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

January 23, 2025

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 2022A00055
MAJESTIC PETROLEUM SERVICES LLC, Respondent.	)	

Appearances: Hazel L. Gauthier, Esq., for Complainant
Kristin A. Jones, Esq., for Respondent

ORDER ON CROSS-MOTIONS FOR SUMMARY DECISION

I. PROCEDURAL HISTORY

This case arises under the employer sanctions provisions of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324a. Complainant, the U.S. Department of Homeland Security, Immigration and Customs Enforcement, filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on August 31, 2022. On October 18, 2022, Respondent Majestic Petroleum Services LLC filed its Answer.

The parties filed cross-Motions for Summary Decision—Complainant on May 14, 2023, and Respondent on May 18, 2023—as well as responses to the other's motion—Respondent on June 15, 2023, and Complainant on June 16, 2023.

On June 21, 2023, at the parties' request, the Court referred the matter to OCAHO's Settlement Officer Program for an initial period of sixty days. The Court later granted a thirty-day extension of the referral period after the parties indicated they were close to reaching a settlement agreement. A request for a status update and a status conference still did not result in submission of a settlement agreement. Consequently, the Court now adjudicates the parties' respective Motions for Summary Decision.

II. LEGAL STANDARDS

A. Summary Decision

Per 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 of material fact and that the party is entitled to summary decision." 28 C.F.R. § 68.38(c).[1] "An issue of material fact is genuine only if it has a real basis in the record" and "[a] genuine issue of material 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, 284 (1986)).[2] "Subjective and conclusory allegations unsupported by specific, concrete evidence, provide no basis for relief. Neither do such allegations create a genuine factual issue where one does not otherwise exist." *Hajiani v. ESHA USA, Inc.*, 10 OCAHO no. 1212, 6 (2014).

"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. 3689 Commerce Pl., Inc.*, 12 OCAHO no. 1296, 4 (2017) (quoting 28 C.F.R. § 68.38(b)). "The Court views all facts and inferences 'in the light most favorable to the non-moving party.'" *R.S. v. Lattice Semiconductor*, 14 OCAHO no. 1362d, 8 (2023) (quoting *United States v. Primera Enters.*, 4 OCAHO no. 615, 249, 261 (1994) (citations omitted).

B. Employment Verification Requirements

"Employers must prepare and retain Forms I-9 for employees hired after November 6, 1986," and these forms must be produced for inspection by the government upon three days' notice. *United States v. Metro. Enters.*, 12 OCAHO no. 1297, 7 (2017) (first citing 8 C.F.R. § 274a.2(b)(2)(ii); and then citing *United States v. Keegan Variety, LLC*, 11 OCAHO no. 1238, 2 (2014)). In

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[1] OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2024).

[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/office-of-the-chief-administrative-hearing-officer-decisions.

completing the Form I-9, an employer must ensure the employee completes Section 1 of the Form on the date of hire, while the employer must complete Section 2 of the Form within three days from the date of hire. *United States v. A&J Kyoto Japanese Rest.*, 10 OCAHO no. 1186, 5 (2013); 8 C.F.R. § 274a.2(b)(i)(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. Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355, 3–4 (2020) (citing 8 C.F.R. § 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.*, 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)).

The distinction between a substantive and technical or procedural violation is significant, as technical or procedural violations are subject to notice and a ten-day correction period before the government may include them in a Notice of Intent to Fine. *See United States v. Cawoods Produce, Inc.*, 12 OCAHO no. 1280, 8 (2016) (first citing 8 U.S.C. § 1324a(b)(6); and then citing *United States v. DJ Drywall, Inc.*, 10 OCAHO no. 1136, 3–4 (2010)). In contrast, the notification and correction period "has no application to substantive violations." *United States v. Foothill Packing, Inc.*, 11 OCAHO no. 1240, 8 (2015). Additionally, "[t]he good faith exception in section 274A(b)(6) only applies to technical or procedural violations." *Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355, at 6.

III. POSITIONS OF THE PARTIES

A. Count I

Count I of the Complaint alleges that Respondent failed to prepare or present the Form I-9 for nineteen individuals employed during the relevant inspection period. Compl. 2.

In its Motion for Summary Decision, Complainant contends that Respondent hired and employed all nineteen individuals during the relevant inspection period, and that Respondent failed to present Forms I-9 for these individuals in response to DHS's Notice of Inspection (NOI). C's Br. in Support 6–7. In support of its argument, Complainant provides a letter written by Respondent's counsel on October 16, 2020, in which Respondent acknowledges it located Forms I-9 for eight of the individuals named in Count I and attached them to the letter. *Id.* at 7; Ex. G-19. Because these eight Forms I-9 were produced more than two years after the date of inspection, July 16, 2018, Complainant argues Respondent violated 8 U.S.C. § 1324a(b)(3). C's Br. in Support 7. According to Complainant, "[t]he Forms I-9 for the remaining eleven (11) out of 19 employees did not exist at the time of the Notice of Inspection (07/16/2018)." *Id.*

Respondent did not address the allegations made in Count I in either its own Motion for Summary Decision or in its Response to Complainant's Motion for Summary Decision.

B. Count II

Count II of the Complaint alleges that Respondent failed to ensure proper completion of Section 1 or failed to properly complete Section 2 of the Form I-9 for 143 individuals employed during the relevant inspection period. Compl. 3.

In its Motion for Summary Decision, Complainant argues that it "has unequivocally demonstrated that Majestic Petroleum failed to ensure that for the 143 employees listed in Count II the employee properly completed section 1 and/or failed to properly complete section 2 or 3 of Form I-9 . . . ." C's Br. in Support 10. Respondent argues in its own Motion for Summary Decision that there is no dispute of material fact, and it is entitled to judgment as a matter of law for 75[3] of the 143 violations alleged in Count II. R's Mot. Summ. Dec. 3–4. The issue is whether an untimely completed attestation in Section 2 is a "substantive" or "technical or procedural" violation. *Compare* R's Br. in Support 8 *with* C's Resp. 7–8.

