

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

March 15, 2023

UNITED STATES OF AMERICA,)	
)	
Complainant,)	
)	8 U.S.C. § 1324a Proceeding
v.)	
)	OCAHO Case No. 2020A00002
EL CAMINO, LLC,)	
)	
Respondent.)	
_____)	

Appearances: Graciela Jiron, Esq., for Complainant
David L. Dotson, Esq., for Respondent

ORDER ON MOTION FOR SUMMARY DECISION

This case arises under the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a. Pending is Complainant's Motion for Summary Decision. For the reasons set forth in this decision, Complainant's Motion will be GRANTED IN PART, and DENIED IN PART.

I. BACKGROUND

Respondent, El Camino, LLC, is a limited liability company operating in the State of New Mexico. On July 16, 2018, Complainant, the Department of Homeland Security, Immigration and Customs Enforcement (ICE or the Government), served Respondent with a Notice of Inspection and an Immigration Enforcement Subpoena. Mot. Summ. Dec. Exhs. G-1, G-2; *see also id.* Exh. G-10, at 2 (Report of Investigation). The subpoena requested Respondent to present Employment Eligibility Verification Forms (Forms I-9) for current and terminated employees for the time period between July 16, 2017, and July 16, 2018. *Id.* Exh. G-2. On July

16, 2018, Respondent delivered to Complainant ninety Forms I-9¹ for all employees, current and terminated, for the requested time period. *Id.* Exhs. G-3, G-6.

On or about August 2018, ICE served Respondent with a Notice of Discrepancies for two employees. *Id.* Exh. G-8; R's Opp'n 2. On or about January 2019, ICE served Respondent with a Notice of Technical or Procedural Failures as a result of the Forms I-9 Respondent submitted to ICE on July 16, 2018. Mot. Summ. Dec. Exh. G-6; R's Opp'n 2.

On July 11, 2019, ICE served a Notice of Intent to Fine on Respondent alleging thirty-six violations of 8 U.S.C. § 1324a(a)(1)(B) and seeking a total of \$44,280 in civil money penalties. *See* Mot. Summ. Dec. Exh. G-4. Respondent timely filed a request for hearing on July 15, 2019. *See id.* at 2; Compl. 12.

On October 9, 2019, Complainant filed with the Office of the Chief Administrative Hearing Officer (OCAHO) a complaint alleging two counts of violations of INA § 274A(a)(1)(B). Under Count I, Complainant alleges that Respondent failed to timely prepare and/or present Forms I-9 for twenty-five employees. Compl. 3, 9–10. Under Count II, Complainant alleges that Respondent failed to ensure that an employee properly completed section 1 and/or failed to properly complete sections 2 or 3 of the Form I-9 for eleven employees. *Id.* at 4, 11. Complainant requests in the complaint that the Court enforce the penalty amount listed in the NIF – \$44,280 in total civil money penalties. *Id.* at 4–5, 9, 11.

On November 12, 2019, Respondent filed an answer denying all material allegations set forth in the complaint and arguing that Complainant failed to specify the deficiencies in the Forms I-9 submitted to ICE.² Ans. 2.

On August 26, 2020, Complainant filed a motion for summary decision, along with several exhibits, including: (1) Notice of Inspection, (2) Immigration Enforcement Subpoena, (3) Original I-9 Forms with Identification Documents, (4) Notice of Intent to Fine, (5) Form 6051-R Receipt for Property, (6) Notice of Technical or Procedural Failures, (7) Corrected I-9 Forms, (8) Notice of Discrepancies, (9) Notice of Suspect Documents, (10) Reports of Investigation, and (11) Memorandum to Case File. Mot. Summ. Dec. Exhs. G-1 – G-11. Complainant asserts that

¹ According to the Report of Investigation, Mot. Summ. Dec. Exh. G-10, at 5, and the DHS Form 6051R Receipt for Property, *id.* Exh. G-5, Respondent produced eighty-eight Forms I-9 to ICE. However, the Notice of Technical or Procedural Failures, *id.* Exh. G-6, and Complainant's briefing, *see* Gov't Mem. 2, reflect that ninety Forms I-9 were produced. Given that there are ninety Forms I-9 submitted in Exhibit G-3, the Court assumes ninety were produced.

