

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

August 20, 2012

UNITED STATES OF AMERICA,)	
Complainant,)	
)	8 U.S.C. § 1324a Proceeding
v.)	OCAHO Case No. 11A00031
)	
BARNETT TAYLOR, LLC, D/B/A)	
BURGER KING,)	
Respondent.)	
_____)	

ORDER DENYING IN PART AND TAKING UNDER ADVISEMENT IN PART
RESPONDENT’S MOTION FOR PARTIAL SUMMARY DECISION, DENYING
RESPONDENT’S MOTION TO STRIKE AND REQUEST FOR ATTORNEYS’ FEES AND
COSTS, GRANTING IN PART AND TAKING UNDER ADVISEMENT IN PART THE
COMPLAINANT’S CROSS-MOTION FOR PARTIAL SUMMARY DECISION, AND
SCHEDULE FOR ADDITIONAL FILINGS

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 Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a complaint alleging that Barnett Taylor LLC d/b/a Burger King (Barnett Taylor or the company) engaged in a total of 84 violations of 8 U.S.C. § 1324a(b) and 8 C.F.R. § 274a.2(b). Barnett Taylor filed a timely answer denying the material allegations and raising various affirmative defenses.

The government subsequently filed a first amended complaint in three counts alleging a total of 83 violations.¹ Count I alleged that the company hired four individuals and either failed to ensure

¹ The government dropped one allegation as to a former employee for whom Barnett Taylor was no longer required to retain or present an I-9 form. It also reduced the penalties sought for the

that each properly completed section 1 of Form I-9, and/or failed itself to properly complete sections 2 or 3 of the form. Count II asserted that the company hired five individuals for whom it failed to ensure that each properly completed section 1 of Form I-9, and/or failed itself to properly complete sections 2 or 3 of the form. Count III alleged that Barnett Taylor hired 74 named individuals for whom it failed to prepare and/or present an I-9 form upon request. The government sought penalties ranging from \$935 to \$981 for each alleged violation, for a total penalty of \$77,835.00.

Prehearing procedures ensued and a schedule was entered pursuant to which discovery was originally set to close on December 30, 2011, but was extended until January 13, 2012 at the request of the parties. The schedule for filing dispositive motions provided that such motions were due no later than January 31, 2012 and responses by March 1, 2012. Barnett Taylor filed a timely Motion for Partial Summary Decision on January 31, 2012 and on March 2, 2012 the parties filed a Joint Motion for an Extension of Time requesting an additional 30 days for the government to file its response. The extension was granted and the time for the government's response was extended until April 2, 2012 at which time the government filed a response in opposition to the company's motion and a Cross-Motion for Partial Summary Decision.

Barnett Taylor then filed a Motion to Strike Complainant's Cross-Motion for Partial Summary Decision and a Request for Attorneys' Fees and Costs associated with preparing the Motion to Strike. The government filed its response in opposition to both the Motion to Strike and the Request for Attorneys' Fees, followed by a Notice of Errata. All the motions are ripe for decision. In addition to the materials submitted by the parties, I also consider the record as a whole, including pleadings, exhibits, and all other materials of record, in resolving them.

II. BACKGROUND INFORMATION

Barnett Taylor LLC was incorporated in 1996 and operates a Burger King franchise restaurant at 13635 North 35th Avenue in Phoenix, Arizona. The company is owned by Thomas Barnett and appears to be part of a multiunit franchise operation linked to Barnett Management Co., as well as to Barnett-Taylor Restaurants, Inc., and Barnett Administrative Services. Barnett Management Company has been in business since 1980 when Thomas Barnett opened his first Burger King restaurant. Barnett-Taylor Restaurants, Inc. was incorporated in 1985 and Barnett Administrative Services in 1995. Barnett Taylor LLC had 22 employees in December 2007 and 20 in February 2011. The general manager of the restaurant during the period from May 1994 to January 2010 was William Marshall.

remaining 83 violations alleged.

ICE served Barnett Taylor with a Notice of Inspection and Administrative Subpoena on December 10, 2007 requesting I-9s for all its current employees and for former employees in accordance with the I-9 mandatory retention requirements. The government issued the company a Notice of Suspect Documents on August 28, 2009 advising Barnett Taylor that ICE had cause to believe that 14 of the 23 then current employees and 20 of the 61 former employees for whom I-9s had not been provided were aliens not authorized for employment in the United States. A Notice of Intent to Fine (NIF) was issued to the company on December 16, 2009. Barnett Taylor made a request for a hearing on January 14, 2010 and all conditions precedent to the institution of this proceeding have been satisfied.