Regarding the remaining sixty-eight violations alleged in Count II, Respondent only argues that a dispute of material fact exists as to four of these allegations.

IV. EVIDENCE

"In administrative proceedings, the strict technical rules of evidence are somewhat relaxed. 5 U.S.C. § 556(d) excludes only evidence which is irrelevant, immaterial, or unduly repetitious. Thus, if the evidence is reliable, probative, and substantial, it will generally be admitted." *United States v. Bhattacharya,* 14 OCAHO no. 1380, 4 (2020) (quoting *United States v. Tinoco-Medina*, 6 OCAHO no. 890, 720, 738 (1996)). The applicable OCAHO rule provides that "[a]ll relevant material and reliable evidence is admissible" with certain exclusions mirroring those in 5 U.S.C. § 556(d). 28 C.F.R. § 68.40(b). Evidence provided "to support or resist a summary decision must be presented through means designed to ensure its reliability." *Bhattacharya,* 14 OCAHO no. 1380, at 4 (citing *Parker v. Wild Goose Storage, Inc.*, 9 OCAHO no. 1081, 3 (2002)). "Ordinarily in OCAHO proceedings, authentication of exhibits in support of a motion for summary decision is accomplished by an accompanying affidavit of the investigating agent, setting forth the circumstances under which the evidence was obtained." *United States v. Carpio-Lingan*, 6 OCAHO no. 914, 5 (1997) (citations omitted).

In support of its Motion for Summary Decision, the Complainant submitted twenty exhibits, marked as "G-1" through "G-20."[4] Included are the notices served on Respondent (Exhibits G-1,

[3] Respondent states that 74 Forms I-9 relate to this issue, while Complainant maintains the correct number is 73. The Court's own count of the names listed in this section of Complainant's Motion for Summary Decision totaled 75.

[4] Complainant did not submit an index to the exhibits. Further, while Complainant's exhibits are not individually paginated, the entire set of exhibits contains its own pagination distinct from that of the Brief in Support. As such, any citation to an exhibit will refer to this distinct pagination.

2, 4, 5, 8, 12), a spreadsheet listing each individual named in Count II of the Complaint, the error associated with their Form I-9, their date of hire per Respondent's list of employees, and the date on which Respondent completed Section 2 of the Form I-9 (G-13), a Memorandum detailing Complainant's process for calculating its proposed civil money penalty (G-17) and the Department of Homeland Security, Homeland Security Investigations' Reports of Investigation (G-18). Exhibit G-20 was submitted with Complainant's Response to Respondent's Motion for Summary Decision, and is an affidavit from the Special Agent detailing the course of the investigation. Response to R's Mot. Ex. G-20.[5] Complainant submitted copies of the Forms I-9 produced by Respondent as part of Complainant's inspection (G-3), copies of corporate documents (G-9 and 10), and Respondent's Quarterly Wage Report for Q2 2019 and Q3 2018 (G-11).

Also included are a series of letters from Respondent's corporate representative, in which she confirms receipt of the Notice of Suspect Documents and states that each of the individuals named in the Notice are no longer employed by Respondent (G-6); lists the names of individuals no longer employed by Respondent and to whom requests for corrections or adjustments to their Forms I-9 could not be made (G-7); lists the names of employees excluded from payroll documents sent previously to Complainant, as well as an explanation for the exclusion (G-16); and outlines its legal position concerning the charges brought against it (G-19).

While Complainant did submit an affidavit detailing the course of the investigation, the affidavit does not address the authenticity of the documents submitted in support of the motion. The characteristics of the exhibits, considered in light of the circumstances, demonstrate that they are the kinds of documents which are routinely obtained in the course of INS investigations, or they were authored by Respondent, and therefore will be considered. *See Carpio-Lingan*, 6 OCAHO no. 914, at 4–5. While it is better for a party to authenticate its exhibits with an affidavit, Respondent has a relationship with each of these documents such that it would "most likely know the facts as to its genuineness and has posed no challenge" to them. *Id.* at 5.

The exception is Exhibit G-15, which contains a spreadsheet listing the name, wages, SSN, hire date, termination date, and physical work location for individuals employed by Respondent. *Id.* at 610–21. It is unclear who prepared this exhibit, for what purpose, and what the information is based upon. As such, the Court will not rely on this exhibit when resolving the cross-motions for summary decision. In addition, the Report of Investigation (G-18) contains considerable redactions and does not provide the investigating agents' names or the author of the report; moreover, it has not been authenticated with an affidavit, and is therefore not sufficiently reliable for consideration.

[5] "Affidavits are reliable if 'they are sworn and signed by the affiants . . . contain facts that would be admissible in evidence . . . rely on personal knowledge . . . [and] show that the affiants are competent to testify to the matters stated therein.'" *United States v. R&SL, Inc.*, 13 OCAHO no. 1333b, 24 (2022) (citation omitted).

Respondent, in support of its own Motion for Summary Decision, submitted four exhibits marked as "R-1" through "R-4."[6]

- Exhibit R-1 contains a copy of Complainant's Responses to Written Interrogatories, signed and dated March 10, 2023. R's Br. in Support 21–39.
- Exhibit R-2 contains copies of the Forms I-9 for seventy-five individuals named in Count II of the Complaint, which Respondent claims contained only technical errors which it corrected. *Id.* at 40–186.
- Exhibit R-3 contains an affidavit from Respondent's corporate representative, signed and dated September 15, 2020. *Id.* at 187–90.
- Exhibit R-4 contains financial records for Respondent-business, including an IRS Form 1120-S Income Tax Return for 2020 and 2021, as well as a Payroll Summary for the period from September 19, 2022, to October 2, 2022. *Id.* at 191–203.

