rebecca Mazone, Edgar J. Ross, and Candito Sanchez, for employment and failed to ensure that each of them properly completed section 1 of form I-9, or failed itself to properly complete sections 2 or 3 for those individuals.

While the government acknowledged that copies of supporting documents were provided with some of the I-9's, H & H nevertheless failed to properly complete or to sign the employer certification in section 2 for all 13 of these employees. That H & H may have copied some of the documents the employees presented does not excuse the failure to complete the attestation itself. *United States v. Mesabi Bituminous, Inc.*, 5 OCAHO no. 801, 642, 644-45 (1995) (noting that attaching documents to a Form I-9 without completing Section 2, including a signature and attestation under the penalty of perjury, is a violation of 8 U.S.C. § 1324a); *United States v. Manos & Assoc., Inc.*, 1 OCAHO no. 130, 877, 890-91 (1989) (finding that photocopying the

employee's documents and attaching the copies to the Form I-9 did not satisfy the employer's I-9 responsibilities).

Summary decision will accordingly be granted with respect to Count I. While the government also alleged that the respondent failed to record all the required information in section 2 and that there were errors in section 1 of the forms as well, it is unnecessary to reach these issues because only one penalty will be assessed for each faulty I-9 regardless of the number of violations it contains.

B. Count II

Count II asserts that the respondent hired Joel Cerrales, Kendra Ellens, Ignacio Gonzales, Francisco Hernandez, Kenneth Hindman, Javier Lopez-Yepez, Gabriel Martinez, Alberto Morquechol, Carlos Parra-Olivas, Miguel Rangel-Garcia, Alejandro Ruiz-Orozco, Tomas Sanchez-Moreno, Everardo Tovar, and Modesto Vasquez-Hernandez for employment, and failed to prepare or present I-9 forms for any of them.

The government's brief asserts that its burden is to show that H & H (1) hired for employment in the United States; (2) the individuals named in Count II; (3) after November 6, 1986; and (4) failed to prepare and/or make available for inspection the Forms I-9 for those individuals. To the extent that this formulation implies that paperwork violations pertaining to former employees hired any time after November of 1986 may be pursued in perpetuity, it is overbroad.

November 6, 1986 is the original effective date of the statute and earlier OCAHO cases have described the government's burden in the manner set out. *See, e.g., United States v. Tri Component Product Corp.*, 5 OCAHO no. 821, 765, 768-69 (1995). This formulation becomes more and more vague, however, with each passing year since the enactment of the statute. An employer is required to retain the I-9 of a former employee 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. 8 U.S.C. § 1324a(b)(3); 8 C.F.R. § 274a.2(b)(2)(i); *United States v. Ojeil*, 7 OCAHO no. 984, 982, 992 (1998). No penalty should be assessed for an employer's failure to produce an I-9 that the employer has no duty to retain.[5] A more accurate statement of the government's burden in 2012 might therefore be that the government must show not only that the individual was hired after November 6, 1986, but also that the individual is either still employed or was hired within three years prior to the date of the Notice of Inspection or terminated within one year prior to the that date, whichever is later.

[5] There are other temporal limitations as well on the ability of the government to pursue stale claims. As explained in *Ojeil*, 7 OCAHO no. 984 at 982-83, 28 U.S.C. § 2462 requires that a case be commenced within five years from the date the claim first accrued.

The government's motion contends that the company is responsible for the "three-year time period covered in the present Form I-9 inspection [that] includes H & H Saguaro's employees hired between second Quarter, 2006 through second Quarter 2009," and ICE's exhibits include H & H's quarterly state Unemployment Tax and Wage Reports for the 14 quarters ending respectively on March 31, 2006 through June 30, 2009. The second quarter of 2006, however, consists of a period beginning on April 1, 2006 and lasting until June 30, 2006. Thus a former employee who was hired in the second quarter of 2006 could, depending upon the employee's termination date, potentially include a former employee for whom the retention period expired any time between April 1, 2009 and June 30, 2009, up to three months prior to service of the Notice of Inspection. Because the relevant dates for determining the retention period for a former employee's I-9 are the actual dates of that employee's hire and termination, and not the quarter within which that date occurred, the government should have provided the actual hire and termination dates for the former employees.

Even without those dates, however, it may be discerned from the quarterly Unemployment Tax and Wage Reports that Kenneth Hindman, Gabriel Martinez, Carlos Parras Olivas, Javier Lopez-Yepez, and Kendra Ellens all received wages after July 1, 2008 and the government is accordingly entitled to summary decision with respect to these employees or former employees; regardless of their exact dates of hire or termination it is clear that H & H was still required on July 1, 2009 to retain I-9 forms for them. It is not clear, however, whether H & H still had a duty on July 1, 2009 to retain I-9 forms for the remaining former employees, and the government's brief does not address this question at all.

The government did show that the named individuals were hired after November 6, 1986 and that H & H failed to produce I-9s for them, but in order to establish a duty to produce the form on July 1, 2009, the government would have to provide evidence that each was hired on a date within a 3 year period prior to July 1, 2009, or terminated on a date within a 1 year period prior to July 1, 2009, whichever of the two dates is later. 8 U.S.C. § 1324a(b)(3).

