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

March 8, 2012

UNITED STATES OF AMERICA, Complainant, v. STANFORD SIGN AND AWNING, INC., Respondent.	))))))))	8 U.S.C. § 1324a Proceeding OCAHO Case No. 11A00069

ORDER GRANTING IN PART AND DENYING WITHOUT PREJUDICE IN PART COMPLAINANT'S MOTION FOR SUMMARY DECISION, AND ESTABLISHING DEADLINE FOR RENEWAL

I. PROCEDURAL HISTORY

This is an action arising under 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 Stanford Sign & Awning, Inc. (Stanford) is the respondent. The Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a three-count complaint on March 29, 2011 alleging that the company violated 8 U.S.C. § 1324a(b).

Count I asserts that Stanford failed to prepare and/or present the Employment Eligibility Verification Form (Form I-9) for 4 named individuals. Count II alleges that the company failed to ensure that 17 named employees properly completed section 1, and/or failed itself to properly complete sections 2 or 3 of the form for them. Count III alleges that Stanford failed to correct technical and procedural paperwork violations on the I-9 forms of 5 employees thus failing to ensure proper completion of section 1 by the employee, or failing itself to properly complete sections 2 or 3. The government seeks a penalty of $1075.25 for each of the 26 alleged violations, for a total penalty of $27,956.50.

The company is not represented by counsel. An answer was filed on its behalf by its president, David B. LeSage, after which a telephonic prehearing conference was held, and the government filed a motion for summary decision. Stanford's response to the motion was made by the company's office manager, Robin T. DesRoches. The motion is ripe for decision.

II. BACKGROUND INFORMATION

Stanford is engaged in the business of manufacturing signs and awnings and has its principal place of business at 2556 Faivre Street, Chula Vista, California. The company described itself as a certified small business that operates in two locations, employs 51 people, has a gross income under $5 million per year, and puts its profits, if any, back into the business. It says that because its activities are linked to the construction industry, the last two years have been extremely difficult.

ICE's exhibit G-6 reflects that a Notice of Inspection was served on Stanford on September 15, 2010,[1] together with two Enforcement Subpoenas. The Notice of Inspection advised Stanford that ICE regulations require three days notice prior to conducting a review of an employer's I-9 forms, and that the letter "serves as advance notice that ICE has scheduled a review of your forms for September 20, 2010." The Notice is silent as to any specific period for which the employees' I-9s had to be produced. The subpoenas, on the other hand, are specific: one directs Stanford to produce information it received from the Social Security Administration for *current employees* at both the Chula Vista and San Marcos locations. The second directs Stanford to produce copies it made of documents presented by *current employees* when they were hired at both locations. An Enforcement Subpoena dated August 24, 2010 directed to the State of California Employment Development Department sought information identifying Stanford's employees and showing their wages for the previous twelve months.

The government says it subsequently received from the company various I-9 forms with supporting documentation and other information from both Stanford's Chula Vista location and Western Sign and Awning, Inc., the company's San Marcos location. After completion of the inspection process, the government served a Notice of Intent to Fine on Stanford on March 2, 2011, and Stanford filed a timely request for a hearing. All conditions precedent to the institution of this proceeding have been satisfied.

[1] The government's memorandum recites that it served the Notice of Inspection on November 19, 2009, but this appears to be an error.

III. EVIDENCE CONSIDERED

A. Exhibits Accompanying the Government's Motion

The government filed exhibits consisting of G-1) Notice of Intent to Fine served on Stanford Sign and Awning, Inc. on March 2, 2011 (5 pgs.); G-2) Complaint (14 pgs.); G-3) a collection of I-9 Forms, some with supporting documents showing the individual's identification and employment authorization (141 pgs.); G-4) Answer (3 pgs.); G-5) Employee Lists and Quarterly Wage and Tax Reports for Stanford Sign & Awning, Inc. and Western Sign & Awning, Inc. (154 pgs.); G-6) Notice of Inspection served on Stanford Sign & Awning, Inc. on September 15, 2010 (2 pgs.); G-7) 3 Immigration Enforcement Subpoenas. (6 pgs.).

B. Exhibits Accompanying Stanford's Response

The respondent included two exhibits to its response, consisting of I-9s for the individuals named Counts II and III (28 pgs.).

IV. APPLICABLE LAW

A. Summary Decision Standards

OCAHO rules[2] 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, 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).[3]

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[2] 28 C.F.R. pt. 68 (2010).