² Respondent also alleged in its answer that the service of the complaint was improper because it failed to include "Exhibit A." Ans. 2. This argument is not asserted in any of Respondent's subsequent filings.

it has presented sufficient evidence to establish Respondent's liability and that there is no genuine issue of material fact. Gov't Mem. of Law in Support of Mot. Summ. Dec. ("Gov't Mem.") 4.

On September 3, 2020, Respondent filed its response to Complainant's motion. In its response, Respondent argues that the good faith defense applies, absolving its liability with respect to the violations that it was notified of in the Notice of Technical or Procedural Failures. R's Opp'n 3. Furthermore, Respondent asserts that "[a]ll of the I-9's in [Complainant's] exhibits are not the same I-9's Respondent originally provided [Complainant], but include the updated versions Respondent supplied within 10 days of the notices Respondent received. Those updated I-9's were prepared per the directions of and forms requested by [Complainant]." *Id.* Respondent argues that Complainant "cannot direct Respondent to update I-9's, direct them to use certain forms, and then charge substantive violations of those submissions and then seek to fine Respondent for the same." *Id.* Respondent also asserts that it ensured that its employees properly completed section 1 and/or sections 1 or 3 of the Form I-9s. *Id.* at 4. Finally, Respondent disputes all of the aggravating factors which Complainant used to enhance the penalty amount. *Id.* at 5.

II. LEGAL STANDARDS

A. Summary Decision

Under OCAHO's Rules of Practice and Procedure, 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).³ "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)).⁴

³ See Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2022).

⁴ 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 accordingly omitted from the citation. Published decisions may be accessed in the Westlaw

“In cases arising under 8 U.S.C. § 1324a, the government has the burden of proving by a preponderance of the evidence that the respondent is liable for committing a violation of the employment eligibility verification requirements.” *United States v. Metro. Enters., Inc.*, 12 OCAHO no. 1297, 7 (2017) (citing *United States v. Nebeker, Inc.*, 10 OCAHO no. 1165, 4 (2013)). The government also has the burden of proof with respect to the penalty and the government “must prove the existence of any aggravating factor by the preponderance of the evidence[.]” *Id.* (quoting *United States v. Niche, Inc.*, 11 OCAHO no. 1250, 6 (2015)) (internal citations omitted).

“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)). Further, if the government satisfies its burden of proof, “the burden of *production* shifts to the respondent to introduce evidence . . . to controvert the government’s evidence . . . If the respondent fails to introduce any such evidence, the unrebutted evidence introduced by the government may be sufficient to satisfy its burden[.]” *United States v. Durable, Inc.*, 11 OCAHO no. 1231, 5 (2014) (citations omitted). All facts and reasonable inferences are viewed “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).

B. Employment Verification Requirements

“Employers must prepare and retain Forms I-9 for employees hired after November 6, 1986,” and employers must produce the I-9s for government inspection upon three days’ notice. *Metro. Enters.*, 12 OCAHO no. 1297 at 7 (citing, *inter alia*, 8 C.F.R. § 274a.2(b)(2)(ii)). An employer must ensure that an employee completes section 1 of the I-9 on the date of hire and the employer must complete section 2 of the I-9 within three days of hire. *United States v. A&J Kyoto Japanese Rest., Inc.*, 10 OCAHO no. 1186, 5 (2013); 8 C.F.R. § 274a.2(b)(1)(i)(A), (ii)(B) (2020). “Employers must retain an employee’s I-9 for three years after the date of hire or one year after the date of termination, whichever is later.” *United States v. Imacuclean Cleaning Servs., LLC*, 13 OCAHO no. 1327, 3 (2019) (citing § 274a.2(b)(2)(i)(A)).

database “FIM-OCAHO,” or in the LexisNexis database “OCAHO,” or at <http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders>.

