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

October 16, 2019

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 19A00018
LAZY DAYS SOUTH, INC., Respondent.	)	

MODIFICATION BY THE CHIEF ADMINISTRATIVE HEARING OFFICER OF THE CHIEF ADMINISTRATIVE LAW JUDGE'S INTERLOCUTORY ORDER

I. PROCEDURAL HISTORY

This case arises under the employer sanctions provision of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324a (2017). The U.S. Department of Homeland Security, Immigration and Customs Enforcement (ICE or Complainant) filed a complaint with the Office of the Chief Administrative Hearing Officer alleging that Respondent Lazy Days South, Inc. violated 8 U.S.C. § 1324a(a)(1)(B) by failing to prepare and/or present Employment Eligibility Verification Forms (Forms I-9) for sixty-four employees. ICE's complaint sought a total of $75,271.80 for the alleged violations. The case was initially assigned to Administrative Law Judge (ALJ) Thomas McCarthy and subsequently reassigned to Chief ALJ Jean King.

After the complaint was served on the parties, Respondent eventually filed: (1) a Motion to Dismiss Complaint Regarding Unlawful Employment for Failure to State a Claim Upon Which Relief Can Be Granted (referred to hereinafter as "Motion to Dismiss"); (2) a Response in Opposition to Notice of Intent to Fine (NIF) Motion for Summary Disposition (hereinafter "Motion for Summary Disposition"); and (3) an answer to the complaint. The Respondent's answer admitted certain allegations in the complaint, but denied that Respondent had violated the law. The Respondent's Motion to Dismiss argued that the complaint should be dismissed because the Complainant failed to provide a clear and concise statement of facts for each violation alleged to have occurred, as required by OCAHO's procedural rules. *See* 28 C.F.R. § 68.7(b)(3) (2018). Respondent's Motion to Dismiss also argued that, under the terms of 8 U.S.C. § 1324a(b)(3), Respondent was no longer required to retain Forms I-9 for many of the employees listed in the complaint. Finally, the Respondent's Motion for Summary Disposition argued that Respondent timely prepared Forms I-9 for all employees, and generally made good faith efforts to comply with the employment eligibility verification requirements of 8 U.S.C. § 1324a(b). The Respondent therefore moved for summary disposition in its favor, and requested that if a penalty

were imposed, the Chief ALJ take into account Respondent's financial losses as well as other mitigating factors in assessing the final penalty.

Complainant subsequently filed a response to Respondent's Motion to Dismiss and Motion for Summary Disposition. In its response, Complainant argued that Respondent either failed to prepare Forms I-9 for the employees in question or used backdated forms. Complainant also argued that Respondent had not been diligent in completing Forms I-9 for its employees, in contrast to Respondent's assertion of good faith compliance. Further, Complainant argued that the proposed penalty was not excessive. Relevant to the issue that is the subject of this administrative review, Complainant also asserted that all of the former employees listed in the complaint fell within the Form I-9 retention period and the Respondent was therefore required to retain and produce a Form I-9 for each of those employees. Attached to the Complainant's response were two exhibits: (1) an employer questionnaire purportedly completed by Respondent's office manager; and (2) an employee list allegedly provided to ICE by the Respondent, which listed hire and termination dates for the employees identified in the complaint.

On September 19, 2019, Chief ALJ King issued an Order on Motion to Dismiss and Motion for Summary Decision. The Order first found that the allegations in the complaint were sufficiently pled to assert a claim upon which relief could be granted. The Order also found that both of the good faith defenses raised by the Respondent were inapplicable to the violations charged in the complaint. The Order additionally determined that Respondent did not meet its burden to show the absence of a genuine issue of material fact warranting summary decision as to most of the alleged violations. However, the Chief ALJ did grant summary decision to the Respondent for the alleged violation related to the Form I-9 for a single employee (David Bodenstein). With respect to this one alleged violation, the Chief ALJ stated as follows:

> Employers must retain an employee's Form I-9 for three years after the date of hire or one year after the date of termination, whichever is later. 8 C.F.R. § 274a.2(b)(2)(i)(A). The record shows that Respondent hired Bodenstein in 2011, and terminated him on January 22, 2016…. As Complainant served the [Notice of Inspection] on November 15, 2016, Respondent no longer had an obligation to retain Bodenstein's Form I-9. Thus, Respondent is not liable for any violation related to David Bodenstein's Form I-9.