III. BARNETT TAYLOR'S MOTION FOR PARTIAL SUMMARY DECISION

A. The Positions of the Parties

1. Barnett Taylor's Motion

Barnett Taylor's motion for partial summary decision is addressed first to the merits of the allegations in Counts II and III which Barnett Taylor says should be removed from the complaint because it has affirmative defenses to both. In addition, the company requests summary decision with respect to its status as a small business and requests a downward adjustment in any penalties sought based on its inability to pay the fines proposed. Accompanying the motion were exhibits A) Attendance Certificate dated October 10, 2007; B) Declaration of William Marshall dated April 23, 2008; C) Answers to Interrogatories dated January 20, 2012 (10 pp.); D) I-9 forms for Guillermo Gomez, Santiago Gonzalez, Sandra Sanmiento, Sol Valdez, and Mario Verdejo (5 pp.); E) Financial Statements for the period ending September 30, 2011 (marked Confidential) (3 pp.); and F) Statement of Cash Flow for period ending September 30, 2011 (marked Confidential).

The company first seeks summary decision finding that it established an affirmative defense to Count II in that it substantially complied with the recordkeeping requirements in good faith as provided in 8 C.F.R. § 274a.4 (sic) with respect to violations in the I-9s of Guillermo Gomez, Santiago Gonzalez, Sandra Sarmiento, Sol Valdez, and Maria Verdejo, citing *United States v. Anthony Borelli & Sons, Inc.*, 8 OCAHO no. 1027, 392, 397-98 (1999).² Barnett Taylor

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 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

acknowledged that in each instance the company failed to ensure that the employee checked a box in section 1 of the form to indicate his or her immigration status, but says that because it examined a permanent resident card for each of the individuals and entered the required information in section 2 of the form, it is entitled to a defense of good faith substantial compliance.

Second, the company alleges with respect to the allegations in Count III that it has an affirmative defense because its failure to retain and present I-9 forms for the 74 individuals³ named was the result of a clerical error beyond its control on the part of a General Manager who was subsequently demoted and is no longer with the company. Barnett Taylor argues that the actions of this individual were outside the scope of his employment and that because he acted as a “rogue” employee the company should not be penalized for his error and the resultant impossibility of producing the forms. Alternatively, the company argues that it has taken corrective steps and that if the allegations are not dismissed, the seriousness of the violations should be eliminated as an aggravating factor in the penalty calculation. Finally, the company says it is entitled to summary decision that it is a small business notwithstanding the high turnover in employees, citing *United States v. Snack Attack Deli, Inc.*, 10 OCAHO no. 1133, 7 (2010), and that reduced penalties are appropriate based on its deteriorating economic position.

2. The Government’s Response

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>.

³ Ashley Andes, Celestina Aparicio, Rosely Armenta, Nicole Bandin, Roberta Barboza, Anery Begay, Brandon Bethouille, Michelle Brandt, Marshon Brooks, Micheala Butler, Larnell Cargile, Zacharle Castro, Sergio Cifuentes, Cassandra Cook, Priscilla Corpron, Jania Culp, Sheryl De Jarnatt, Ana De Jesus, Robert D. Evans, Diana Felix Bravo, Cody Forbis, Johanna Garcia, Daniel Gastellum, Dayna Goves, Diego Domingo Guterrez, Susan Henderson, Cristina Higuera, Kyle Housell, Kevin Hoy, Matilde Ixtabalan, Crystal Jarvis, Michael Keenom, Brandon Kestle, Jessica Lara, Ryan Lemoigle, Stephanie Lopez, Heaven Lucas, Elizabeth Luque, Sheana Macarthur, Schanequa Mack, Tammy Madman, Anthony Mandella, Carmen Marquez, Holly Mohler, Margurite Molden, Martha Mora, Migdalia Rosil Morales, Stephanie Morrow, Maria Mujica Vargas, Anatashia M. Muntz, Colin Myer, Rosa Nogales, Charles Osterwise, Cozet Pancost, Luis Perez, Ivan Portillo, Jerson Pvac, Ramon Reyes, Autumn Robles, Josefina Rodriguez, Miguel Rodriguez, Maria Ruiz, Nicole Sailer, Silvia Sanchez, Edvin Santos, Jose Santos, Jorge Sarti, Travis Schmantjen, Enrique Sorat Gonzales, Sheryl Suddeth, Jesus Teieda, Bernabe Vasquez, Rebecca Weber, and Stevi Woods.

