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

August 18, 2022

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 2020A00012
EL PASO PAPER BOX, INC.,	)	
Respondent.	)	

ORDER ON MOTIONS FOR SUMMARY DECISION

I. BACKGROUND

On November 5, 2019, the United States Department of Homeland Security, Immigration and Customs Enforcement (Complainant or the government) filed a complaint against Respondent, El Paso Paper Box, Inc. (Respondent or the company). The complaint reflects that the government served a Notice of Intent to Fine (NIF) on June 19, 2019, and Respondent thereafter made a timely request for hearing. Respondent filed an answer to the complaint December 5, 2019.

On July 30, 2020, the company filed Respondent's Motion for Summary Decision (R's MSD), to which the government filed Complainant's Response to Respondent's Motion for Summary Decision (C's Opp'n) on August 21, 2020.

On August 3, 2020, the government filed Complainant's Motion for Summary Decision with an accompanying Complainant's Memorandum of Law in Support of Motion for Summary Decision (C's Mem. MSD), and Complainant's Motion to Accept Late Filing. The motion to accept the late filed summary decision motion was granted on August 21, 2020. Respondent filed Respondent's Response to Complainant's Motion for Summary Decision (R's Opp'n) on September 8, 2020.

The Complaint charges Respondent, a Texas corporation that manufactures folding cartons for the packaging industry, with three counts of violating section 274A(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. §§ 1324a(a)(1)(B) and one count of violating section

274A(a)(1)(A), 8 U.S.C. § 1324a(A)(1)(A). [1] Compl. Ex. A, at 3–8. Complainant asserts that Respondent did not prepare or present the Employment Verification Form (Form I-9) for two employees (Count I); ensure that the employees properly completed section 1 and/or failed to properly complete section 2 or 3 of the Form I-9 as to sixty-seven employees (Count II and III); and "knowingly continued to employ one employee." Compl. 1–4. Complainant seeks $70,305.10 in penalties for these violations. Compl. Ex. A, at 1.

II. STANDARDS

A. Summary Decision

"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." *United States v. Metro. Enters., Inc.*, 12 OCAHO no. 1297, 7 (2017) (citing *United States v. Nebeker, Inc.*, 10 OCAHO no. 1165, 4 (2013)).[2] The government also has the burden of proof with respect to the penalty and the government "must prove the existence of any aggravating factor by the preponderance of the evidence[.]" *Id.* (quoting *United States v. Niche, Inc.*, 11 OCAHO no. 1250, 6 (2015)).

Under the Office of the Chief Administrative Hearing Officer (OCAHO) rules, the Administrative Law Judge (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." 28 C.F.R. § 68.38(c). "An issue of material fact is genuine only if it has a real basis in the record" and 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) (first citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986); and then citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

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[1] Count IV in the Complaint alleges that Respondent violated the Immigration and Nationality Act by "knowingly continuing to employ one employee", and cites to page 8 of Exhibit A, the NIF, but incorrectly cites to § 274A(a)(1)(B) of the Immigration and Nationality Act. The NIF, which was attached to the Complaint, correctly cites to § 274A(a)(1)(A), and Respondent did not raise the error in its filings. As the Complaint incorporates the NIF, and Respondent was clearly put on notice of the allegation, the Court will consider the erroneous citation in Count IV to be a harmless, scrivener's error.

[2] 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 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.

"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)). "[T]he 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.'" *United States v. 3679 Com. Place, Inc.*, 12 OCAHO no. 1296, 4 (2017) (quoting 28 C.F.R. § 68.38(b)). Further, if the government satisfies 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). All facts and reasonable inferences are 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).

"The filing of cross motions does not necessarily mean that summary decision should issue in favor of either party; each motion must be considered on its own merits." *United States v. Foothill Packing, Inc.*, 11 OCAHO no. 1240, 7 (2015) (citation omitted).

B. Employment Verification Requirements

"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." *Metro. Enters., Inc.*, 12 OCAHO no. 1297, at 7 (citation omitted). "Employers must prepare and retain Forms I-9 for employees hired after November 6, 1986, and employers must produce the I-9s for government inspection upon three days' notice." *Id.* at 7 (citing 8 C.F.R. § 274a.2(b)(2)(ii)). An employer must ensure that an employee completes section 1 of the I-9 on the date of hire and the employer must complete section 2 of the I-9 within three days of hire. *United States v. A&J Kyoto Japanese Rest. Inc.*, 10 OCAHO no. 1186, 5 (2013); 8 C.F.R. § 274a.2(b)(1)(A), (ii)(B). "Employers must retain an employee's I-9 for three years after the date of hire or one year after the date of termination, whichever is later." *United States v. Imacuclean Cleaning Servs., LLC*, 13 OCAHO no. 1327, 3 (2019) (citing § 274a.2(b)(2)(i)(A)).