“Failures to satisfy the requirements of the employment verification system are known as ‘paperwork violations,’ which are either ‘substantive’ or ‘technical or procedural.’” *Metro. Enters., Inc.*, 12 OCAHO no. 1297 at 7 (citing Memorandum from Paul W. Virtue, INS Acting Exec. Comm’r of Programs, *Interim Guidelines: Section 274A(b)(6) of the Immigration & Nationality Act Added by Section 411 of the Illegal Immigration Reform & Immigrant Responsibility Act of 1996* (Mar. 6, 1997) (Virtue Memorandum)). As explained in *United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1071, 11 (2001), dissemination of the Virtue Memorandum to the public may be viewed as an invitation for the public to rely upon them as representing agency policy. While this office is not bound by the Virtue Memorandum, the Government is bound by it, and failure to follow its own guidance is grounds for dismissal of those claims. *Id.* at 12. With respect to technical or procedural violations, the employer must be given a period of not less than ten business days to correct the failure voluntarily. 8 U.S.C. § 1324a(b)(6)(A)–(B).

III. DISCUSSION

A. Count I

Under Count I of the complaint, ICE alleges that Respondent failed to timely prepare and/or present the Forms I-9 for twenty-five employees. Compl. 3, 9–10.⁵ ICE asserts that “[t]he Forms I-9 for these twenty-five employees did not exist at the time of the Notice of Inspection.” Gov’t Mem. 5. ICE claims that it meets its burden of proof based on a simple “visual examination” of the Forms I-9. *Id.* at 4 (quoting *United States v. W.S.C. Plumbing, Inc.*, 9 OCAHO no. 1062, 7 (2000)) (internal quotations omitted).

The Court finds that ICE is entitled to summary decision with respect to thirteen of the violations listed in Count I. The Court also finds that ICE failed to meet its burden of proving the absence of questions of material fact with respect to the remaining twelve alleged violations listed in Count I.

1. Failure to Timely Prepare Forms I-9 for Thirteen Individuals

⁵ In its Memorandum, Complainant asserts that Respondent “violated the law when it failed to prepare or present Forms I-9 for the twenty-five (25) employees listed in Count I of the Complaint.” Gov’t Mem. 5. However, in Count I of the Complaint and the NIF, Complainant alleges that Respondent violated § 1324a(a)(1)(B) by “failing to *timely* prepare and/or present” Forms I-9. *See* Compl. 3, 9 (emphasis added). Given that Respondent cited the failure to timely prepare and/or present charge in its opposition, R’s Opp’n 1, the Court does not find that Respondent was prejudiced by the error. As Complainant did not move to amend the Complaint, the Court will treat the charge in Count I as failure to timely prepare and/or present Forms I-9.

The Government has proven by a preponderance of evidence that Respondent failed to timely prepare the Forms I-9 for thirteen individuals listed in Count I of the complaint.⁶ “An I-9 form is timely prepared when the employee completes section 1 on the day the employee is hired, and the employer completes section 2 within three business days of the hire.” *A&J Kyoto Japanese Rest.*, 10 OCAHO no. 1186 at 5; 8 C.F.R. § 274a.2(b)(1)(i)(A), (ii)(B). The photocopies of the Forms I-9 submitted by the Government show that section 1 was not signed by the employee on the date of hire; that the date of certification under section 2 of the Forms I-9 follows the date of hire by more than three days; and/or while no date of hire is listed, the date of certification under section 2 follows the date of the section 1 attestation by more than three days, meaning that section 2 could not have been timely completed. *See* Mot. Summ. Dec. Exh. G-3, at 21–23, 42–44, 90–93, 108–13, 119–20, 123–26, 141–43, 144–46, 147–49, 190–93, 194–97, 254–56, 300–03.⁷

In its response to the motion, Respondent does not appear to contest that these Forms I-9 were not timely prepared; rather, Respondent claims that it acted in good faith by correcting the Forms I-9 at Respondent’s direction, rather than back-dating the documents “to appear as if they had been originally signed.” *See* R’s Opp’n 3. Respondent argues that the good faith defense applies here because these violations were technical or procedural failures. *Id.* Moreover, Respondent argues that the good faith defense was held to be applicable where the respondent has been charged with failure to properly complete, retain, or produce I-9 forms. *Id.* (citing *DLS Precision Fab LLC v. U.S. Immigration & Customs Enforcement*, 867 F.3d 1079, 1084 (9th Cir. 2017)).