The government responded that the company failed to meet its evidentiary burden with respect to either defense and that it is entitled to summary decision as to liability for both counts. As to Count II, ICE pointed out that the doctrine of substantial compliance is available as an affirmative defense only in very narrowly limited circumstances, and that those circumstances do not include the situation where the employee has failed to properly complete the section 1 attestation. The government argued that the minimum criteria set out *United States v. N. Mich. Fruit Co.*, 4 OCAHO no. 667, 680, 696-97 (1994) have not been met with respect to the I-9s in issue inasmuch as these criteria include indication by a check mark or some other means indicating that the individual is a citizen, a lawful permanent resident, or an alien authorized to work until a specified date. *Id.* The government also emphasized the admonition in *United States v. Jonel, Inc.*, 7 OCAHO no. 967, 733, 746 (1997) that completion of the section 1 attestation is essential to the purpose of the statute.

As to Count III, the government pointed to Barnett Taylor's vague, shifting, and inconsistent versions of the explanation it provided for the company's inability to present the forms in question. According to the respondent's prehearing statement, General Manager William Marshall was confused about the I-9 retention requirements and discarded the forms.⁴ Marshall's 2008 Declaration states that Marshall assisted in completing I-9s and that they were prepared for all newly hired employees, but that the forms in question had been misplaced or discarded. The 2008 Declaration makes no reference to any alleged confusion on Marshall's part, nor does he take any responsibility for the disposal of the I-9s or refer to the events subsequently set out in Barnett Taylor's Interrogatory Answers of January 20, 2012 that appear to contradict the prehearing statement as well as the Answer. The Interrogatory Answers state that at some unidentified time several years ago the I-9s were placed in a box in Marshall's office for temporary storage and inadvertently disposed of as garbage by an unidentified worker who was cleaning the office.

As to the size of the business, the government responded by pointing out that Barnett Taylor offered no evidentiary materials in support of its assertions as to the turnover of employees, the decline in profits, or any other information relevant to the issue of its size. It said that in any event it did not aggravate the requested penalties based on the size of the company; while its initial calculation did so, this was removed in subsequent discussions. Finally, the government contends that there are genuine issues of material fact as to the size of the business and the company's ability to pay because Barnett Taylor is only one of 23 franchises owned by Barnett Taylor Management, Inc., and the management company's franchises have 500 employees, annual labor costs around \$8 million, and estimated annual revenue in excess of \$25 million.

⁴ The Answer similarly says that "many" of the missing I-9 forms listed under Count III were completed by Barnett Taylor's former Store Manager who, in 2007, misunderstood the I-9 retention rule for former employees and when sorting I-9 forms and applying the retention rule, mistakenly threw away a large number of former employees' I-9 forms.