"Failures to satisfy the requirements of the employment verification system are known as 'paperwork violations,' which are either 'substantive' or 'technical or procedural.'" *Metro. Enters., Inc.*, 12 OCAHO no. 1297, at 7 (citing 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)). As explained in *United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1071, 11 (2001), dissemination of the Virtue Memorandum to the public may be viewed as an invitation for the public to rely upon them as representing agency policy. While this tribunal is not bound by the Virtue Memorandum, the Complainant is so bound, and failure to follow its own guidance is grounds for dismissal of those claims. *Id.* at 12. With respect to technical or procedural violations, the employer must be given

a period of not less than ten business days to correct the failure voluntarily. 8 U.S.C. § 1324a(b)(6)(A)-(B).

C. Good Faith Defense

In its answer, Respondent asserts that it complied with the I-9 requirements in good faith. Section 1324a(a)(6) provides that an entity is considered to have complied with the employment verification requirements notwithstanding a technical or procedural failure if the employer made a good faith attempt to comply. However, an employer cannot avoid liability under § 1324a(a)(1)(B) for technical or procedural verification failures if it fails to correct those failures within ten days after the date Complainant notifies the employer of the failure. *WSC Plumbing, Inc.*, 9 OCAHO no. 1071, at 2. A Notice of Technical and Procedural Failures generally serves as notice of such violations. *See United States v. Stanford Sign & Awning, Inc.*, 10 OCAHO no. 1145, 9 (2012).

The good faith defense does not apply to substantive violations. *United States v. Super 8 Motel & Villella Italian Rest.*, 10 OCAHO no. 1191, 4 (2013).

> Violations that the *Virtue Memorandum* characterize as substantive rather than technical or procedural include failure to prepare or present an I-9; failure to check a box indicating whether an employee attests to being a U.S. citizen, lawful permanent resident, or alien authorized to work; and review of improper List A, B, or C documents.

Id. at 5.

D. Statute of Limitations

Respondent also asserts that the allegations are barred by the statute of limitations. Section 1324a does not establish a time limit for when proceedings under its provisions must be commenced. OCAHO case law has held that the five-year statute of limitations codified at 28 U.S.C. § 2462 is applicable to proceedings under § 1324a. *United States v. St. Croix Pers. Servs., Inc.*, 12 OCAHO no. 1289, 10–11 (2016); *see also Ojeil v. Ishk*, 7 OCAHO no. 984, 988–89 (citing *United States v. Curran Eng'g Co.*, 7 OCAHO no. 975, 874, 879 (1997)). Therefore, "a complaint is timely if filed within five years of the date on which a violation accrues." *United States v. Leed Constr.*, 11 OCAHO no. 1237, 6 (2014) (citing *United States v. H & H Saguaro Specialists*, 10 OCAHO no. 1144, 6 n.5 (2012)).

"The accrual date of a violation depends on the specific violation." *United States v. Visiontron Corp.*, 13 OCAHO no. 1348, 5 (2020). "Generally, paperwork violations are 'continuous' violations until they are corrected or until the employer is no longer required to retain the Form I-9 pursuant to [the] retention requirements" of the Immigration Reform and Control Act of 1986 (IRCA). *Id.* (first citing § 274a.2(b)(2)(i)(A); then citing *Curran Eng'g Co.*, 7 OCAHO no. 975, at 895; and then citing *United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1061, 11 (2000)).

III. DISCUSSION

A. Position of the Parties

1. Complainant's MSD

Complainant asserts that it has met its burden of proof to support a summary decision in its favor. C's Mem. MSD 4. It asserts that the alleged violations are all substantive verification violations, and the affirmative defense of "good faith" is not available to Respondent as it is only available for technical and procedural violations. C's Mem. MSD 5. In support of the motion, Complainant submitted ten group exhibits consisting of, among other things, the original Forms I-9, a Memorandum to Case File and a Report of Investigation. C's MSD Exs. G-3, G-9, G-10. Also included is a summary of each alleged violation. C's MSD Ex. G-4.

2. Respondent's Opposition to Complainant's MSD

In its Response to Complainant's Motion for Summary Decision, Respondent argues that Complainant is not entitled to summary decision because a genuine issue of material fact exists regarding liability; specifically, the alleged violations are technical or procedural violations which are excused by Respondent's good faith. R's Opp'n 1. Respondent attached affidavits from Paul Malooly, owner and president of El Paso Paper Box with some photographs (R-1), Maria Tonche, Payroll and benefits coordinator (R-2), Forms I-9 and E-Verify print-outs.

3. Respondent's MSD

Respondent asserts that the Complaint is barred by the statute of limitations with respect to forty-two of the violations because the Complaint was filed more than five years after the fourth business day after hiring each employee. R's MSD 1. Respondent asserts that an examination of these Form I-9s reveals that the charge is failure to timely complete section 2 of each form. *Id.* at 4. Respondent attached Forms I-9 as well as an analysis of the I-9s of sixty-nine employees.

4. Complainant's Opposition to Respondent's MSD

In its response to Respondent's Motion for Summary Decision, Complainant argues that the violations at issue in this case, particularly those in Count II, are continuing violations and therefore are not subject to the statute of limitations. C's Opp'n 7.