Complainant does not challenge the reliability or admission of these exhibits, and the Court finds that they are routine business documents, were produced by Complainant, or were signed by Respondent. Therefore, the Court will consider these exhibits in resolving the motions.

V. LIABILITY

A. Count I

Complainant contends that Respondent failed to present Forms I-9 for nineteen employees listed in Count I of the Complaint. "Employers must prepare and retain Forms I-9 for employees hired after November 6, 1986," and employers must produce the forms for government inspection upon three days' notice. *Metro. Enters.*, 12 OCAHO no. 1297, at 7 (citing 8 C.F.R. § 274a.2(b)(2)(ii)). "Any refusal or delay in presentation of the Forms I-9 for inspection is a violation of the retention requirements as set forth in section 274A(b)(3) of the Act." 8 C.F.R. § 274a.2(b)(2)(ii).

The Court finds Respondent is liable as charged. Each individual named in Count I was hired by Respondent after November 6, 1986, making each individual's Form I-9 subject to the preparation and retention requirements of the Act. *See* R's Prehearing Statement 5 (admitting Respondent employed all individuals named in Count I during the relevant inspection period); Answer, Ex. B 2 ("Respondent . . . began its operations in 2013."). Complainant served an NOI on Respondent on July 17, 2019, which directed Respondent to deliver Forms I-9 for "all of your current employees and those employees terminated on or after July 17, 2018 to July 17, 2019," by July 22, 2019. C's Br. in Support, Ex. G-1. ICE appeared at Respondent's place of business on July 24, 2019, and collected the I-9s. C's Br. in Support, Exs. G-19 and 20.

The only evidence in the record that supports Complainant's allegation that the nineteen Forms I-9 were missing is a letter sent by Respondent, through counsel, to Complainant on October 16,

[6] Respondent also did not provide an exhibit list describing each exhibit, nor do these exhibits contain their own unique pagination. As such, any citation to Respondent's exhibits will refer to the pagination of the entire PDF document of its Motion for Summary Decision.

2020, in response to Complainant's NIF and invitation to settlement discussion.[7] C's Br. in Support, Ex. G-19. In that letter, Respondent notified Complainant that it had "found the following 8 of the missing 19 I-9s," which it attached to the letter. *Id.* at Ex. G-19, 8. Respondent went on to request "that the fines for the 11 missing I-9s be reduced . . . ." *Id.* Thus, while Respondent prepared these eight Forms I-9, it did not present them to Complainant within three days of having received the NOI. Further, it acknowledged the remaining eleven Forms I-9 from Count I were still missing and declined to challenge Complainant's factual assertions related to this Count in either its Motion for Summary Decision or its Response to Complainant's Motion. As a result, the Court finds that no genuine issue of material fact exists with respect to the allegations in Count I, and that Complainant is entitled to judgment as a matter of law. Accordingly, Complainant's Motion for Summary Decision is GRANTED with respect to all nineteen allegations in Count I.

B. Count II

Complainant contends that Respondent failed to ensure that the employees properly completed Section 1 and/or that Respondent failed to properly complete Section 2 or 3 for 143 employees listed in Count II. Complainant argues that a visual inspection of the Forms I-9 in question substantiate its assertion that the forms contain substantive paperwork violations, which violations are broken down into six categories. C's Br. in Support 7–10. The Court will discuss each category in turn.

1. Failure to ensure employee provided A-number in Section 1 where the A number is not in Sections 2 or 3[8]

For one individual named in Count II, Complainant alleges Respondent failed to ensure they provided their A-number in Section 1 of the Form I-9. C's Mot. Summ. Dec. 8. This Court has held that "[a]n employer's failure to ensure that the employee . . . includes his or her alien registration number, are all serious, substantive violations." *United States v. Speedy Gonzalez Constr., Inc.*, 12 OCAHO no. 1228, 3 (2014).

A visual inspection of the Form I-9 in question reveals that the employee checked the box indicating his status as a Lawful Permanent Resident, however, no A-number was provided on the line next to this box. C's Br. in Support, Ex. G-3 at 487. Further, the individual's A-number does not appear elsewhere on either the Form I-9 or the documents he provided to prove his employment

[7] The Court finds the letter's contents serve as an admission by Respondent, as Respondent submitted the letter as evidence in support of its Answer. *See* Answer, Ex. B. Federal Rule of Civil Procedure 56(c) permits a court to consider any admissions as part of the basis for summary judgment. *See United States v. Dominguez*, 7 OCAHO no. 972, 782, 795 (1997) (citing *United States v. Tri Component Prod. Corp.*, 5 OCAHO no. 821, 765, 768 ("[S]ummary decision issued pursuant to 28 C.F.R. § 68.38 may be based on matters deemed admitted.").

[8] Complainant's Motion for Summary Decision alleges this type of substantive violation applies to the Form I-9 of the following employee number as listed on the Complaint: 121. C's Br. in Support 8; Exs. G-3, G-13.

authorization. *Id.* at 487–89. Therefore, the Court finds no issue of material fact exists with respect to this error constituting a substantive violation. Consequently, Complainant is entitled to judgment as a matter of law. And since Respondent did not provide evidence challenging this assertion, Complainant's Motion for Summary Decision with respect to this violation is granted.

2. Failure to ensure employee attested to immigration status in Section 1[9]

For thirty individuals named in Count II, Complainant alleges Respondent failed to ensure they checked a box attesting to their immigration status in Section 1 of the Form I-9. "OCAHO case law has consistently held that failure to ensure that the employee checks a box in section 1 is a substantive violation." *United States v. Durable, Inc.*, 11 OCAHO no. 1229, 12 (2014). In its Response to Complainant's Motion for Summary Decision, Respondent challenges this assertion with respect to one individual: "Complainant states that [employee #97] did not check the box under 'US citizen/noncitizen/LPR/alien authorized to work.' However, a review of the I-9 indicates that he did check the box but it was on an expired form, which is not a substantive error." R's Resp. 3.