[3] 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. 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

A party seeking a summary disposition bears the initial burden of demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party satisfies its initial burden, the nonmoving party must come forward with contravening evidence to avoid summary resolution. *Id*. In considering such a motion, the facts must be viewed in the light most favorable to the nonmoving party, *United States v. Primera Enters., Inc*., 4 OCAHO no. 615, 259, 261 (1994); this is particularly necessary where the nonmoving party is not represented by counsel. *United States v. Jonel, Inc.*, 7 OCAHO no. 967, 733, 736 (1997). While the rules themselves do not authorize a qualitative double standard for treating the papers of the moving party and the nonmoving party differently, there is nevertheless in practice a more lenient standard applied to the materials of the party opposing summary resolution, particularly where the nonmoving party is unrepresented. *Parker v. Wild Goose Storage, Inc.*, 9 OCAHO no. 1081, 5-6 (2002) (citing *Lew v. Kona Hosp.*, 754 F.2d 1420, 1423 (9th Cir. 1985)).

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. 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) (2010). Forms 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 forms upon request constitutes a separate violation. 8 C.F.R. § 274a.10(b)(2). An employer is obligated to retain the original signed copy of the Form I-9 for either three years after the date of hire of the employee, or one year after the date the individual's employment is terminated, whichever is later. 8 U.S.C. § 1324a(b)(3); 8 C.F.R. § 274a.2(b)(2)(i)(A).

The government bears the burden of proof with respect to the violations, as to both liability and penalty. *See United States v. Am. Terrazzo Corp*., 6 OCAHO no. 877, 577, 581 (1996); *United States v. Skydive Acad. of Haw. Corp*., 6 OCAHO no. 848, 235, 239-40 (1996).

C. Liability for Technical and Procedural Violations

The governing statute provides that a technical or procedural failure to meet a requirement despite an employer's good faith attempt to comply with the statute will not be penalized unless the government first explained the basis for the failure and then provided the employer a period of not less than ten business days after the explanation within which to correct the violations and the employer has not corrected the failure voluntarily within such period. 8 U.S.C. § 1324a(b)(6).

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unbound case will always be 1, and is accordingly omitted from the citation.

The distinction between substantive violations and those that are technical or procedural in nature is elaborated in a 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) (the "Virtue Memorandum" or "Interim Guidelines"), *available at* 74 Interpreter Releases 706 app. 1 (Apr. 28, 1997). As explained in *United States v. WSC Plumbing, Inc*., 9 OCAHO no. 1071, 11 (2001), dissemination of the Interim Guidelines to the public may be viewed as an invitation for the public to rely upon them as representing agency policy.

V. THE POSITIONS OF THE PARTIES

A. Count I

Count I initially asserted that Stanford failed to prepare or present I-9 forms for Joanna Cuevas, Richard Delgatto, Scott Glenn and Christopher Gudmonson. Stanford's answer said that one of the employees was hired prior to November 6, 1986 and that two were terminated prior to the audit. At the telephonic prehearing conference Stanford explained that it had no I-9 for Richard Delgatto because Delgatto was hired prior to November 6, 1986, the effective date of the governing statute, so it never had to prepare one. With respect to Joanna Cuevas and Christopher Gudmonson, the respondent said it actually did have I-9 forms for them but did not produce them because Cuevas and Gudmonson were no longer employees on the date it received the Notice of Inspection. With respect to Scott Glenn, Stanford's answer said that the I-9 "was not included in the group of I-9's submitted." The meaning of this assertion is unclear, but it appears to be a concession that Stanford did not present an I-9 for Scott Glenn.

The government's motion agreed to drop its allegation with respect to Delgatto, but continued to pursue the remaining allegations in Count I. Sanford's response to the motion did not further address the allegations in Count I.

B. Count II

The complaint asserts in Count II that Stanford either failed to ensure that the employee properly completed section 1 of the I-9 form, or itself failed to properly complete section 2 or 3 of the form for Jose Barerra, Michael Brown, Michael Delgatto, Robin DesRochas, Rosendo Estrada, Bonnie Gill, Oscar Ibarra, Marcos Jimenez, Jeremy Kelley, Michael Leon, David LeSage, Jose Lopez, Joe Maverchik, Adam Nguyen, Julio Ocegueda, Judith Pritchard, and Jose Valenzuela.

The government's motion, however, makes no mention of section 1 and asserts that the violations are in sections 2 or 3 of the form, but does not identify the violations themselves with specificity. Rather, the memorandum asserts that there are substantive errors in the forms and

says that because the respondent agreed that the I-9s were not properly completed it is entitled to summary decision. Stanford's answer acknowledged generally that in filling out its I-9s, "information was not recorded correctly," and its response to the motion similarly says that "[w]e know now that we have filled out some the I-9s incorrectly" (sic). It says further that the company has since enrolled in e-verify and corrected the incorrect I-9s.