Order at 7.

On September 26, 2019, the undersigned issued a *sua sponte* Notification of Administrative Review of Interlocutory Order, pursuant to 28 C.F.R. § 68.53(a)(3). The Notification stated that the sole issue to be reviewed was "whether the ALJ properly granted summary decision to Respondent on the violation related to David Bodenstein's Form I-9." Notification at 2. The Notification invited the parties to submit briefs or other written statements by October 10, 2019, addressing the issue presented. *See* 28 C.F.R. §§ 68.53(c), 68.54(b)(1). Neither party submitted a brief or any other filing related to this administrative review by the October 10 deadline. I therefore have reviewed the Chief ALJ's September 19, 2019, Order as well as relevant portions of the official case record in arriving at this decision. For the reasons stated below, the Chief ALJ's September 19, 2019, Order on Motion to Dismiss and Motion for

Summary Decision is MODIFIED and the case is REMANDED for further proceedings consistent with this order.

II. STANDARD FOR INTERLOCUTORY REVIEW

Under OCAHO's rules of practice and procedure, the Chief Administrative Hearing Officer (CAHO) may review an interlocutory order issued by an ALJ in cases under 8 U.S.C. § 1324a if, within ten days of the date of entry of the interlocutory order, the CAHO issues a Notification of Review stating the issues to be reviewed. *See* 28 C.F.R. § 68.53(a)(3). CAHO review of an interlocutory order is appropriate if the CAHO determines that "the order concerns an important question of law on which there is a substantial difference of opinion" and either "an immediate appeal will advance the ultimate termination of the proceeding" or "subsequent review will be an inadequate remedy." 28 C.F.R. § 68.53(a)(1), (3). For the reasons stated below, the undersigned has determined that review of this interlocutory order is appropriate under these standards.

A. The Order Concerns an Important Question of Law On Which There Is a Substantial Difference of Opinion

As stated in the Notification of Administrative Review, the sole issue to be reviewed is whether the Chief ALJ properly granted summary decision to the Respondent on one of the alleged violations in the complaint. This issue concerns application of the Form I-9 retention period set forth in 8 U.S.C. § 1324a(b)(3) and 8 C.F.R. § 274a.2(b)(2)(i)(A). This retention period and its application in particular circumstances is frequently at issue in OCAHO cases, and is often a source of confusion for parties. *See, e.g.*, *United States v. Intelli Transp. Servs., Inc.*, 13 OCAHO no. 1319, 4 (2019) ("Respondent appears to misunderstand the I-9 retention requirement."); *United States v. Schaus*, 11 OCAHO no. 1239, 6 (2014) ("With respect to its contentions about the retention period for the I-9s of the remaining employees, … [Respondent] either misrepresents or fundamentally misunderstands both the statute and the regulation governing the duty to retain I-9 forms."); *United States v. Barnett Taylor, LLC*, 10 OCAHO no. 1155, 3 (2012) ("According to respondent's prehearing statement, [Respondent's General Manager] was confused about the I-9 retention requirement and discarded the forms."). Moreover, whether an employer was required to retain a particular employee's Form I-9 at the time of ICE's inspection is a question central to determination of liability for many alleged violations of 8 U.S.C. § 1324a(a)(1)(B), including some of those at issue in this case. *See, e.g.*, *United States v. Buffalo Transp., Inc.*, 11 OCAHO no. 1263, 8-9 (2015) (finding that the retention period had expired for the Forms I-9 for three employees by the date of ICE's inspection, relieving the Respondent of liability for those alleged violations). Therefore, the part of the order that discusses the retention period for Forms I-9 concerns an important question of law.

In order to establish that there is "a substantial difference of opinion" on a particular question of law, "[t]here must be substantial independent grounds (e.g., contrary authority) to question the ruling." *United States v. Dominguez*, 7 OCAHO no. 973, 844, 849 (1997); *see also United States v. Frimmel Mgmt., LLC*, 12 OCAHO no. 1271a, 3 n.3 (2016). The conclusion reached by the Chief ALJ in this case with regard to the application of the Form I-9 retention period to one alleged violation appears to be contrary to numerous other OCAHO precedent decisions applying the same legal principle. *See Buffalo Transp., Inc.*, 11 OCAHO no. 1263, at

8-9; *Schaus*, 11 OCAHO no. 1239, at 10 n.11. Accordingly, a "substantial difference of opinion" exists in OCAHO case law concerning application of this question of law.