A visual inspection of the Forms I-9 for these individuals shows that for twenty-nine of the thirty forms, the employee did not check a box indicating their immigration status. Accordingly, no dispute of material fact exists regarding these allegations and Complainant is entitled to judgment as a matter of law. Further, as Respondent does not challenge these violations, and did not provide any contravening evidence, Complainant's Motion for Summary Decision is granted with respect to these twenty-nine violations.

Regarding the Form I-9 for employee #97, a simple visual inspection of the evidence provided by Complainant shows that Respondent had two different Forms I-9 on file for this employee, one where the employer attestation is dated "07/20/2019" and another dated "8/15/17." C's Br. in Support, Ex. G-3 at 387–93. On the more recent form, the employee failed to check a box and sign Section 1. *Id.* at 387. In contrast, Respondent is correct that the earlier form is complete, nevertheless, errors remain: Section 1 was completed using an expired version of the Form I-9, and the employer's attestation in Section 2 was completed more than three days after the individual's first day of employment. *Id.* at 391–93. However, in the spreadsheet identifying the specific error, Complainant references the errors in the 2019 Form, but cites to the 2017 date of completion. In *United States v. Alpine Staffing, Inc.*, 12 OCAHO no. 1303, 16 n.9 (2017), the Court found that where multiple forms existed for an individual, the Court considers violations contained on the Form I-9 charged by ICE. In this case, it appears Complainant charged violations for the 2019 Form as it correctly identified those violations in both the charge and in its charging sheet. The reference to the 2017 completion appears to have been a scrivener's error. As the violations are present, Complainant's Motion for Summary Decision is granted as to this violation.

[9] Complainant's Motion for Summary Decision alleges this type of substantive violation applies to the Form I-9 of the following employee numbers: 1, 2, 9, 10, 17, 26, 27, 29, 30, 34, 43, 46, 49, 58, 78, 84, 85, 90, 92, 93, 94, 95, 97, 106, 108, 109, 110, 125, 128, and 129. C's Br. in Support 8; Exs. G-3, G-13.

3. Failure to ensure employee signed the attestation in Section 1[10]

For thirty-one individuals named in Count II, Complainant alleges Respondent failed to ensure they signed the attestation in Section 1 of the Form I-9. Per OCAHO case law, this is a substantive violation. *Durable, Inc.*, 11 OCAHO no. 1229, at 12 ("A failure to satisfy [the requirement to sign the Section 1 attestation] on the date of hire is not curable and is not a technical or procedural violation."). Respondent counters that this assertion is incorrect as to three of the named individuals. Regarding the Forms I-9 for employees #53 and #77, Respondent says "it is clear from a cursory review of the I-9s that they did" sign the attestation in Section 1. R's Resp. 3. Additionally, "[t]he I-9 for [employee #11] had his signature on it, but it had been inadvertently placed in the wrong box, but Respondent was still charged with a substantive violation." *Id.*

A simple examination of the Forms I-9 for twenty-eight of the thirty-one individuals named in this section of Count II reveals the employee did not sign the attestation in Section 1. As a result, the Court finds there is no genuine dispute of material fact with respect to these allegations and Complainant is entitled to judgment as a matter of law. Accordingly, Complainant's Motion for Summary Decision is granted as to these twenty-eight violations.

Concerning the remaining three individuals named in this section of Count II, Respondent is correct in that a visual examination of the Forms I-9 for employees #53 and #77 show they signed the attestation in Section 1. C's Br. in Support, Ex. G-3 at 206, 305. However, these Forms I-9 contain other substantive violations, which Complainant properly characterized in the evidence submitted with its Motion for Summary Decision. *See id.*, Ex. G-13.

In the spreadsheet characterizing the specific violation associated with each Form I-9 included in Count II, the error associated with employee #53's form is described as "Section 2, Missing Employer signature." *Id.* at G-13, 602. A visual examination of this employee's Form I-9 reveals that Section 2 is signed and dated, but the printed name of the signatory is missing. *Id.* at Ex. G-3, 207. Similarly, the error associated with employee #77's form is described as "Section 2 – missing employer name and completed form." *Id.* at Ex. G-13, 603. A visual examination of this form reveals that Section 2 is signed by an individual with the title of "receptionist," but the individual's printed name and the date on which they signed the attestation are missing. *Id.* at Ex. G-3, 306.

"Some OCAHO ALJs have found that the failure to provide the authorized representative's printed name in section 2 is a substantive violation. Other OCAHO ALJs, however, have found that the failure to print the representative's name in section 2 is not always a substantive violation." *United States v. Imaculean Cleaning Servs., LLC*, 13 OCAHO no. 1327, 6 (2019) (internal citations omitted). It seems OCAHO ALJs found this violation to be substantive when the identity of the signatory cannot otherwise be determined, either based on information found in other sections of the same Form I-9 or when compared with other Forms I-9 from the same employer. *See id.* For

[10] Complainant's Motion for Summary Decision alleges this type of substantive violation applies to the Form I-9 of the following employee numbers: 11, 13, 14, 33, 35, 42, 48, 53, 54, 56, 61, 62, 65, 66, 67, 69, 72, 73, 74, 75, 76, 77, 83, 91, 99, 100, 101, 105, 116, 141, and 143. C's Mot. Summ. Dec. 8–9; Exs. G-3, G-13.

example, in *Imacuclean Cleaning Servs., LLC*, several Forms I-9 were missing the authorized representative's signature in Section 2, but because the representative's title was included on the forms, the Court could compare her signature to other Forms I-9 signed by someone with the same title. *Id.* Through this process the Court ultimately identified the signatory and determined Complainant had not proven a substantive violation occurred with those forms. *Id.*

In this case, neither the printed name nor the title of the authorized representative is included in Section 2 of employee #53's Form I-9. Moreover, the signature in Section 2 is identical to the employee's signature from Section 1. Therefore, it would appear the employee signed both sections, which shows that the employer did not in fact attest to having examined employee #53's employment authorization documents. As a result, the Court finds this error constitutes a substantive violation for which Respondent is liable.

