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

May 8, 2020

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 2020A00042
R2M2 REBAR & STRESSING, INC., Respondent.	)	

ORDER ON PARTIAL MOTION TO DISMISS

This case arises under the employer sanctions provisions under § 274A of the Immigration and Nationality Act (INA or the Act), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a (2019). Pending before the Court is Respondent's Partial Motion to Dismiss. Complainant filed a response.

I. BACKGROUND

On February 21, 2018, Complainant, the Department of Homeland Security Immigration and Customs Enforcement (ICE), served a Notice of Inspection (NOI) on Respondent, R2M2 Rebar & Stressing, Inc. Resp. Mot. at 3–4. Complainant stated that it would inspect Respondent's Forms I-9 on February 28, 2018. *Id.* at 3. On December 5, 2019, Complainant served a Notice of Intent to Fine (NIF) on Respondent. Compl. Ex. A. On February 6, 2020, Complainant filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO), against Respondent alleging two counts of violations of 8 U.S.C. § 1324a. In Count I, Complainant alleges Respondent failed to prepare and/or present Forms I-9 for ninety employees. In Count II, Complainant alleges that Respondent failed to ensure proper completion of section 1 and/or failed to properly complete sections 2 or 3 of the I-9s for eighty-seven employees. Complainant seeks $358,423 in penalties.

Respondent filed an answer on March 6, 2020. On April 3, 2020, Respondent filed a Partial Motion to Dismiss Based on the Statute of Limitations. Complainant filed a response to the motion on April 9, 2020.

II. INSTANT MOTION

Respondent moves to dismiss twenty-two violations alleged in Count I based on the statute of limitations. While captioned as a motion to dismiss, the motion does not address the facial sufficiency of the complaint, but rather seeks judgment on the merits and refers to and relies on matters outside the pleadings. Respondent attached to its motion a list of employees for Count I, which includes the hire and termination dates of the employees; and an employee list for individuals in Count I who Respondent hired before February 3, 2015.

Generally, when "considering a motion to dismiss, the [C]ourt must limit its analysis to the four corners of the complaint." *Jarvis v. AK Steel*, 7 OCAHO no. 930, 111, 113 (1997) (citations omitted). When matters outside the pleadings are to be considered, a court may appropriately convert the motion to dismiss to one for summary decision. *United States v. Split Rail Fence, Co.*, 11 OCAHO no. 1216, 3 (2014). "Generally, when a motion to dismiss is treated as a motion for summary decision, notice must be given to the nonmoving party in order to provide that party an opportunity to present relevant materials." *Id.* Here, Complainant's response in opposition to the motion also refers to and is accompanied by materials not included in the pleadings. Complainant and Respondent each included the list of employees for Count I. Complainant also attached the NOI and Enforcement Subpoena, a Receipt of Property, and an Employee Roster. Thus, there is no need to issue a notice of conversion or to allow additional time for presenting contravening evidence. *Id.* As such, Respondent's motion for partial dismissal is converted to a motion for partial summary decision.

In Count I, Complainant alleges that Respondent did not present I-9s for the ninety employees. Respondent argues that the five year statute of limitations bars twenty-two of the alleged Count I violations. Specifically, Respondent contends that a violation for failure to prepare and/or present an I-9 form is a timeliness violation that was complete, at the latest, on the third day after Respondent hired the employee. Respondent argues that it hired these twenty-two employees more than five years before Complainant filed the complaint. Thus, Respondent argues the violations related to these twenty-two employees' I-9s were complete three days after hire, which was more than five years before the complaint was filed, and are therefore barred by the statute of limitations.

Complainant contends that the Court should deny Respondent's motion because violations for failure to prepare and/or present I-9 forms are continuing violations. Complainant also argues that Respondent seems to have misconstrued the I-9 retention requirement and asserts that Respondent was required to retain all of the I-9 forms at issue. Complainant argues that Respondent did not provide any I-9 forms for the individuals listed in Count I.

III. STANDARDS

Under the OCAHO rules, the Administrative Law Judge (ALJ) "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R.

§ 68.38(c).[1] "An issue of fact is genuine only if it has a real basis in the record" and "[a] genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit." *Sepahpour v. Unisys, Inc.*, 3 OCAHO no. 500, 1012, 1014 (1993) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).[2]

"Once the moving party satisfies its initial burden of demonstrating both the absence of a material factual issue and that the party is entitled to judgment as a matter of law, the nonmoving party must come forward with contravening evidence to avoid summary resolution." *United States v. Four Seasons Earthworks, Inc*., 10 OCAHO no. 1150, 3 (2012) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). "[T]he party opposing the motion for summary decision 'may not rest upon the mere allegations or denials' of its pleadings, but must 'set forth specific facts showing that there is a genuine issue of fact for the hearing.'" *United States v. 3679 Commerce Place, Inc.*, 12 OCAHO no. 1296, 4 (2017) (quoting 28 C.F.R. § 68.38(b)). The Court views all facts and reasonable inferences "in the light most favorable to the non-moving party." *United States v. Prima Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994) (citations omitted).