In *DLS Precision Fab LLC*, the Ninth Circuit acknowledged that the good faith defense “could apply to . . . violations of § 1324a(b) . . . for failing to properly complete, retain, or produce I-9 forms.” 867 F.3d at 1084. However, the Circuit explained that the respondent could not assert the good faith defense because the alleged violations—which included “failing to properly complete, retain, or produce I-9 forms”—were substantive, rather than technical or

⁶ The Forms I-9 found in violation are associated with the following individuals listed in Count I of the Notice of Intent to Fine by their numerical order and their initials: Individual 2 (J.A.), Individual 3 (A.A.), Individual 5 (D.D.L.S.), Individual 6 (J.G.), Individual 8 (A.G.C.), Individual 9 (E.G.P.), Individual 10 (E.J.G.), Individual 11 (M.J.J.), Individual 12 (M.J.M.), Individual 16 (E.M.), Individual 17 (M.M.), Individual 19 (D.R.), and Individual 24 (D.T.). *See* Compl. 10. The attached Violations Chart provides a detailed breakdown of the employees, violations, and findings for each Count.

⁷ In light of this holding, the Court need not address whether Complainant has demonstrated liability for failure to timely present as to these thirteen individuals. *See R&SL Inc.*, 13 OCAHO no. 1333b, at 35 (“An employer is liable for only one violation per I-9, despite the presence of other violations.” (citation omitted)).

procedural. *Id.* OCAHO’s case law makes it clear that the untimely preparation of Forms I-9 is a substantive paperwork violation. *See United States v. Frio Cnty. Partners, Inc.*, 12 OCAHO no. 1276, 9 (2016) (“Failure to timely prepare a Form I-9 is a substantive violation.”) (citation omitted). Thus, the good-faith defense does not apply to Respondent’s failure to timely prepare Forms I-9.

Therefore, the Government has met its burden of proving that Respondent is liable for failing to timely prepare Forms I-9 for thirteen individuals listed in Count I of the complaint. Complainant’s Motion for Summary Decision is GRANTED with respect to the thirteen violations listed in this section of the order.

2. Ownership Liability

With respect to the alleged violation regarding Employee Number 13 of Count I of the Complaint—Wanita Jones—the Court finds that ICE has demonstrated that the Respondent did not timely prepare the Form I-9. However, the Court also finds that ICE has not met its burden of establishing that Wanita Jones is an employee for whom Respondent was required to prepare or present a Form I-9.

The Government asserts that Respondent failed to timely prepare or present the Form I-9 for Wanita Jones. *See* Mot. Summ. Dec. Exh. G-4, at 3–4. The Government submitted Ms. Jones’ Form I-9, which reflects that she did not sign section 1 on her first day of hire, and that the section 2 attestation follows the date of hire by more than three days. *See id.* Exh. G-3, at 150–51. However, employers cannot be held liable under § 1324a for failing to timely prepare or present a Form I-9 for an owner of the company. *See, e.g., United States v. Visiontron Corp.*, 13 OCAHO no. 1348, 4-5 (2020); *United States v. Intelli Transport Servs., Inc.*, 13 OCAHO no. 1319, 4 (2019). “As a general rule, OCAHO case law has recognized that an individual is not an employee of an enterprise if he or she has an ownership interest in, and control over, all or part of the enterprise.” *United States v. Alpine Staffing, Inc.*, 12 OCAHO no. 1303, 11 (2017) (citing *United States v. Speedy Gonzalez Constr. Inc.*, 11 OCAHO no. 1228, 9 (2014)).