Employee #77's Form I-9 suffers from slightly different defects. Section 2 of his form contains a more legible signature and the job title of the authorized representative, which signature, job title, and handwriting matches that appearing on other Forms I-9, allowing the Court to identify the representative as A.G. C's Br. in Support, Ex. G-3 at 306. Therefore, because the Court could determine the authorized representative's name, and her signature is consistent with that appearing on other Forms I-9, the Court would normally find this error constitutes a technical violation. However, as discussed in detail below, this was charged as a technical violation, but was not corrected, thus it ripened into a substantive violation. *See infra* section IV.B.5. Consequently, the Court finds Respondent liable for this Form I-9.

The issue with employee #11's Form I-9 is that his signature appears in the place where a preparer would normally sign and not in the Section 1 attestation. C's Br. in Support, Ex. G-3, at 44. OCAHO ALJs have held that an employer's signature in one section of the Form I-9 cannot function as a substitute for a missing signature in another section. *Durable, Inc.*, 11 OCAHO no. 1229, at 13 (citing *United States v. Catalano*, 7 OCAHO no. 974, 860, 866, 872 (1997) when holding that an employer's signature in Section 3 cannot satisfy the requirement that it also sign Section 2). The undersigned finds the same principle applies to employee signatures, and that employee #11's signature in the "preparer" section of the Form I-9 does not satisfy the requirement that he sign the Section 1 attestation. As such, the Court finds this error constitutes a substantive violation for which Respondent is liable.

Therefore, the Court finds Respondent liable for all thirty-one violations alleged in this section of Count II.

4. Failure to sign the attestation in Section 2[11]

For two individuals named in Count II, Complainant alleges Respondent failed to sign the attestation in Section 2 of the Form I-9. C's Mot. Summ. Dec. 9. "Failure to sign the employer

[11] Complainant's Motion for Summary Decision alleges this type of substantive violation applies to the Form I-9 of the following employee numbers: 80 and 102. C's Br. in Support 9; Exs. G-3, G-13.

attestation in section 2 is a substantive violation." *United States v. Frio Cnty. Partners, Inc.*, 12 OCAHO no. 1276, 9 (2016) (citing *Durable, Inc.*, 11 OCAHO no. 1229, at 13 and Virtue Memorandum at 3–4).

A visual examination of the Forms I-9 for these two individuals shows Respondent failed to sign the attestation in Section 2. C's Br. in Support, Ex. G-3 at 320, 410. Therefore, no dispute of material fact exists, and Complainant is entitled to judgment as a matter of law. Complainant's Motion for Summary Decision is therefore granted as to these two violations.

5. Failure to properly complete section 2 within three business days of the employee's first day of employment[12]

a. Positions of the Parties

For seventy-five individuals named in Count II, Complainant alleges Respondent failed to complete Section 2 and the attestation within three business days of the employee's first day of employment. C's Br. in Support 9–10. More specifically:

> The statute makes it clear that in Section 2 of the Form I-9, the employer must attest through a signature that it has verified that the individual is not an unauthorized noncitizen by examining his or her documents within three days of hire. INA § 274A(b)(1)(A). A simple visual inspection of the Forms I-9 shows Majestic Petroleum to be in violation of the INA as the Forms I-9 show Respondent completed section 2 verification after the service of the NOI on July 16, 2018, which is more than three days beyond the employee's first day of employment.

Id. at 10.

In its Motion for Summary Decision, Respondent argues that a failure to timely write the certification date in Section 2 of the Form I-9 represents a technical or procedural violation, not a substantive violation. R's Br. in Support 8. Therefore, Respondent contends, it should have been afforded the opportunity to correct the technical failure, which Respondent argues it did. *Id.* at 8–9. And because these failures were timely corrected, "[t]his Court should find in favor of the Respondent and grant a Summary Decision that these 74 I-9s are in compliance with the law and regulations described above . . . ." *Id.* at 9.

Respondent expands on this argument in its Response to Complainant's Motion for Summary Decision, adding that "[t]he fact that the employer dated the certification after that fact does not indicate that the employment verification and certification was not completed within three business

[12] Complainant's Motion for Summary Decision alleges this type of substantive violation applies to the Form I-9 of the following employee numbers: 3, 4, 5, 6, 7, 8, 12, 15, 16, 18, 19, 20, 21, 22, 23, 24, 25, 28, 31, 32, 36, 38, 39, 40, 41, 44, 45, 47, 50, 51, 52, 55, 57, 59, 60, 63, 64, 68, 70, 79, 82, 86, 87, 88, 89, 96, 98, 103, 104, 107, 111, 112, 113, 114, 117, 118, 119, 120, 122, 123, 124, 126, 127, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, and 142. C's Br. in Support 9–10; Exs. G-3, G-13.

days of employment. . . . Complainant has no idea when Respondent completed the certification in Section 2." R's Resp. 4–5. Put simply, just because Respondent forgot to write the date it conducted the verification on Section 2 of the Form I-9, this does not mean the verification never took place, and since Complainant provided no other evidence demonstrating Respondent's failure to verify these individuals' documents, Complainant has not met its burden of proof with respect to those Forms I-9.