B. Denial of Respondent's MSD

Respondent's primary argument is that the statute of limitations bars forty-two of the allegations "because the Complaint was filed more than five years after the fourth business day after hiring each employee." R's MSD 1. Respondent claims that an examination of the contested forty-two employees "makes . . . clear that [R]espondent is being charged with having failed to timely complete section 2 of each Form I-9." *Id.* at 4.

The forty-two violations arise from Count 2 of the Complaint, which alleges failure to ensure that the employee properly completed Section 1 and/or failure to properly complete Section 2 or 3 of the Form I-9, not failure to timely prepare. *Compare* R's MSD 2–3, *with* Compl., Ex. A, at 3–8. Respondent premises its argument on the incorrect assumption that Complainant charged failure to timely prepare. A thorough review of the Complaint and accompanying NIF reveals Respondent was not charged with failure to timely prepare. While failure to timely prepare is a violation "frozen in time[,]" *Visiontron Corp.*, 13 OCAHO no. 1348, at 5, failure to ensure proper completion and/or failure to properly complete the Form I-9 is a paperwork violation that continues until corrected. *See United States v. Farias Enters. LLC*, 13 OCAHO no. 1338, 7 (2020) (citing *Curran Eng'g Co.*, 7 OCAHO no. 975, at 895). Therefore, the statute of limitations for the latter does not begin to run until the employer cures the violations. *See Visiontron Corp.*, 13 OCAHO no. 1348, at 6. Respondent does not assert that five years lapsed since the correction of the forty-two employees' Forms I-9. Thus, the statute of limitations does not bar those forty-two claims. As such, Respondent's Motion for Summary Decision is DENIED.

C. Complainant's MSD

1. Count I – Failure to Prepare and/or Present

Count 1 charges Respondent with "failing to prepare and/or present the Employment Eligibility Verification Form (Form I-9) for two employees."[3] Compl. 2. The Notice of Intent to Fine specifies the charge as failure to prepare and/or present the Employment Eligibility Forms Verification "after being requested to do so by an authorized agency of the United States." Compl. Ex. A.

In the summary of the violations for the two employees, Complainant alleges that the Form I-9 did not exist prior to the service of the Notice of Inspection (NOI) on July 17, 2018. C's MSD Ex. G-4, at 4, 9. The I-9s were prepared by the company on July 20, 2018 and July 23–24, 2018 respectively. C's MSD Ex. G-3, at 39, 110–12; R's Opp'n 6, 11. The employees' first day of employment per the Forms I-9 was September 18, 2014, and June 2, 2006, respectively. *Id.* Respondent concedes that the forms either were not completed or could not be found for these two employees prior to service of the NOI, but they were prepared after and provided to the inspectors. R's Opp'n Ex. R-2, at 2. However, it is not clear from the record precisely when the Forms I-9 were presented: before or after the inspection which occurred on July 20, 2018.

Failure to prepare and failure to present the I-9 Forms are two distinct violations of 8 U.S.C. § 274A(a)(1)(B). Because the charge is asserted in the disjunctive, this Order will analyze both alleged violations. A "failure to prepare" describes an employer's failure to attest on the Forms I-9 that the prospective or current employee "is not an unauthorized alien" by their examination of a list of documents identified in §1324a(b)(1)(B) (e.g., a passport) and the employer's requirement to have their prospective or actual employee attest that they are a person lawfully permitted to work in the United States. § 1324a(b)(2).

[3] Employee Numbers 1 and 2 of Count I in the Violations Chart.

A failure to present derives from § 1324a(b)(3), which states that after complying with the attestation requirements identified in the previous section, an employer must retain the I-9 records and make them available for inspection by the government "beginning on the date of the hiring, recruiting, or referral" and ending on the latter date of three years from the date of the recruitment or referral, one year after the employee's termination, or three years from the employee's hire. Per 8 C.F.R. § 274a.2(b)(2)(ii), following the three business days-notice of an impending inspection, "any refusal or delay in presenting the Forms I-9 for inspection is a violation of the retention requirements as set forth in Section 274A(b)(3) of the Act." Thus, a failure to present occurs when the employer fails to provide DHS the Form I-9 on the day of the inspection.

In this case, Complainant cannot meet its burden to demonstrate failure to prepare Forms I-9 as it is indisputable that the Forms were indeed prepared. The fact that they were not prepared as of the date the NOI was served is not itself a violation other than as a marker that starts the three-day period required to present the Forms I-9. It is an indication that the forms were not *timely* prepared, but Complainant did not allege failure to timely prepare in either the NIF or Complaint.[4]

The next issue is whether Complainant has met its burden of establishing liability for failure to present.[5] The I-9 for Employee Number 2 of Count I (as listed in the Appendix to this order) was not prepared until after the inspection as the date on the signature lines indicate, so the Court finds that liability has been established for failure to present for that employee. The I-9 for Employee Number 1 was signed on the day of inspection, but the record does not establish whether Respondent presented it to Complainant on that day. The undersigned finds that there is a material issue of fact on whether Employee Number 1's I-9 was provided to Complainant on the day of the inspection.