C. Count III

The government alleges that Stanford was given the opportunity to correct technical violations in the I-9s it prepared for Victor Gomez, Lance Reiche, Enrique Rodriguez, Michael Sherer, and James Sindelar, and failed to do so.

Stanford's answer asserted that it is a small business and works hard to meet all the regulations and paperwork requirements from the city, county, state, and country. Its response to the motion says that DesRoches misunderstood the instructions given to her verbally by an agent with a heavy accent, that she did not really know how the corrections were to be made and thought that ICE would review the forms with her, but this did not happen. The agent just picked up the corrected forms without consultation. It said further that Stanford had no HR department and its employees all had a plethora of duties and were diligent in performing them.

VI. DISCUSSION AND ANALYSIS

A. Count I

ICE's motion asserts that the statute requires employers to complete I-9 forms for all employees hired after November 6, 1986, and to retain the forms and make them available for inspection, citing 8 U.S.C. § 1324a(b)(3); 8 C.F.R. § 274a.2(b)(2). It states further that the names of the individuals appear on the respondent's payroll as employees, but that their I-9s were not produced. Stanford suggests that because the subpoenas it received referred only to current employees, it thought that it only needed to produce the I-9 forms for current employees too. The quarterly wage detail report for the quarter ending September 30, 2010 confirms Stanford's assertion that Cuevas was terminated on July 30, 2010 and Gudmundson on July 22, 2010.

The Notice of Inspection itself was silent as to any particular period for which I-9s would be inspected. Some requests made by ICE specify a particular finite period of time the I-9 Inspection is intended to cover. *See, e.g., United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 2 (2011) (requesting I-9s "for employees who worked between June 30, 2006 and July 1, 2009"); *United States v. Ketchikan Drywall Services, Inc.*, 10 OCAHO no. 1139, 2-3 (2011) (requesting I-9s "for employees who worked between January 1, 2005 and March 25, 2008"). Still others include language specifying that the inspection of I-9s will be of those for current employees "and all former employees in accordance with mandatory retention

requirements of 8 U.S.C. § 1324a(b)(3) (three years after the date of hire or one year after termination of employment, whichever is later"). *See, e.g., United States v. H & H Saguaro Specialists*, 10 OCAHO no. 1144, 10 (2012).

The government's motion cites to no authority for and makes no argument as to why a Notice of Inspection that is wholly silent as to any particular time period for which I-9s are to be inspected is sufficient to provide adequate notice to an employer of which I-9s are being requested.

The opportunity to cite that authority and make that argument will be provided.

B. Count II

The sum total of the government's argument in support of its allegations in Count II says,

> The errors or insufficient information on the Forms I-9 for the employees listed under Count II were for substantive errors. Substantive errors are deficiencies in regards to information that cannot be corrected or later added after an inspection. As a result, Stanford was not provided with an opportunity to correct such errors. Stanford agrees that the Forms I-9 were not properly completed. Ex. 4. ICE therefore requests summary decision as to Count II of the Complaint.

In order to establish liability for a particular violation, the government must first state with specificity what the violation consists of. The violations here have not been identified with specificity and Stanford's opaque acknowledgment that it "filled out some [of] the I-9s incorrectly" does nothing either to help identify the undisclosed errors the government relies on, or to provide a basis upon which to predicate a finding that each of the alleged violations alleged in Count II is substantive in nature.

Factual allegations made in a complaint that are not expressly denied in the answer are ordinarily deemed to be admitted. *United States v. Acevedo*, 1 OCAHO no. 95, 647, 648 (1989); 28 C.F.R. § 68.9(c)(1). Such an allegation must, however, be sufficiently particularized if it is to provide support for a subsequent motion for summary decision. *United States v. Weymoor Investments, Ltd.*, 1 OCAHO no. 56, 343, 344 (1989). Where a party admits or fails to contest a vague, opaque, or conclusory allegation, such an "admission" is ineffective because conclusory allegations unsupported by specific facts do not provide an adequate basis for summary decision. *United States v. Sourovova*, 7 OCAHO no. 987, 1021, 1027 (1998) (*Sourovova I*); *United States v. L&M Tire Co.*, 1 OCAHO no. 134, 910, 912 (1990) ("ambiguous and possibly conflictual" response to request for admissions does not constitute an "admission").

In support of the motion the government's memorandum asserts that a simple "visual

examination" of the I-9 forms establishes the violations, evidently in the expectation that I will search through the 141 pages of undifferentiated documents proffered as exhibit G-3, try and identify the specific I-9 forms complained about, then guess which particular error or errors the government is relying on with respect to each form, and whether the error is one occurring in section 1[4], section 2, or section 3. Exhibit G-3 includes I-9s and supporting documents for a number of employees, not all of whom are named in the complaint, and in some instances there are multiple I-9s for a single individual.