Complainant rejects Respondent's argument that "failure to properly complete the attestation portion of Section 2 is a technical violation," arguing the position is based on an incorrect reading of the Virtue Memorandum. C's Resp. 7–8. According to Complainant, the Virtue Memo "characterizes the failure to date Section 2 within three business days of the employee's first date of employment as both a substantive violation and a technical violation." *Id.* at 8. And because here "[t]he Forms I-9 at issue contain an attestation date," as opposed to being left blank, "ICE properly charged the respondent's failure to properly complete Section 2 of the Forms I-9 as a substantive violation." *Id.* (citing OCAHO cases where the Court considered the failure to properly complete Section 2 within three days of an employee's hire as a substantive violation).

Additionally, Complainant challenges Respondent's assertion that it otherwise lacks evidence that the verifications did not take place during the statutorily prescribed period. Complainant points to several Forms I-9 which contain information rendering a timely verification by Respondent factually impossible.[13] C's Resp. 7.

b. Law & Analysis

As an initial matter, Respondent argues that the Complainant identified these I-9s as having blank Part 2 attestation dates and treated them as technical or procedural violations. R's Br. in Support 7–8. The evidence included with Complainant's Motion for Summary Decision and Response supports Respondent's position. In the Notice of Technical or Procedural Failures issued to Respondent, Complainant identified several failures on the Forms I-9 which it "circled in ink or highlighted." C's Br. in Support, Ex. G-4 at 572. When identifying which failures applied to Respondent, Complainant marked an "X" in the box next to "Failure to date Section 2 within three business days of date employment begins of within three business days of hire." *Id.* at 573. Complainant then provided Respondent with fourteen days, until December 17, 2019, to correct the failures, "[i]nitial and date the corrections made," and provide "a brief explanation . . . for corrections that reasonably cannot be made." *Id.* Further, in its Response, Complainant included an affidavit from the Special Agent responsible for the investigation, through which the Agent attests to having identified missing Section 2 attestation dates as a technical or procedural error which could be corrected. C's Resp., Ex. G-20 at 2. According to the Virtue Memorandum, "for those identified technical or procedural failures that the employer has not properly corrected where

[13] Complainant notes that for four Forms I-9, the individual that allegedly verified the identity documents of the new employee was not yet employed by Respondent at the time of hire. C's Resp. 7. For another Form I-9, the identity document verified by Respondent was issued after the date on which the verification supposedly took place. *Id.* at 6–7.

such corrections could reasonably have been made, the employer is deemed to be not in compliance with section 274A(b)." Virtue Memorandum § B.4.a.(2).

The Virtue Memorandum, in relevant part, provides that among the substantive violations are failure to "ensure that the individual dates section 1 for the Form I-9 at the time of hire if the hire occurred before September 30, 1996" and failure to "date section 2 of the Form I-9 within three business days of the date the individual is hired . . . if the date that section 2 was to be completed occurred before September 30, 1996." Virtue Memorandum §§ A.3.a.(B)(6), (C)(4). It lists the same allegations as technical when the time of hire is after September 30, 1996. *Id.* §§ A.3.b.(A)(5), (B)(5). In the Appendices, the violation is listed as "employer attestation not completed within 3 business days of hire," with the distinction between substantive and technical being the September 30, 1996, hire date. *Id.* App. A-C.

Thus, it appears Complainant correctly followed its own policy guidelines when classifying Respondent's missing Section 2 attestation dates as technical or procedural errors, as each of the individuals whose Forms I-9 are at issue were hired after September 30, 1996. *See supra*, section V.A. The forms were not properly corrected as the new dates were well after the hire dates for the employees, and the violation ripened into a substantive violation.

Notwithstanding Complainant's compliance with its own policy, the weight of the OCAHO cases have found that failure to timely prepare the Form I-9 is, in any event, a substantive violation.[14] *United States v. Dr. Robert Schaus, D.D.S.*, 11 OCAHO no. 1239, 7–8 (2014) ("While the omission of a particular date on a form that is actually timely prepared is a technical or procedural violation, that fact may not be construed to allow an employer to avoid timely preparing I-9s or to wait for an NOI before preparing them."). In *Dr. Robert Schaus, D.D.S.*, the Respondent raised the good faith provision as articulated in the Virtue Memorandum, but the ALJ drew the distinction between the omission of a date on a timely prepared Form I-9 and the failure to promptly prepare the Form I-9. *Id.* at 7. Other cases do not make this distinction, however, and also do not note the date distinction in the Virtue Memorandum: "OCAHO case law has long held that failure to timely prepare an I-9 is a substantive violation." *Id.* (citing *United States v. Platinum Builders of Cent. Fl., Inc.*, 10 OCAHO no. 1199, 8 (2013) (citing to Virtue Memorandum without noting the date distinction); and then citing *United States v. New China Buffet Rest.*, 10 OCAHO no. 1132, 4 (2010) (citing to Virtue Memorandum in rejecting argument that failure to properly complete section 2 of Form I-9 within three business days of hire is a procedural violation where dates of hire were 2007)); *see also United States v. Holtsville 811 Inc.*, 11 OCAHO no. 1258, 6–9 (2015); *United States v. Anodizing Indus., Inc.*, 10 OCAHO no. 1184, 4 (2013). "The longer the delay in preparing an I-9 form, the more serious the violation." *Platinum Builders of Cent. Fla., Inc.*, 10 OCAHO no. 1199, at 8; *United States v. El Camino, LLC*, 18 OCAHO no. 1479, 6–7 (2023); *Frio Cnty. Partners, Inc.*, 12 OCAHO no. 11276, at 11 ("Failure to timely prepare a Form I-9 is a substantive violation.") (citation omitted); *Immaculean Servs., LLC*, 13 OCAHO no. 1327, at 3.

[14] *But see United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1071, 8–11 (2001) (considering timeliness failures and indicating that the government would have to provide notice and an opportunity to correct the violations were they to occur after September 30, 1996).