Therefore, Complainant's Motion for Summary Decision is DENIED as to failure to prepare for and/or present for Employee Number 1 of Count I, and it is GRANTED for Employee Number 2 of Count I.[6]

As to the affirmative defenses, failure to prepare and/or present is simply not a technical or procedural violation – these violations strike at the heart of the employment eligibility verification requirements. Further, they are considered "continuous" violations until they are

[4] Complainant did not in the alternative plead failure to timely prepare, nor did it subsequently move to amend the complaint.

[5] Accordingly, Respondent's argument that the first employee's I-9 was not created at the time of hire because he was initially classified as an independent contractor is of no relevance.

[6] The attached Appendix of the Violations Chart provides a detailed breakdown of the employees, violations, and findings for each count.

corrected. *See* § 274a.2(b)(2)(i)(A); *Curran Eng'g Co.*, 7 OCAHO no. 975, at 895; *see also WSC Plumbing, Inc.*, 9 OCAHO no. 1061, at 11. Therefore, the statute of limitations does not begin to run until the forms are created. The only exception is for timeliness violations, which are frozen in time at the point when the employer "fail[s] to complete, or to ensure completion, of an I-9 form by the date that the completion is required." *WSC Plumbing, Inc.*, 9 OCAHO no. 1061, at 11–12 (quoting *Curran Eng'g Co.*, 7 OCAHO no. 975, at 897). As noted above, the Complaint does not charge a timeliness failure.

2. Count II – Failure to Ensure Employees Properly Completed Section 1 and/or Failure to Properly Complete Section 2 or 3

Complainant contends that Respondent violated § 1324a(b)(2) because it "failed to ensure that for the employees listed in Count II of the Complaint that employee properly completed section 1 and/or failed to properly complete section 2 or 3 of Form I-9 for sixty-six (66) employees." C's Mem. MSD 6.

a. Backdated

Complainant alleges that Respondent backdated six employees' I-9s.[7] C's Mem. MSD 6. Specifically, Complainant asserts that for those six forms, Section 1 was completed on a Form I-9 version dated November 14, 2016, while Section 2 was completed on a version dated July 17, 2017. C's MSD Ex. G-4, at 2, 7–8, 10, 14. But the signature dates of Section 2 predate the existence of the Form I-9 version dated July 17, 2017. *Id*. "Generally, OCAHO has found that an employer backdated I-9s when the signature in section 2 predates the employment of the employee who purportedly signed it on that date, or when the dates on the Form I-9 predate that version of the form." *United States v. R&SL, Inc.*, 13 OCAHO no. 1333a, 18 (2020) (citations omitted).

A visual inspection of the forms reveals that the signatures in Section 2 of the I-9s predate the existence of the version of the form used. C's MSD Ex. G-3, at 14, 107, 119, 123, 180; R's Opp'n Ex. G-3, at 83. Respondent concedes that Section 2 of the forms were completed after July 17, 2016, but does not explain why the signature dates are backdated. R's Opp'n 4, 9, 11, 12, 17. Therefore, the undersigned finds that Respondent backdated the six I-9s; thus, Respondent failed to properly complete Section 2 for six I-9s.

b. Failure to Check Box Specifying Work Authorization

Complainant claims that Respondent "fail[ed] to check a box attesting to being a United States Citizen, a noncitizen national of the United States, lawful permanent resident, or an alien authorized to work in Section 1 of the Form I-9 of checking multiple boxes attesting to more than one" for one employee.[8] C's Mem. MSD 6–7. Failure to ensure that an employee checks

[7] Employee Numbers 4, 28, 37, 41, 43, and 65 of Count II in the Violations Chart.

[8] Employee Number 11 of Count II in the Violations Chart.

the box specifying his or her authorization status in Section 1 of the Form I-9 is a serious violation "because if the employee fails to provide information sufficient to disclose his or her immigration status on the face of the form, the employee's signature attests to nothing at all." *United States v. Pegasus Fam. Rest., Inc.* 12 OCAHO no. 1293, 18 (2016) (citation omitted).

A review of the subject I-9 shows that the employee did not check the box indicating whether he was a U.S. citizen or national, a lawful permanent resident, or an authorized immigrant. C's MSD Ex. G-3, at 31. Thus, Complainant's summary decision is granted as to this one employee.

c. Failure to Provide Alien (A) Number

Complainant charges Respondent with failure to provide the alien number where the lawful permanent resident box was checked for three employees.[9] C's Mem. MSD 7. Failure to list the alien number on an I-9 that has the lawful permanent resident box checked is a substantive violation, "[u]nless an alien number appears in section 2 of the I-9 or a legible copy of the document accompanies the form[.]" *United States v. Horno MSJ, Ltd., Co.,* 11 OCAHO no. 1247, 8 (2015) (first citing Virtue Mem.; and then citing *United States v. Ketchikan Drywall Servs., Inc.*, 10 OCAHO no. 1139, 6 (2011)).