Here, the record reflects that Ms. Jones was an owner of the Respondent-company. Respondent’s response to the motion included an Affidavit of Wanita Jones where Ms. Jones claims that she “was the owner of El Camino, LLC.” R’s Opp’n 12. The Report of Investigation prepared by Homeland Security Investigations substantiates Ms. Jones’ assertion by stating that Wanita Jones is the owner and manager of El Camino. *See* Mot. Summ. Dec. Exh. G-10, at 2, 5, 9. Although “[w]hether an individual is an employee is a fact-intensive inquiry because . . . ‘the individual’s title is [not] determinative,’” *Alpine Staffing, Inc.*, 12 OCAHO no. 1303 at 11 (citation omitted), the evidence from both parties indicates that Wanita Jones was an owner of El Camino at the time of the investigation and that she acted on behalf of Respondent during the investigation. *See, e.g.,* R’s Opp’n 12 (Ms. Jones attesting that “under DHS direction, I corrected

all the I-9's complained of and delivered the same to DHS"); Mot. Summ. Dec. Exh. G-10, at 2, 5 (details of investigation recounting DHS interview with Ms. Jones).

As such, although Respondent does not assert that Wanita Jones should not be considered an employee, Complainant has not met its burden of establishing that she is an employee for whom Respondent was required to prepare or present her Form I-9, and Complainant's Motion for Summary Decision as to this claim is DENIED. Given that Respondent has not moved for Summary Decision as to this claim, the Court provides the parties notice of the potential dismissal of Complainant's claim against Wanita Jones, and an opportunity to show cause why the claim should not be dismissed prior to dismissal. *See* 28 C.F.R. § 68.10(b).

3. Genuine Issues of Material Fact for Eleven Alleged Violations

a. Missing First Day of Employment

The Government has not proven the absence of genuine issues of material fact with respect to the alleged violations associated with Individual 1 (A.A.) and Individual 22 (A.S.) listed in Count I of complaint. According to the photocopy of the Form I-9 associated with Individual 1 (A.A.), the dates of the section 1 attestation and the section 2 attestation are both listed as August 20, 2016. *See* Mot. Summ. Dec. Exh. G-3, at 18–19. However, the Form I-9 does not list the individual's first day of employment, and the Government did not provide any other evidence regarding their first dates of employment. *Id.* at 19. The Government has not put forth any evidence that this Form I-9 was prepared more than three days after the individual's first day of employment.⁸ The mere fact that the employee's first day of employment is not listed on the Form I-9 does not establish that the Form I-9 was untimely prepared. Since the section 1 and section 2 attestation dates are the same, but the first day of employment is not listed, there are genuine issues of fact as to whether this Form I-9 was timely prepared and/or presented, and moreover, the evidence does not show whether Respondent employed this individual for the requisite time period between July 16, 2017 and July 16, 2018.

With respect to the Form I-9 associated with Individual 22 (A.S.), the first day of employment is also not listed. *See* Mot. Summ. Dec. Exh. G-3, at 280–81. Additionally, the date of the section 1 attestation is July 18, 2018, and the section 2 attestation is July 20, 2018. *Id.* This Form I-9 appears to have been prepared four days after the Government served Respondent with the Notice of Inspection. It also appears that this individual was issued a Temporary Driver's License on July 18, 2018, which is two days after the Notice of Inspection

⁸ The Driver's License attached to the Form I-9 was issued on May 27, 2015, and expired on July 21, 2017, and the attached Social Security card does not reflect date of issuance or expiration. Mot. Summ. Dec. Exh. G-3, at 20. Thus, these documents do not suggest failure to timely prepare and/or present, given the August 20, 2016 attestation dates.