In *United States v. Occupational Res. Mgmt. Inc.*, 10 OCAHO no. 1166, 14–15 (2013), the ALJ addressed this issue at some length. In that case, the Respondents pointed out the Virtue Memorandum, to which the ALJ responded,

> The 1996 reforms did not repeal any provision of the statute or regulations, nor did they alter an employer's obligation to ensure preparation of I-9 forms in the time and manner required by the statute and regulations . . . The company seeks to blur the distinction between the inadvertent omission of a date or a delay in entering a date on an existing form that was actually prepared at the appropriate time, and a failure to prepare the form at all when required. A total failure to prepare an I-9 at all at the time of hire is still a substantive violation . . . According to [the respondent's] view, no penalty could attach to a subsequently prepared and deliberately perjured I-9 form, so that an employer would be free to wait until service of a Notice of Inspection, then prepare and backdate I-9s for all its employees many years after the forms should have been prepared . . . Waiting for months or years after these employees' hire dates to prepare their I-9s and then backdating them is not a technical or procedural violation nor does it reflect a good faith attempt to comply with the requirements.

Id. at 14–15.

The distinction between a timeliness violation where the form was timely completed but the date was missing, and instances where the form was not timely completed, can be supported by the Virtue Memorandum itself, which provides that it is a technical violation to fail to "*date* section 2 of the Form within three business days." The Appendices A and B, however, provide that it is a substantive violation if the employee attestation is not *completed at the time of hire* if the employee was hired before September 30, 1996, and technical if hired after that date.

While these distinctions may explain some of the ALJ decisions, ultimately ALJs are reluctant to consider timeliness violations procedural or technical in nature, because to do so would allow a company to avoid completing the form until years after hiring, indeed until such time as DHS serves a notice of inspection, defeating the purpose of the statute. Given the weight and consistency of recent caselaw interpreting this provision, this ALJ also finds that true timeliness violations, where the forms were not completed within the requisite time periods, are substantive violations. The reasons cited in the *Occupational Rest. Mgmt. Inc.* case are compelling. Waiting months or years to complete the form is not a good faith attempt to comply with the statute, and as noted above, defeats the purpose of the statute.

Further, OCAHO case law considers a timeliness violation to be frozen in time: "[A] paperwork violation that alleges a timeliness failure is '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.'" *United States v. T-Ray Constr. Co.*, 13 OCAHO no. 1346, 7 (2020) (quoting *WSC Plumbing*, 9 OCAHO no. 1061, at 11–12). Unlike other verification failures, timeliness violations cannot be

cured. *WSC Plumbing*, 9 OCAHO no. 1061, at 16. No purpose would be served by providing a notice of inspection and allowing the company to correct the violation.

Adding a missing date to an otherwise timely completed form, on the other hand, can be corrected, and here DHS appears to have allowed Respondent to correct the violation. This would only resolve the matter, however, if the completed dates reflected the true date of the attestations, and that they were timely completed. In that situation, of course, there is no true timeliness issue. This is distinct from backdating, which is where an employer fills in an earlier date that is not the true date of the attestation.

Here, the dates on the I-9s reflect dates well after the date of hire. Respondent argues "[t]he fact that the employer dated the certification after that fact does not indicate that the employment verification and certification was not completed within three business days of employment. . . . Complainant has no idea when Respondent completed the certification in Section 2." R's Resp. 4–5. However, in section 1, the form provides, "I attest, under penalty of perjury, that I am [fill in the blanks], and then the next block indicates, "Signature of Employee" and "Today's Date". C's Br. in Support 9; Exs. G-3, G-13. Section 2, likewise, contains a certification statement and then the blocks containing "Signature of Employer or Authorized Representative", "Today's Date", and then "Title of Employer or Authorized Representative." The date block clearly indicates that it is to be completed on the date that the signatory made the attestation. This creates an inference upon which this Court can make a finding that the date represents the date that the attestation/certification was accomplished. As noted above, Respondent may not rest upon mere denials at this point, but must set forth specific facts showing a genuine issue of material fact. *3689 Commerce Pl., Inc.*, 12 OCAHO no. 1296, at 4. Respondent did not provide any affidavits or other evidence to show that the attestations were otherwise timely completed.

Complainant has also demonstrated that for several of the Forms I-9, it would have been factually impossible for a timely attestation to have taken place. For example, the driver's license provided by employee #111 to prove his employment authorization, which Respondent claims to have verified within three days of his beginning employment, was not issued until eight months after this employee began working. C's Resp. 7; C's Br. in Support, Ex. G-3 at 438, 441. Further, a visual inspection of the Forms I-9 and employment records for employees #4, #12, #19, and #96 show that their Section 2 attestation was completed by an individual who was not employed by Respondent at the time of their hire. C's Resp. 7; C's Br. in Support Ex. G-3. While Complainant did not demonstrate that all the I-9s fall within this category, it shows that Respondent did not have a consistent policy of timely completing and reviewing the I-9 Forms and supporting documents.

Consequently, the Court finds that Respondent's errors represent timeliness violations, which are substantive paperwork violations not subject to notification or correction.

Therefore, because a visual examination of the Forms I-9 shows Respondent failed to complete the attestation in Section 2 within the first three business days of the individual's hire, the Court finds no dispute of material fact exists and Complainant is entitled to judgment as a matter of law. Accordingly, Complainant's Motion for Summary Decision is granted with respect to all seventy-five violations alleged in this section of Count II. And being that Respondent's Motion for

Summary Decision only sought to contest the violations in this section of Count II, Respondent's Motion is therefore denied.

6. Presented forms are either missing entire pages or Section 2's employer attestation date[15]

For four of the individuals named in Count II, Complainant alleges that the Form I-9 Respondent submitted is either missing an entire page or the date on which the employer completed its attestation in Section 2. C's Br. in Support 10; Exs. G-3, G-13.