The government's response was accompanied by exhibits consisting of C-A)⁵ Affidavit of Auditor Keith Campton dated January 13, 2012 (8 pp.); C-B) DHS spreadsheet Barnett Burger King entities (3 pp.); C-C) Arizona Corporation Commission record for Barnett Taylor LLC (2 pp.); C-D) Arizona Corporation Commission record for Barnett Taylor Restaurants, Inc. (8 pp.); C-E) Affidavit of Special Agent Anthony Sinatra dated January 13, 2012 (3 pp.); C-F) Notice of Inspection and Administrative Subpoena served December 10, 2007 (2 pp.); C-G) ICE Receipt for Property dated January 3, 2008; C-H) Arizona Dept. of Economic Security Unemployment Tax and Wage Reports for the quarters ending March 31, 2004 through December 31, 2007 (36 pp.); C- I) Affidavit of Auditor Keith Campton dated March 30, 2012 (7 pp.); C-J) Barnett Taylor Restaurants, Inc. corporate income tax return for 2007 (marked Confidential) (12 pp.); C-K) Barnett Taylor Restaurants, Inc. corporate income tax for 2006 (marked Confidential) (14 pp.); C-L) Barnett Taylor Restaurants, Inc. corporate income tax for 2005 (marked Confidential) (17 pp.); C-M) Barnett Taylor Restaurants, Inc. corporate income tax for 2008 (marked Confidential) (10 pp.); C-N) Certificate of Trust Existence and Authority for The Barnett Family Trust dated October 6, 1992 and amended July 16, 2003 (12 pp.); C-O) Barnett Taylor Restaurants, Inc. corporate income tax for 2009 (marked Confidential) (14 pp.); C-P) Barnett Taylor Restaurants, Inc. corporate income tax for 2010 (marked Confidential) (11 pp.); C-Q) printout from the Barnett Management Co. website (10 pp.); C-R) partial Burger King Corp. Franchise Disclosure Document issued April 28, 2011 and amended July 29, 2011 (9 pp.); C-S) Arizona Corporation Commission record for Barnett Management Co. (8 pp.); C-T) Barnett Management Co. list of estimated number of employees and amount of payroll for fourth quarter 2011; C-U) Arizona Dept. of Economic Security Unemployment Tax and Wage Reports for the quarters ending March 31, 2008 through March 31, 2011 (but identified in the government's index as 1Q 2008-4Q 2010) for Barnett Administrative Services, Inc. (45 pp.); C-V) Arizona Corporation Commission record for Barnett Administrative Services, Inc. (7 pp.); C-W) Arizona Dept. of Economic Security Unemployment Tax and Wage Reports for the quarters ending March 31, 2007 through December 31, 2007 for Barnett Administrative Services, Inc. (15 pp.); C-X) Email messages between ICE and Barnett Taylor dated January 14, 2008 - May 22, 2008 with addendum (6 pp.); C-Y) Arizona Dept. of Economic Security Unemployment Tax and Wage Reports for the quarter ending December 31, 2011 for Barnett Taylor Restaurant, LLC; C-Z) Arizona Dept. of Economic Security Unemployment Tax and Wage Reports for the quarters ending March 31, 2008 through December 31, 2011 for Barnett Taylor, LLC (32 pp.); C-AA) Attendance certificate for Tonya Scott dated August 23, 2007; C-BB) Tonya Scott emails dated August 27, 2007, August 30, 2007, September 14, 2007, and September 19, 2007 (4 pp.); C-CC) Attendance certificate for William T. Marshall dated October 10, 2007; C-DD) Attendance certificate for Maria Murguia dated October 10, 2007; C-EE) "Immigration and Employment: New Laws, New Challenges, New Strategies" dated October 10, 2007 (12 pp.); C-FF) Barnett Taylor LLC balance sheet dated September 30, 2011 (marked Confidential) (3 pp.); C-GG) Loan

⁵ Because both parties identified their exhibits alphabetically, the letter "C" has been added to the complainant's designations in order to distinguish between them.

agreement between MidFirst Bank and BKR Restaurants LLC Barnett Krispin Properties, LLC (marked Confidential) (35 pp.); C-HH) Barnett Taylor LLC financial statement for the 12 months ending December 31, 2010 (marked Confidential) (3 pp.); C-II) Barnett Taylor LLC Management Statement Comparatives for the 12 months ending December 31, 2009 (marked Confidential) (3 pp.); C-JJ) Barnett Taylor LLC Income statement (showing Management Fees for the prior year (2008); C-KK) Barnett Taylor LLC financial statement for the 12 months ending December 31, 2007 (marked Confidential) (3 pp.); C-LL) Barnett Taylor LLC financial statement for the 12 months ending December 31, 2006 (marked Confidential) (3 pp.); C-MM) Barnett Taylor LLC financial statement for the 12 months ending December 31, 2005 (marked Confidential) (3 pp.); C-NN) BKR Restaurants LLC financial statement for the 9 months ending September 30, 2011 (marked Confidential) (3 pp.); C-OO) BKR Restaurants LLC financial statement for the 12 months ending December 31, 2010 (marked Confidential) (3 pp.); C-PP) BKR Restaurants LLC financial statement for the 12 months ending December 31, 2009 (marked Confidential) (3 pp.); C-QQ) BKR Restaurants LLC financial statement for the 12 months ending December 31, 2008 (marked Confidential) (3 pp.); C-RR) BKR Restaurants LLC financial statement for the 12 months ending December 31, 2007 (marked Confidential) (3 pp.); C-SS) BKR Restaurants LLC financial statement for the 12 months ending December 31, 2006 (marked Confidential) (3 pp.); C-TT) BKR Restaurants LLC financial statement for the 12 months ending December 31, 2005 (marked Confidential) (3 pp.); C-UU) I-9 forms for Guillermo Gomez, Santiago Gonzales, Sandra Zarmiento, Sol Valdez, and Mario Verdejo (5 pp.); C-VV) BKR Restaurants, LLC corporate income tax return for 2010 (marked Confidential) (19 pp.).