Although the three subject I-9s have the lawful permanent resident box checked, they do not provide the alien number anywhere in the forms. R's Opp'n Ex. G-3, at 88–90; C's MSD Ex. G-3, at 116–17, 173–76. Moreover, the alien numbers are not included in any of the documents attached to the forms. *See id.* Therefore, Complainant's summary decision for these three employees is granted.

d. Failure to Review and Verify a Proper List A, B, or C Document

Complainant asserts that Respondent failed to review and verify a proper List A, B, or C document for three employees.[10] C's Mem. MSD 7. "[F]ailure to review and verify a proper List A or Lists B and C document(s) in section 2" of the Form I-9 is a substantive paperwork violation. *United States v. Frimmel Mgmt., LLC*, 12 OCAHO no. 1271c, 16 (2016) (citing Virtue Mem. 3–4).

A review of Employee Number 1's Form I-9 reveals that the List B document, a Texas identification card, was expired at the time the Form I-9 was completed. C's MSD Ex. G-3, at 2. Therefore, Respondent failed to review and verify a proper List B document for this one employee and summary decision is granted for this I-9.

Respondent did not list the List C document (social security card) information in Section 2 of Employee Number 10's I-9 and incorrectly specified that the social security card of Employer Number 21 was unrestricted when it was in fact restricted. C's MSD Ex. G-3, at 29; R's Opp'n Ex. G-3, at 59. However, Respondent retained a legible copy of the social security cards with

[9] Employee Numbers 31, 40, and 63 of Count II in the Violations Chart.

[10] Employee Numbers 1, 10, and 21 of Count II in the Violations Chart.

the Forms I-9 and presented them at the I-9 inspection. C's MSD Ex. G-3, at 30; R's Opp'n Ex. G-3, at 60. Such mistakes are more appropriately labeled as failures to "provide the document title, identification number(s) and/or expiration date(s) of a proper List A document or proper List B and List C documents in section 2 of the Form I-9, unless a legible copy of the document(s) is retained with the Form I-9 and presented at the I-9 inspection[,]" as opposed to failures to review and verify proper List A, B, or C documents. *See* Virtue Mem. 3–4.

A failure to provide the document title, identification number(s) and/or expiration date(s) of List(s) A, B, and/or C documents is technical or procedural "if a legible copy of the document(s) is retained with the Form I-9 and presented at the I-9 inspection[.]" Virtue Mem. 4–5. Accordingly, Complainant should have, and indeed did, provide Respondent notice and an opportunity to correct these violations. C's MSD Ex. G-7, at 2. However, there is no evidence in the record that Respondent did in fact correct these violations, which forces the Court to conclude that Respondent did not correct these violations. Respondent's failure to correct renders it liable for two violations of § 1324a(b). *See* § 1324a(b)(6)(B); Virtue Mem. 1.

e. Failure to Recertify and Complete Within 90 days the Pertinent Section 2 Information for Verification with a Receipt for Lost or Stolen Documents

Complainant argues that Respondent failed "to recertify and complete within 90 days the pertinent Section 2 information for verification with a receipt for lost or stolen documents" for one employee.[11] C's Mem. MSD 7. While an employer "must accept a receipt for the application for a replacement document . . . in lieu of the required document" if the document was lost, stolen, or damaged, the employee must "present[] the replacement document within 90 days of the hire[.]" 8 C.F.R. 274a.2(b)(vi); *e.g.,* U.S. Citizenship and Immigr. Servs., Handbook for Employers M-274, §§ 4.3, 12 (2020) (hereinafter Handbook for Employers). Respondent attached the receipt for the application of a social security card to this employee's I-9. C's MSD Ex. G-3, at 163. However, Respondent did not provide evidence that it subsequently recertified the social security card within ninety days of accepting the receipt. Accordingly, Respondent is liable for failing to recertify and complete the portion of Section 2 of this I-9 within 90 days of accepting the receipt for lost or stolen documents and Complainant's MSD is granted as to this one employee.

f. Failure to Complete Section 2 of the Form I-9

Complainant alleges that Respondent failed to complete Section 2 of the I-9 for forty-six employees.[12] C's Mem. MSD 7. Section 2 of the I-9 "is the 'Employer Review and Verification' section and is the very heart of the verification process initiated by Congress in

[11] Employee Number 58 of Count II in the Violations Chart.

[12] Employee Numbers 2, 7, 8, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 22, 23, 24, 25, 27, 29, 30, 32, 33, 35, 36, 38, 39, 40, 44, 45, 46, 47, 48, 51, 52, 53, 54, 55, 56, 57, 59, 60, 61, 62, 63, 64, and 66 of Count II in the Violations Chart.

IRCA." *R&SL, Inc.*, 13 OCAHO no. 1333b, at 34. Thus, failure to complete Section 2 is a serious violation. *See id.* Within Section 2, the Virtue Memorandum lists failure to provide details for List A, B, or C documents, such as expiration dates for Lists A, B, and/or C documents, and failure to provide employer attestation as substantive violations. Virtue Mem. 3–4.