No specific hiring or termination dates were provided for the former employees, and, although the government's submission suggests that Ellens did provide their termination dates, that information evidently was not used by ICE to determine whether H & H had a duty to retain the form on July 1, 2009. The Czarzasty Affidavit says Ellens said Olivas-Parra was terminated on July 2, 2009, Miguel Rangel Garcia in 2006 and Alberto Morquechol in the last part of 2006. The Czarzasty Affidavit also states that Ellens provided termination dates for the employees whose names appeared on the Notice of Suspect Documents and the Notice of Discrepancies, but neither these documents nor that information is in the record.[6]

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[6] The Czarzasty affidavit asserts that the Notice of Suspect Documents is provided at Ex. G-7, but it is not. Ex. G-7 is a one-page Receipt for Property the government gave H & H when it took possession of the I-9s on July 8, 2009. According to the government's amended prehearing

Construing the known facts, as I must, in the light most favorable to H & H, and drawing all reasonable inferences in the company's favor, I find that the government failed to show that the company had a duty on July 1, 2009 to retain I-9s for Joel Cerrales, Ignacio Gonzales, Francisco Hernandez, Alberto Morquechol, Miguel Rangel Garcia, Alejandro Ruiz-Orozco, Tomas Sanchez-Moreno, Everardo Tovar, and Modesto Vasquez-Hernandez. There are genuine issues of material fact as to precisely when each of these individuals was hired and/or terminated and in consequence the government has not shown that it is entitled to judgment as a matter of law with respect to any liability for H & H's failure to present I-9 forms for them on or after July 1, 2009.

CONCLUSION

The government's motion will be granted with respect to liability for the violations alleged in Count I, and for 5 of the violations alleged in Count II. It will be provisionally denied with respect to the other 9 former employees named in Count II. The parties will, however, be given a period of 15 days in which to file supplemental evidentiary materials, if any, to show the actual dates of hire and termination for these 9 individuals. Failing additional submissions, the allegations with respect to these 9 former employees will be dismissed and a final decision issued finding 18 violations, 13 in Count I and 5 in Count II, and assessing an appropriate penalty.

VI. PRELIMINARY FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. H & H Saguaro Specialists is a small desert plant company incorporated in 1999 and owned by Kendra Ellens; it has its principal place of business in Phoenix, Arizona.

2. United States Department of Homeland Security, Immigration and Customs Enforcement served a Notice of Intent to Fine (NIF) on H & H Saguaro Specialists on August 23, 2010 alleging that the Respondent committed 27 violations of the Immigration and Nationality Act, 8 U.S.C. § 1324a and seeking a total of $25,245.00 in civil money penalties.

3. H & H Saguaro Specialists filed a request for hearing on September 22, 2010.

4. The United States Department of Homeland Security, Immigration and Customs Enforcement filed a complaint with this office in two counts against H & H Saguaro Specialists on October 14, 2010.

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statement filed on November 4, 2011, it identified the Notices as Exhibits G-3 and G-4, but neither was included with ICE's motion.

5. H & H Saguaro Specialists filed an answer to the complaint on March 7, 2011.

6. H & H Saguaro Specialists hired Refujio R. Alcantar, Ramiro Barajas, Juan L. Fishback, Jason P. Forte, Everado Garcia Payan, Kenneth Gillespie, Eugene A. Guerra, DeRenda D. Hill, Stanley F. Howell, Ted L. Kresbach, Rebecca Mazone, Edgar J. Ross, and Candito Sanchez for employment in the United States and failed to properly complete section 2 of Form I-9 for each of them.

7. H & H Saguaro Specialists hired Kenneth Hindman, Gabriel Martinez, Carlos Parra-Olivas, Javier Lopez-Vepez, and Kendra Ellens for employment in the United States and failed to prepare or present I-9 forms for each of them.

B. Conclusions of Law

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

2. H & H Saguaro Specialists is an entity within the meaning of 8 U.S.C. § 1324a(a)(1).

3. H & H Saguaro Specialists engaged in 18 separate violations of 8 U.S.C. § 1324a(b) (2006) and the government is entitled to summary decision with respect to liability therefor.

ORDER

The government's motion for summary decision is granted in part and denied in part. The government is entitled to summary decision as to liability for the 13 violations charged in Count I and for 5 of the 14 violations charged in Count II. The question of penalties for these violations is reserved.

The motion is provisionally denied with respect to liability for 9 of the violations charged in Count II, but the parties will have 15 days from the date of this order in which to file supplementary evidentiary materials showing the actual dates of hire and termination for the 9 former employees for whom H & H's duty to present Form I-9 has not been established.

Either party having evidence respecting the current legal status of the company itself may submit it within the 15 day period. Assertions of fact must be supported by affidavit or other evidence such as copies of documents. An affidavit is a written statement, signed by the person making it, that is dated and says it is signed under penalty of perjury.

SO ORDERED.

Dated and entered this 15th day of February, 2012.

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Ellen K. Thomas
Administrative Law Judge