B. Discussion and Analysis

Barnett Taylor's motion concedes with respect to Counts II and III that the factual allegations are true, but states that it has affirmative defenses that bar liability based on those facts. Because its motion is predicated upon affirmative defenses, Barnett Taylor has the burden of proof to establish facts that support each defense. *See United States v. Alvand, Inc.*, 2 OCAHO no. 352, 378, 382-83 (1991).

1. Count II

As to Count II, Barnett Taylor conflates separate affirmative defenses potentially available in OCAHO proceedings. The company's citation to 8 C.F.R. § 274a.4 evidently refers to the good faith affirmative defense provided in 8 U.S.C. § 1324a(a)(3) which provides a narrow but complete defense to an allegation of knowingly hiring an unauthorized alien. No such allegation is made here and this defense has no application to the question of liability for paperwork violations. *See N. Mich. Fruit*, 4 OCAHO no. 667 at 690 (discussing a similar confusion). Although Barnett Taylor did not specifically invoke the statutory good faith affirmative defense to technical or procedural violations provided by 8 U.S.C. § 1324a(b)(6), this defense too would be unavailable to Barnett Taylor because it has no application to substantive violations, as the government pointed out.

Because neither the statute nor the regulations provide for a defense of substantial compliance, it is narrowly construed. *Jonel*, 7 OCAHO no. 967 at 746. Barnett Taylor cites to *United States v. Mesabi Bituminous, Inc.*, 5 OCAHO no. 801, 642, 644 (1995) and *United States v. Ketchikan Drywall Services, Inc.*, 10 OCAHO no. 1139, 16 (2011) for the proposition that an affirmative defense of substantial compliance can be found where the employee has made “‘an indication in Section 1 by a check box or some other means attesting under penalty of perjury’ regarding their work authorization status.” While this is a correct statement of the law, Barnett Taylor did not contend, and the record does not reflect, that any employee named in Count II actually did this.

Visual examination of the I-9s for the five employees reflects that none of them checked any box in section 1 and none of them entered an alien number on the line provided, or entered any other information in section 1 to indicate that the individual was attesting to a particular immigration status. In support of its claim to this defense, Barnett Taylor says that the I-9s speak for themselves and they show that the company examined a permanent resident card for each employee and recorded the required information in section 2 of each I-9. Section 2 does reflect such entries. But the company cited no case law supporting the proposition that omissions in the required attestation in section 1 can be cured by entries in section 2, and the law is clearly otherwise.

The purpose of section 1 is to demonstrate that the employee actually verified the information entered in the section. *See United States v. Mario Saikhon, Inc.*, 1 OCAHO no. 279, 1811, 1822 (1990). When no information is entered in section 1, that purpose is thwarted regardless of what the employer entered in section 2. If an employee failed to provide information sufficient to disclose his or her immigration status on the face of the I-9 form, the employee’s signature actually attests to nothing at all, and the statutory attestation requirement is not satisfied. *Ketchikan*, 10 OCAHO no. 1139 at 15. Accordingly when an employee does not check a box in section 1 and does not enter an alien number on the appropriate line, the employer has failed to ensure that the employee properly completed section 1. This is a substantive violation. *Id.*

There appears to be no genuine issue of material fact with respect to the violations alleged in Count II. Because substantial compliance does not provide a defense to these violations, Barnett Taylor has not established that it is entitled to judgment as a matter of law. The company’s motion for summary decision will accordingly be denied with respect to Count II.