B. An Immediate Appeal Will Advance the Ultimate Termination of the Proceeding

Finally, the undersigned has determined that an immediate appeal will advance the ultimate termination of the proceeding. If the alleged violation related to David Bodenstein's Form I-9 remains dismissed through the duration of the proceedings before the Chief ALJ, the parties would be precluded from discovering and presenting evidence related to that alleged violation. If the undersigned waited to review the case until after the Chief ALJ issued a final order and then found the dismissal of this violation to have been erroneous, a modification and remand at that juncture would likely necessitate re-opening of discovery, introduction of new evidence and conduct of additional proceedings before the Chief ALJ relating to the violation at issue, thereby prolonging the ultimate termination of the case. *Compare United States v. Schwartz*, 5 OCAHO no. 760, 320, 322 (1995) (agreeing with the complainant that "reversal by the CAHO following an evidentiary hearing might result in retrying a number of matters," but ultimately declining to certify the interlocutory order for CAHO review on other grounds), *with Dominguez*, 7 OCAHO no. 973, at 852 (declining to certify an interlocutory order for CAHO review in part because, with respect to the question at issue, reversal by the CAHO after the final order "would not require new evidence, a new trial, or even a remand."). Therefore, immediate review in this instance would advance the ultimate termination of the proceeding.

III. DISCUSSION

As stated above and in the Notification of Administrative Review, the sole issue in this administrative review is whether the Chief ALJ properly granted summary decision to Respondent on the alleged violation related to David Bodenstein's Form I-9. According to the facts as recounted by the Chief ALJ and reflected in the record, Respondent hired Bodenstein in 2011 and terminated him on January 22, 2016. Complainant then served the Notice of Inspection (NOI) on November 15, 2016.

Employers are required to retain an employee's Form I-9 for three years after the date of the employee's hire or one year after the date of the employee's termination, whichever is later. 8 C.F.R. § 274a.2(b)(2)(i)(A); *see also* 8 U.S.C. § 1324a(b)(3). In this case, three years after the date of Bodenstein's hire was sometime in 2014, and one year after the date of Bodenstein's termination was January 22, 2017. Respondent was therefore required to retain Bodenstein's Form I-9 until January 22, 2017, which is the later of these two dates.[1] Accordingly, Respondent was still under the retention requirement pertaining to Bodenstein's Form I-9 on November 15, 2016, the date Complainant served the NOI on the Respondent.

[1] Several previous OCAHO cases are instructive on the application of the retention period to similar factual circumstances. For instance, in *United States v. Buffalo Transportation, Inc.*, 11 OCAHO no. 1263, 8-9 (2015), the ALJ compared hire and termination dates to the NOI date for five employees, finding that the Respondent in that case was still required to retain a Form I-9 for two employees as of the date the NOI was served. *See also Schaus*, 11 OCAHO no. 1239, 10 n.11 (determining the retention requirements for two employees based on their hire and termination dates); *United States v. Metro. Enters., Inc.*, 12 OCAHO no. 1297, 10 (2017) (determining the window of hire and termination dates that former employees must fall into in order for the Respondent to be liable for violations related to those employees' Forms I-9).

IV. CONCLUSION

Based on the facts recounted by the Chief ALJ and reflected in the record, Respondent was still required to retain David Bodenstein's Form I-9 as of the date the NOI was served. Therefore, the alleged violation related to Bodenstein's Form I-9 should not have been dismissed on this basis. Accordingly, the Chief ALJ's Order on Motion to Dismiss and Motion for Summary Decision is hereby MODIFIED as follows:

1. Respondent's Motion for Summary Disposition is DENIED; and
2. The alleged violation related to David Bodenstein's Form I-9, which had been dismissed, is REINSTATED.

Pursuant to 28 C.F.R. § 68.53(d), the case is also hereby REMANDED to the Chief ALJ for further proceedings consistent with this order.

It is SO ORDERED, dated, and entered this 16th day of October, 2019.

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Robin M. Stutman
Chief Administrative Hearing Officer