A visual inspection of the I-9s reveals that Respondent did not fill out any information in Section 2 for ten I-9s.[13] C's MSD Ex. G-3, at 45; R's Opp'n Ex. G-3, at 51, 63, 67, 91; C's MSD Ex. G-3, at 101, 113, 143, 148, 154. For twenty-eight I-9s, Respondent only inputted the business name and address in Section 2; it neglected to include the employer attestation and date, List A, or B or C documents, or first date of employment.[14] C's MSD Ex. G-3, at 8, 20, 22, 32, 34, 36, 42, 47; R's Opp'n Ex. G-3, at 61, 65, 76, 86, 96; C's MSD Ex. G-3, at 104, 108, 125, 128, 130, 133, 146, 151, 156, 158, 164, 166, 168, 171, 182. Respondent did not provide page two, which contains Section 2, for three I-9s.[15] C's MSD Ex. G-3, at 50; R's Opp'n Ex. G-3, at 85; C's MSD Ex. G-3, at 132. For one I-9, Respondent neglected to provide the expiration dates for the List B and C documents and employer attestation.[16] C's MSD Ex. G-3, at 177. As such, Respondent is liable for forty-two violations of failure to complete Section 2.

For one I-9, Respondent did complete section 2 in its entirety.[17] R's Opp'n Ex. G-3 at 54.[18] Accordingly, Complainant did not meet its burden of proof, and summary decision as to this one employee is not granted.

There are three additional I-9s for which Respondent did not complete Section 2 in its entirety.[19] However, for those three I-9s, Complainant charged additional violations that the Court has already found Respondent liable for. "An employer is liable for only one violation per I-9, despite the presence of other violations." *R&SL Inc.*, 13 OCAHO no. 1333b, at 35 (citation omitted). Therefore, if there is more than one violation for an I-9, the Court will find

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[13] Employee Numbers 16, 19, 23, 25, 32, 35, 39, 51, 53, and 55 of Count II in the Violations Chart.

[14] Employee Numbers 2, 7, 8, 12, 13, 14, 15, 17, 22, 24, 27, 30, 33, 36, 38, 44, 45, 46, 48, 52, 54, 56, 57, 59, 60, 61, 62, and 66 of Count II in the Violations Chart.

[15] Employee Numbers 18, 29, and 47 of Count II in the Violations Chart.

[16] Employee Number 64 of Count II in the Violations Chart.

[17] Employee Number 20 of Count II in the Violations Chart.

[18] Although Respondent did complete section 2 of the I-9s for this employee, section 2 was completed after the NOI was served, which raises timing issues. However, Complainant did not charge this I-9 with any other violations, nor did Complainant move to amend the complaint.

[19] Employee Numbers 11, 40, and 63 of Count II in the Violations Chart.

Respondent liable for the first violation that Complainant alleged. For example, Complainant charged Employee Number 11's I-9 with two violations – failure to check a box attesting to work status and failure to complete Section 2. C's Mem. MSD 6. Respondent will only be held liable for failure to check a box attesting to work status for Employee Number 11 of Count II in the Violations Chart, even though Respondent also did not complete section 2 of this employee's I-9. Thus, liability for failure to complete Section 2 for these three I-9s is inappropriate.

g. Failure to Complete Employer Attestation

Complainant claims that Respondent failed to properly certify Section 2 for two I-9s.[20] C's Mem. MSD 7–8. Similarly, Complainant charges Respondent with failure to sign the attestation in section 2 for three I-9s.[21] *Id.* at 8. "An employer is obligated to attest to the examination of an employee's employment verification documents, 8 C.F.R. § 274a.2(b)(1)(ii), and failure to do so is a serious substantive error." *United States v. Senox Corp.*, 11 OCAHO no. 1219, 8 (2014) (citation omitted). A visual examination of the subject I-9s reveals that Respondent failed to sign section 2. C's MSD Ex. G-3, at 18–19; R's Opp'n Ex. G-3, at 100, 121, and 142. Therefore, summary decision for failure to properly complete the attestation is granted as to these five I-9s.

h. Failure to Complete Section 3 of the Form I-9:

Complainant claims that Respondent failed to complete Section 3 for two I-9s.[22] C's Mem. MSD 8. "Section 3 must be completed only when necessary to document that an employee's eligibility has been reverified prior to the expiration date, if any, on the employee's work authorization document." *United States v. Occupational Res. Mgmt., Inc.*, 10 OCAHO no. 1166, 6 (2013) (citing 8 C.F.R. § 274a.2(b)(vii)). "At or before the expiration, the employee must present a document that shows either continuing permission to work or evidences a new grant of work authorization." *United States v. China Wok Rest., Inc.*, 4 OCAHO no. 608, 176, 194 (1994) (citing § 274a.2(b)(1)(vii)). Then, the employer "must review this document and if it appears to be genuine and to relate to the individual, reverify by noting the document's number and expiration date on the Form I-9." *Id.* (quoting § 274a.2(b)(1)(vii)). Failure to reverify employment eligibility is a substantive violation. *Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355, at 7 (first citing Virtue Mem. 4; and then citing *United States v. Hartmann Studios, Inc.*, 11 OCAHO no. 1255, 10 (2015)).