2. Count III

OCAHO case law recognizes that impossibility may provide a valid affirmative defense to the failure to present of I-9 forms where the forms were actually completed but later became unavailable through no fault of the respondent. *Alvand*, 2 OCAHO no. 352 at 383 (finding that impossibility could be a valid defense if evidence established that the forms had been completed but were subsequently lost or destroyed in the course of a burglary); *United States v. Noel Plastering & Stucco, Inc.*, 2 OCAHO no. 396, 763, 768 (1991) (finding that a defense of

impossibility could potentially succeed if the respondent could prove that fire destroyed the offices where I-9s were kept). Nothing in either of these cases suggests that impossibility is available as an affirmative defense when a company's own employee destroys or discards the I-9s, whatever his reason for doing so.

For purposes of this motion, and notwithstanding the inconsistencies in the company's explanation, I credit Barnett Taylor's assertion that the I-9s were actually prepared but that they were discarded in error by an employee, whether that employee was Marshall himself or some other individual.⁶ Whichever version is correct, Marshall either threw away the I-9s, or some of them as asserted in the answer and the prehearing statement, or he left them sitting in a box in his office where they were collected with other trash as alleged in the interrogatory answers. Barnett Taylor seeks to characterize this disposal of the forms as an "accident," but unlike the burglary in *Alvand* or the fire in *Noel Plastering*, the events described here were not externally caused; they involve voluntary actions on the part of the company's own employees. Nothing in *Alvand* or *Noel Plastering* suggests that a defense of impossibility is available to an employer whose own employee voluntarily destroys its I-9 forms.

Barnett Taylor has thus not established a defense to liability for the violations in Count III. While the company established that there is no genuine issue of material fact as to the allegations in this count, it did not establish that it was entitled to judgment as a matter of law. Its motion for partial summary decision will accordingly be denied as to Count III as well.

3. Barnett Taylor's Status as a Small Employer and its Ability to Pay

Finally, Barnett Taylor's motion seeks summary decision as to the fact that it is a small employer, and seeks adjustment of the penalties based on its inability to pay because of its deteriorating economic position. As the government's response points out, factual allegations made in a brief or memorandum are not evidence and may not be considered as such, *United States v. Yin Tien Chen*, 9 OCAHO no. 1092, 4 (2003), and the exhibits tendered do not address all of Barnett Taylor's factual representations. The company's motion will be taken under advisement with respect to these issues and an opportunity will be provided for the company to supplement the record with additional evidentiary materials.

IV. BARNETT TAYLOR'S MOTION TO STRIKE THE GOVERNMENT'S CROSS-MOTION FOR PARTIAL SUMMARY DECISION

⁶ Marshall claims he does not know the name of the employee who cleaned his office, as time has passed and he has worked with more than 1,000 employees during his tenure with Burger King.

A. The Positions of the Parties

1. Barnett Taylor's Motion to Strike

Barnett Taylor's motion to strike asserts that the company will be prejudiced if the government's untimely cross-motion is considered because the government would then have had the "inequitable advantage" of an additional two months in which to evaluate the respondent's arguments and prepare its motion. In the event the motion to strike is denied, Barnett Taylor requests an additional 30 days within which to respond to the government's cross-motion. Barnett Taylor also requests attorneys' fees and costs in preparing the motion to strike, which was made necessary by the government's "flagrant disregard" of the scheduling order.

2. The Government's Response

The government asserts its cross-motion was properly brought under the OCAHO rules⁷ which permit a party to respond to a motion for summary decision by serving opposing papers or to "countermove for summary decision." 28 C.F.R. § 68.38(a). The government pointed out that its response and cross-motion did not raise any new issues and were both limited to those issues raised in the respondent's motion for summary decision, and that it filed its response/cross-motion by the due date set by this office for responses. The government also opposed the request for attorneys' fees, saying there is no basis in either law or fact for such a sanction.

Exhibits accompanying Barnett Taylor's Motion to Strike were identified as 1) Memorandum of Case Management Conference dated September 20, 2011 (2 pp.); 2) Joint Motion for Extension of Time dated February 28, 2012, with attachment A (7 pp.); and 3) Extension of Time dated February 29, 2012 (2 pp.). The exhibits accompanying the government's response in opposition was identified as Attachment A) an email message from respondent's counsel to government counsel dated January 31, 2012 regarding document production.