I decline to undertake this task. As Judge Posner pointed out in another context, mind reading is not an accepted tool of judicial inquiry. *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994). Examination of the forms does not necessarily establish which specific violations the government relies upon, and its memorandum does nothing to assist me in doing so. Rather, the memorandum appears to misunderstand the burden of proof for a paperwork violation. Summary decision does not issue automatically, even when the nonmoving party fails to respond to a motion. *United States v. Sourovova*, 8 OCAHO no. 1020, 283, 284 (1998) (*Sourovova II*). The moving party still has the burden to show that there is no genuine issue of material fact, and also that the party is entitled to judgment as a matter of law. *Id.*; 28 C.F.R. § 68.38(c). That showing has not been made here.

The purpose of summary decision is to isolate and dispose of factually unsupported claims or defenses. *United States v. Aid Maintenance Co.*, 6 OCAHO no. 893, 810, 813-14 (1996). A party seeking it bears the initial responsibility of explaining the basis for the motion and identifying the specific portions of the pleadings, depositions, discovery responses, admissions, or affidavits that demonstrate the absence of a genuine issue of material fact. *Id.* at 14.

An opportunity to make a more particularized showing will be provided.

C. Count III

Similarly with respect to Count III, the technical errors that were supposed to be corrected are not identified with specificity, nor is it clear what facts the government relies on with respect to the alleged failures to correct. It is not clear, moreover, whether a Notice of Technical or Procedural Violations was ever issued; if there was such a notice it was not included among the government's exhibits and the government's motion does not refer to it. While the government's memorandum asserts with respect to Count III that "an opportunity" was given for Stanford to correct the errors, factual allegations made in a brief or memorandum are not evidence and may not be considered as such. *United States v. Hotel Martha Washington Corp.*, 6 OCAHO no. 846, 216, 225 n.5 (1996). Neither is there other evidence warranting a conclusion that after

[4] ICE's memorandum refers to the failure to complete section 2 or section 3, but the NIF, incorporated in the complaint, charges failure to complete section 1 and/or section 2 or 3.

explanation of the violations, the requisite period of 10 business days was provided for Stanford to correct them. This showing is essential because failure to follow the notice and correction procedures precludes alleging those violations in a complaint. *See United States v. DJ Drywall, Inc.*, 10 OCAHO no. 1136, 3-4 (2010) (citing *WSC Plumbing*, 9 OCAHO no. 1071 at 12-15).

The lack of specificity both as to what the specific technical errors in the original I-9s were, and as to exactly what is wrong with Stanford's corrections also precludes summary decision with respect to the allegations in Count III.

The government's memorandum is somewhat confusing, moreover, as to the basis for Count III. It asserts that,

> Although, Stanford failed to properly complete the Forms I-9 for 25 employees, Stanford was provided with an opportunity to correct such errors and avoid fines. Upon correcting errors, Stanford must initial ***and*** date each correction. Stanford failed to initial and date corrections on all 25 Forms I-9. ICE counsel requested that discretion be exercised favorably for Stanford and that a fine only be pursued if there were no initials or dates next to each correction. Stanford failed to initial or date 5 Forms I-9. Stanford agrees that the 5 Forms I-9 were not corrected properly. Ex. 4.

If the violations alleged involve Stanford's failure to initial and date the corrections the company made after being served with the notice of technical and procedural failures, the government has provided no legal authority for the assertion that this is a substantive violation meriting a civil money penalty. The government's memorandum identifies the Virtue Memorandum as the guidance it relies on, but the Virtue Memorandum expressly states that "[i]nitialing and dating corrections is important for proper correction of the failure. However, failure to initial and date a correction does not render a failure substantive." 74 Interpreter Releases 706 app.1, nn.7 & 8 (Apr. 28, 1997). How this is to be construed in the current context is unelaborated.

An opportunity to clarify the basis for the allegations in Count III will be provided.

ORDER

The government's motion for summary decision is granted in part. Stanford violated the statute by hiring Scott Glenn for employment and failing to present a Form I-9 for him on three days notice. The penalty for this violation is taken under advisement.

The motion is otherwise denied, without prejudice to its renewal with appropriate revisions on or before April 9, 2012. Stanford will have a period of thirty days from the service date of the government's renewed motion in which to respond to the renewed motion. In the event the motion is not renewed, a penalty will be assessed for the violation involving Scott Glenn.

SO ORDERED.

Dated and entered this 8th day of March, 2012.

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Ellen K. Thomas
Administrative Law Judge