In *R&SL Inc.*, the ALJ found that the complainant did not establish that the respondent failed to complete Section 3 of forms I-9 because the complainant did not show that the respondent was required to reverify. 13 OCAHO no. 1333a, at 16. Specifically, the ALJ noted that the complainant failed to provide evidence "that the employee was terminated after completing the original I-9 and rehired later[,]" thus "triggering the section 3 requirement." *Id.*

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[20] Employee Numbers 5 and 6 of Count II in the Violations Chart.

[21] Employee Numbers 34, 42, and 50 of Count II in the Violations Chart.

[22] Employee Numbers 3 and 27 of Count II in the Violations Chart.

Similarly, here, Complainant did not provide evidence, nor is there anything in the record, that the employees were still employed at the time their employment authorization or documentation of employment authorization expired such that reverification was required. Therefore, summary decision for failure to complete Section 3 for these two employees is denied. Note, however, that the Court has already granted summary decision for Complainant as to Employee Number 27 for failure to complete Section 2, and therefore summary decision will not relieve the Respondent of liability for this I-9.

i. Failure to Date Section 3 of the Form I-9

Complainant argues that Respondent failed to complete Section 3 for three I-9s.[23] C's Mem. MSD 8. An employer's failure to date Section 3 is a substantive violation. *Ketchikan Drywall Servs., Inc.*, 10 OCAHO no. 1139, at 14; *e.g.,* Virtue Mem. 4. For the three alleged I-9s, Respondent completed Section 3 but failed to date the section. *See* C's MSD Ex. G-3, at 27; R's Opp'n Ex. G-3, at 71; C's MSD Ex. G-3, at 137. Thus, summary decision for these three I-9s is granted.

3. Count III: Failure to Ensure Employees Properly Completed Section 1 and/or Failure to Properly Complete Section 2 or 3

Complainant charges Respondent with failure to ensure that one employee properly completed Section 1 of the Form I-9 and/or failure to properly complete Section 2 or 3. C's Mem. MSD 9. Specifically, Complainant notes that Respondent did not complete Section 3 for reverification when the employee's work authorization expired. C's MSD Ex. G-4, at 1. A visual inspection of the Form I-9 reveals that Respondent failed to complete Section 3 of the I-9. C's MSD Ex. G-2, at 5. The individual, who was hired on March 7, 2017, provided an employment authorization card which expired on November 30, 2017. C's MSD Ex. G-2, at 4–7. Complainant avers in its recitation of the errors in Exhibit G-4 that the individual was still employed at the time of inspection, and therefore Respondent did not reverify the employment authorization by completing section 3. C's MSD Ex. G-4, at 1. Additionally, the Report of Investigation indicates that he was a current employee well after the NOI. C's MSD Ex. G-10, at 53. Accordingly, Respondent was obligated to complete Section 3 of the I-9 for this employee prior to the expiration of his work authorization. Respondent's failure to do so makes summary decision as to this count appropriate.

4. Count IV: Knowingly Continued to Employ

Complainant alleges Respondent hired an individual who was or became unauthorized for employment, and continued to employ the person knowing that they were or had become, unauthorized for employment in violation of 8 U.S.C. § 1324a(a)(2). C's Mem. MSD 9–10. Specifically, Complainant asserts that queries of law enforcement databases reveals that this individual had a lapse in work authorization from December 1, 2017, to December 20, 2017. C's MSD Ex. G-10, at 53. This allegation involves the same employee as the one in Count 3.

[23] Employee Numbers 9, 26, and 49 of Count II in the Violations Chart.

Section 1324a(a)(2) makes it "unlawful for a person or other entity, after hiring an alien for employment . . . to continue to employ the alien in the United States knowing the alien is (or has become) an unauthorized alien with respect to such employment." Knowing "includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition." 8 C.F.R. § 274a.1(*l*)(1); *see also United States v. Buckingham Ltd. P'ship*, 1 OCAHO no. 151, 1059, 1067 (1990) (The "knowing" requirement of a § 1324a(a)(2) violation "can be proven by showing actual or constructive knowledge[.]"). The regulation explains that constructive knowledge may include situations where the employer

> [h]as information available to it that would indicate that the alien is not authorized to work, such as Labor Certification and/or an Application for Prospective Employer; or [a]cts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf.