B. Discussion and Analysis

The respondent's motion to strike the complainant's cross-motion will be denied. Any "prejudice" resulting to the company from the filing of the government's cross-motion is self-inflicted; Barnett Taylor had the opportunity to file a response to the government's motion and to seek an extension of time in which to do so if needed. That it elected instead to file only a Motion to Strike and a Request for Attorneys' Fees and Costs was by its own voluntary choice.

As it applies to the issues of liability for Counts II and III moreover, Barnett Taylor's motion to strike exalts form over substance. With or without a separate cross-motion from the government,

⁷ Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2011).

the record reflects that the violations alleged in these counts occurred and that the company's efforts to establish an affirmative defense to liability for either count proved unsuccessful. What the company would be able to accomplish were it to be provided additional time to respond to the government's arguments with respect to liability for these violations is unelaborated.

The alternative to resolving issues by summary adjudication is to conduct a hearing. While Barnett Taylor asserts that it was burdened by filing the motion to strike, that burden pales next to the burden of preparing for and participating in an otherwise unnecessary hearing. The whole purpose of summary adjudication is to avoid unnecessary hearings. *United States v. Aid Maintenance Co., Inc.*, 7 OCAHO no. 951, 475, 478 (1997). For this reason, our rules require evidentiary hearings only where genuine factual issues are raised. 28 C.F.R. § 68.38(e). Parties should not be put to the burden and expense of a hearing unless it is shown that there are genuine issues of material fact to be determined, and agencies routinely decline to hold hearings where there is no factual dispute of substance. *Veg-Mix, Inc. v. Dep't of Agriculture*, 832 F.2d 601, 607-08 (D.C. Cir. 1987).

The company's Request for Attorneys' Fees and Costs will also be denied. Such fees and costs are available in these proceedings only in accordance with the provisions of 5 U.S.C. § 504 and only to a prevailing party. 28 C.F.R. § 68.52(c)(9).

V. THE GOVERNMENT'S CROSS-MOTION

A. Liability for Violations Alleged in Counts II and III

Visual examination of the five I-9 forms at issue in Count II in light of our caselaw reflects that there is no genuine issue of material fact and ICE is entitled to judgment as a matter of law with respect to liability for the five violations alleged. On the facts shown with respect to Count III, ICE is similarly entitled to judgment as a matter of law with respect to the 74 violations alleged in that count. The government's motion will be granted with respect to liability for these violations.

B. Issues Related to Penalties

Issues with respect to the size of the employer, together with other issues respecting the application of the statutory penalty factors, will be deferred pending an opportunity for the submission of additional evidentiary materials. In its Prehearing Statement, Barnett Taylor introduced the additional question of whether it was appropriate to apply penalty standards adopted in November 2009 to violations that occurred in 2007 and before. The company asserts that any penalties to be assessed should be calculated based on the fine schedule that was in effect in 2007. The government will be requested to address this question.

VI. VIOLATIONS ALLEGED IN COUNT I

Neither party made reference to the allegations in Count I that the company hired Delilah Garcia, Eduardo Lopez-Luna, Heather Parkinson, and Kyle Williams and either failed to ensure that each properly completed section 1 of Form I-9, and/or failed itself to properly complete sections 2 or 3 of the form. The parties will be given the opportunity to file dispositive motions and evidentiary support with respect to these allegations.

ORDER

Respondent's Motion for Partial Summary Decision is denied with respect to the question of liability for Counts II and III, and taken under advisement with respect to the remainder. Respondent's Motion to Strike Complainant's Cross-Motion for Partial Summary Decision and Request for Attorneys' Fees and Costs are denied. Complainant's Cross-Motion for Partial Summary Decision is granted with respect to liability for Counts II and III, and taken under advisement with respect to the remainder.

The parties will have a period of 30 days from the date of this order in which to make additional filings in support of their respective positions respecting the appropriate penalties for Counts II and III.⁸ The complainant is requested to address in addition the question of whether the November 2009 guidelines have any application to violations that occurred in 2007 or earlier.

The parties will also have 30 days from the date of this order in which to file dispositive motions with respect to Count I. Responses will be due within 30 days after service of any such motion.

SO ORDERED.

Dated and entered this 20th day of August, 2012.

Ellen K. Thomas
Administrative Law Judge

⁸ At the request of Peter Vincent, his name should be removed from the service list and copies of filings should not be sent to him.