IV. DISCUSSION

Respondent appears to argue that the twenty-two violations at issue are timeliness violations because the I-9 forms were not completed within three days of hire. Employers must ensure that the employee completes section 1 of the I-9 form on the date of hire and the employer must complete section 2 within three days of hire. 8 C.F.R. § 274a.2(b). Timeliness violations occur when an employer fails to complete or fails to ensure completion of an I-9 form by the date completion is required. *United States v. Curran Eng'g Co., Inc.*, 7 OCAHO no. 975, 874, 897 (1997). Therefore, if the I-9 is not completed within that timeframe and is completed later, the I-9 was not timely completed. *See id.*

Complainant does not allege that Respondent failed to *timely* complete the twenty-two I-9 forms, however. Instead, Complainant alleges that Respondent failed to complete the I-9s and/or failed to present the I-9 forms. If an employer fails to present an I-9 and/or fails to prepare an I-9, it is not a timeliness violation since the employer never prepared an I-9 and/or never presented the I-9. "OCAHO has held that the duty to prepare an I-9 does not terminate on the third day after

[1] *See* Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2019).

[2] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

hire, rather 'the failure to prepare an I-9 for an employee continues until such time as the form is actually completed, and thereafter until the retention period expires.'" *United States v. Intelli Transport Servs., Inc.*, 13 OCAHO no. 1319, 6 (2019) (quoting *United States v. Schaus*, 11 OCAHO no. 1239, 12 (2014)); *see* 8 C.F.R. § 274a.2(b)(2)(i)(A); *Curran Eng'g*, 7 OCAHO no. 975 at 895. Thus, "a verification failure occurs not at a single moment in time, but rather throughout the period of noncompliance." *United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1071, 9 (2001). Complainant alleges that Respondent did not prepare I-9s at all and did not present I-9s for these employees. Respondent does not show that it prepared or presented I-9s related to the twenty-two violations at issue. As such, the violations at issue are continuing violations.

Respondent contends that the twenty-two violations at issue are barred by the statute of limitations because Respondent hired the employees more than five years before Complainant filed the complaint. OCAHO case law has held that the five-year statute of limitations codified at 28 U.S.C. § 2462 is applicable to proceedings under § 1324a. *United States v. Visiontron*, 13 OCAHO no. 1348, 5 (2020) (citing *United States v. St. Croix Personnel Servs., Inc.*, 12 OCAHO no. 1289, 10–11 (2016)). A § 1324a complaint is timely if filed within five years of the date on which the violation first accrued. *Id.* The accrual date of a violation depends on the specific violation. *Id.* A timeliness violation accrues on the second or fourth day after hire, depending on which section(s) were not timely completed. *Id*; *see WSC Plumbing, Inc.*, 9 OCAHO no. 1071 at 16 (explaining that a timeliness violation is not a continuing violation, but is instead "'frozen in time' at the moment when the deadline passes for completion of the relevant section"). In contrast, as explained above, most paperwork violations, including violations for failing to prepare an I-9, are continuing violations which continue until corrected or the retention period has expired. *Visiontron*, 13 OCAHO no. 1348 at 5; *Intelli Transport Servs.*, 13 OCAHO no. 1319 at 6. Employers must retain an employee's Form I-9 for three years after the date of hire or one year after the employee is terminated, whichever is later. 8 C.F.R. § 274a.2(b)(2)(i)(A). "The retention period for an I-9 form comes into play only after an individual actually becomes a former employee." *United States v. Dr. Robert Schaus, D.D.S.*, 11 OCAHO no. 1239, 7 (2014) (citing § 274a.2(b)(2)(i)(A)).

Respondent provided an employee list for the employees in Count I, which includes the hire and termination dates of each employee. Mot. Partial Dismiss Ex. 1. Respondent also attached a list of the twenty-two employees whose I-9 forms are at issue. Mot. Partial Dismiss Ex. 2. Two of the twenty-two employees have been terminated. Mot. Partial Dismiss Ex. 1. The two employees were hired in 2005 and 2012, respectively, and terminated on December 4, 2017 and February 2, 2018, respectively. *Id.* Complainant served the Notice of Inspection on February 21, 2018 and requested I-9s for all current employees and all employees terminated within the last three months. Resp. to Mot. at 6, 9. Based on their dates of hire and termination, Respondent was required to retain an I-9 for both employees at the time of inspection, as it was required to retain one employee's I-9 until December 4, 2018, and the other employee's I-9 until February 2, 2019. Respondent employed the remaining twenty employees at the time of inspection; thus, Respondent was required to retain their I-9 forms. *Id.* Respondent has not provided any evidence that it has corrected the alleged violations for failure to prepare and/or present the twenty-two I-9 forms. Thus, Respondent has not shown that the statute of limitations applies to these violations.

As such, the statute of limitations does not bar the violations for failure to prepare and/or present I-9 forms. Further, Respondent was required to retain I-9 forms for the twenty-two employees at issue. Respondent has not met its burden to establish that the Court should grant summary decision in its favor. As such, Respondent's motion for partial summary decision is DENIED.

V. CONCLUSION

Respondent's Motion to Dismiss is converted to a motion for summary decision. The statute of limitations under 8 U.S.C. § 2462 does not bar the violations for failure to prepare and/or present I-9s in Count I. As such, Respondent's motion for summary decision is DENIED.

SO ORDERED.

Dated and entered on May 8, 2020.

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Jean C. King
Chief Administrative Law Judge