§ 274a.1(l)(1); *see also United States v. Muniz Concrete & Contracting, Inc.*, 12 OCAHO no. 1278, 8–9 (2016).[24] Previously, an "employer was found to have constructive knowledge of the alien worker's unauthorized status" when the "employee wrote the expiration date for his employment authorization document in section 1 of the Form I-9 and the employer failed to reverify the individual's work authorization prior to the expiration date of the document[.]" *Muniz Concrete & Contracting, Inc.*, 12 OCAHO no. 1278, at 8–9 (citing *Foothill Packing, Inc.*, 11 OCAHO no. 1240, at 9); *e.g., United States v. Great Bend Packing Co.*, 6 OCAHO no. 835, 129, 132–33 (1996); *Buckingham Ltd. P'ship*, 1 OCAHO no. 151, at 1067; *Occupational Res. Mgmt., Inc.*, 10 OCAHO no. 1166, at 5.

Here, while Respondent concedes that "the evidence shows there was a 19 day lapse in work authorization[,]" it counters that "[t]here is no proof [that it] knowingly continued to employ an individual unauthorized to work." R's Opp'n 20. Nevertheless, OCAHO precedent dictates that Respondent had constructive knowledge that it continued to employ the individual despite his lack of work authorization because it inputted the employee's employment authorization card and its corresponding expiration date of November 30, 2017 in Section 2 of the employee's I-9. Therefore, summary decision for Count IV is granted.

5. Inapplicability of Good Faith Defense

[24] Actual knowledge is defined as "awareness of something in fact." *United States v. Fasakin*, 14 OCAHO no. 1375b, 19 (2021) (citing *Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768, 776 (2020)). "In contrast, 'the law will sometimes impute knowledge—often called "constructive" knowledge—to a person who fails to learn something that a reasonably diligent person would have learned.'" *Id.* (quoting *Intel Corp.*, 140 S. Ct. at 776); *accord Buckingham Ltd. P'ship*, 1 OCAHO no. 151, at 1067 ("[E]vidence of knowledge to support a 'knowingly continue to employ' charge is sufficient where an employer should have known that the alien had become unauthorized.").

As explained above, the good faith defense does not apply to substantive violations. Except for failure to provide the document title, identification number(s) and/or expiration date(s) of List(s) A, B, and/or C documents "if a legible copy of the document(s) is retained with the Form I-9 and presented at the I-9 inspection," which was the violation found under the allegation of failure to review and verify a proper List A, B, or C document of Count II, the violations in this case are all substantive. Therefore, the good faith defense is inapplicable.

IV. CONCLUSION

Respondent's Motion for Summary Decision is DENIED.

Complainant's Motion for Summary Decision is GRANTED in part, and DENIED in part.

For Count I, Complainant's Motion for Summary Decision is DENIED as to failure to prepare and/or failure to present for Employee Number 1 of Count I and it is GRANTED for Employee Number 2 of Count I. As such, Complainant established that Respondent failed to present the I-9 at the time of inspection for one employee.

For Count II, Complainant's Motion for Summary Decision is DENIED for two I-9s and GRANTED as to sixty-four I-9s; thus, Complainant established that Respondent failed to ensure employees properly completed section 1 and/or failed to properly complete Section 2 or 3 for sixty-four employees.

For Count III, Complainant's Motion for Summary Decision is GRANTED – Complainant established that Respondent failed to ensure employees properly completed section 1 and/or failed to properly complete Section 2 or 3 for one employee.

For Count IV, Complainant's Motion for Summary Decision is GRANTED – Complainant established that Respondent knowingly continued to employ an individual who became unauthorized for employment for one employee.

The undersigned finds that there is a material issue of fact as to whether the I-9 for Employee Number 1 of Count I was provided to Complainant on the day of the inspection. The parties are ORDERED to meet and confer regarding this allegation. Subsequently, the parties are to file a joint submission informing the Court of their positions.

Under Federal Rule of Civil Procedure 56(f), which is a permissible guide in these proceedings per 28 C.F.R. § 68.1, a court may grant summary judgment on grounds not raised by a party "[a]fter giving notice and a reasonable time to respond." It appears that summary decision should be granted in favor of Respondent because it appears unlikely that Complainant would be able to prove the following violations, as detailed above: for Count I, failure to prepare for Employee Number 1; for Count II, failure to complete section 2 of the I-9 for Employee Number

20 and failure to complete section 3 for Employee Numbers 3 and 27.[25] The parties are hereby given notice and an opportunity to respond before the Court enters summary decision in favor of Respondent for these allegations.

Because there are still outstanding allegations, the Court has not resolved the summary decision motions as to penalties. The Court notes, however, that the information in the record relating to the penalties is stale. Should the Court resolve this case on the basis of supplement briefing, it will also enter an order regarding penalties. Accordingly, the Court will permit the parties to submit current financial information relevant to the calculation of penalties.

The joint submission and any supplemental briefing and updated financial information relating to penalties is due 30 days from the date of this Order. Replies are due 14 days after submission of the briefs and updated financial information.

SO ORDERED.

Dated and entered on August 18, 2022.

Jean King
Chief Administrative Law Judge

[25] Respondent was found liable for failing to complete section 2 of the I-9 for Employee Number 27; consequently summary decision for this employee will not impact the finding of liability.