A visual examination of the Form I-9 for employee #71 shows the entire first page is missing, which contains the employee's attestation to their immigration status. *See id.* at Ex. G-3, 286–87 (containing only page 2 of the Form I-9 and copies of the individual's documents). This is clearly a substantive violation for which the Court finds Respondent liable.

Regarding employe #115, a visual examination of the Form I-9 reveals the only missing information is the Section 2 date of hire and Section 2 date of attestation. *Id.* at Ex. G-3, 457. As in section 5 above, the missing date was first considered a technical violation, but Respondent did not correct the violation, and it therefore ripened into a substantive violation of failure to properly prepare the Form I-9. Consequently, the Court finds that Respondent has failed to raise a genuine issue of material fact with respect to this violation and that Complainant is entitled to judgment as a matter of law. Accordingly, Complainant's Motion for Summary Decision is granted as to this violation.

Regarding employees #37 and #82, however, it appears Respondent did not provide a Form I-9 entirely. No form for these individuals was included with Complainant's evidence and Complainant's own description of the violation associated with these individuals is "No Form I-9 provided by Employer." C's Br. in Support, Ex. G-13 at 602–03. Thus, it would appear that Respondent's error with respect to these Forms I-9 is a failure to prepare them, not a failure to ensure proper completion of Section 1 or to complete Section 2, as they were charged. The CAHO has noted that an ALJ may conform an improperly characterized charge by ICE where the incorrect characterization "necessarily and inherently encompasses" the correct characterization. *United States v. El Paso Paper Box, Inc.*, 17 OCAHO no. 1451b, 7 (2023). In *El Paso Paper Box*, ICE had charged the Respondent with failure to prepare Forms I-9 despite the forms clearly having been prepared, albeit after the NOI was issued. *United States v. El Paso Paper Box, Inc.*, 17 OCAHO no. 1451, at 7 (2023). The CAHO reasoned that

> as a charge of failure to prepare a Form I-9 necessarily and inherently encompasses an allegation of a failure to timely prepare a Form I-9, the parties' treatment of a scenario in which Forms I-9 created after the service of an NOI are charged only as a failure-to-prepare violation may nevertheless authorize an ALJ, under certain circumstances, to conform the failure-to-prepare charge to the

[15] Complainant's Motion for Summary Decision alleges this type of violation relates to the Form I-9 of the following employee numbers: 37, 71, 82, 115. C's Br. in Support 10; Exs. G-3, G-13.

> evidence and find liability as a failure to timely prepare the Form I-9.

El Paso Paper Box, Inc., 17 OCAHO no. 1451b, at 7 (citing 28 C.F.R. § 68.9(e), which authorizes an ALJ to conform a pleading to evidence once the issue has been tried by the parties' express or implied consent).

In this case, however, the undersigned finds that ICE's original, improper characterization of the charge (failure to properly complete) does not "necessarily and inherently encompass" the proper characterization (failure to prepare). The factual underpinnings to support liability for the former are too different from those needed to support liability for the latter. Moreover, even if the Court were to conform the charge to its proper characterization, the record does not contain evidence to support a finding of liability under that charge. As discussed above, Count I of the Complaint contained the violations charged as "failure to prepare/present." Compl. 2. To establish liability for these violations, ICE relied entirely on a letter from Respondent's counsel admitting the forms for all nineteen individuals named in Count I were either not prepared or not presented at the time of ICE's inspection. *See* C's Br. in Support, Ex. G-19. Employees #37 and #82 were not named in Count I, and so there is no evidence that forms for these individuals were never prepared.

Consequently, the Court finds that Complainant has not shown that it is entitled to judgment as to these two alleged violations. Accordingly, Complainant's Motion for Summary Decision is denied as to these two violations in Count II of the Complaint.

Complainant's Motion for Summary Decision is GRANTED as to all but two violations (#37 and #82). Respondent's Motion for Summary Decision is DENIED.

Complainant must submit a status update as to how it intends to proceed with its charge as to violations for employees #37 and #82.

VI. BIFURCATION OF LIABILITY AND PENALTY ASSESSMENT

Due to the passage of time since the respective motions for summary decision were filed. Respondent's dispute of Complainant's penalty calculation relies in part on the argument that it is unable to pay the proposed fine due to the COVID-19 pandemic. R's Mot. Summ. Dec. 3–4; R's Br. in Support Ex. R-3 ¶¶ 19–21. In support of this assertion, Respondent provided financial documents from 2020–21 and payroll information from October 2022. R's Br. in Support Ex. R-4. The Court will therefore bifurcate the issues of liability and penalty assessment to permit Respondent to provide updated financial information of evidentiary quality. Bifurcation is in the Court's discretion. *Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355, at 8 (citing *Hernandez v. Farley Candy Co.*, 5 OCAHO no. 781, 464, 465 (1995)).

As a result, the Court permits Respondent to submit updated financial information relevant to the penalty determination no later than February 13, 2025. If Respondent files supplemental financial evidence, Complainant may file a response addressing the financial information only, no later than, February 27, 2025. The Court will assess penalties in a subsequent order.

VII. CONCLUSION

The undersigned GRANTS IN PART Complainant's Motion for Summary Decision and finds that Respondent is liable for 160 violations of 8 U.S.C. § 1324a(a)(1)(B). The Court bifurcates the issues of liability and penalty assessment.

Complainant's Motion for Summary Decision is DENIED IN PART with respect to two violations alleged in Count II.

Respondent's Motion for Summary Decision is DENIED.

Complainant must submit a status report as to how it intends to proceed with its charge as to violations for employees #37 and #82 by February 13, 2025.

Respondent may submit updated financial information no later than February 13, 2025. If Respondent submits supplemental financial evidence, Complainant may file a response no later than February 27, 2025.

SO ORDERED.

Dated and entered on January 23, 2025.

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Honorable Jean C. King
Chief Administrative Law Judge