was served on Respondent. *See id.* at 282; *id.* Exh. G-1, at 3. Nevertheless, the Government has still not met its burden of proof with respect to this alleged violation. The Government has not provided evidence that Respondent did not prepare a Form I-9 for this individual within three days of his first day of employment. Viewing all facts and inferences in favor of the non-moving party, it is possible that Respondent hired this individual and the employee signed the section 1 attestation on July 18, 2018, and Respondent signed the section 2 attestation on July 20, 2018. Thus, the evidence does not show whether Respondent employed this individual for the requisite time period between July 16, 2017, and July 16, 2018, and whether Respondent failed to timely prepare and/or present his Form I-9. Accordingly, the Court finds that the Government has not proven the absence of genuine issues of material fact with respect to the alleged violations on the Forms I-9 for Individual 1 (A.A.) and Individual 22 (A.S.) listed in Count I of complaint.

Therefore, Complainant's Motion for Summary Decision is DENIED with respect to the two violations associated with Individual 1 (A.A.) and Individual 22 (A.S.) listed in Count I of complaint.

b. Photocopy of Forms I-9 Not Submitted

With respect to four alleged violations listed in Count I of the complaint,⁹ the Government has not proven the absence of material factual issues. The Government did not submit copies of these Forms I-9, did not provide evidence that these individuals were employed by Respondent, and did not provide evidence that these forms were not timely prepared or presented. While the absence of Forms I-9 may be because the forms were not prepared (and therefore were not timely) the only mention of the individuals associated with these four violations is located in the complaint and accompanying Notice of Intent to Fine; there is no mention of these individuals in any of the Government's other exhibits. As such, the Government has not met its burden of proving that there are no genuine issues of material fact with respect to these four alleged violations. Thus, Complainant's Motion for Summary Decision is DENIED with respect to these four alleged violations.

c. Page Two of Forms I-9 Not Submitted

The Court also finds that the Government has not proven the absence of material factual issues with respect to the five remaining alleged violations listed in Count I of the complaint.¹⁰

⁹ The four alleged violations referred to here are associated with the following individuals listed in Count I of the Notice of Intent to Fine by their numerical order and their initials: Individual 7 (C.G.), Individual 15 (H.M.), Individual 20 (J.R.), and Individual 21 (J.R.).

¹⁰ The five alleged violations referred to here are associated with the following individuals listed in Count I of the Notice of Intent to Fine by their numerical order and their initials: Individual 4

The Government provided a copy of the first page of these Forms I-9 and of the documents showing proof of identity but did not include the second page of the Forms I-9. *See* Mot. Summ. Dec. Exh. G-3, at 53–54, 160–61, 228–30, 297–99, 320–22. The second page of the Form I-9 generally lists the employee’s first day of work as well as the employer’s attestation that it has verified the employee’s employment eligibility. Without information on the employee’s first day of work or the date when Respondent verified the employee’s employment eligibility, the Court cannot determine whether Respondent failed to timely prepare or present the Forms I-9 for these individuals. Therefore, the Court finds that the Government has not proven the absence of material factual issues with respect to these five Forms I-9.

Complainant’s Motion for Summary Decision is, therefore, DENIED with respect to the eleven alleged violations mentioned in Section IV.A.3 of this order.

B. Count II

Under Count II of the complaint, ICE alleges that Respondent failed to ensure that section 1 of the Forms I-9 were properly completed and/or failed to properly complete sections 2 or 3 of the Forms I-9 for eleven employees. Compl. 4, 11. The Government offers the following “description of errors” in these Forms I-9:

For one I-9 Form, the employer failed to ensure that the individual provide an Alien Registration Number [(A-Number)]. For two I-9 Forms, the employer failed to ensure the individual signed the attestation in Section 1. For five I-9 Forms, the employer failed to review and verify a proper List A, B, or C document . . . For three I-9 Forms, the employer failed to record the identification number of a proper List C document and there was no copy of the document retained with the I-9 Form presented . . .

Gov’t Mem. 6. The Government does not specifically identify which error appears on each of the eleven Forms I-9 in Count II, but asserts that “a simple visual inspection of the Forms I-9 shows El Camino to be in violation of the INA.” *Id.* at 7 (citing Exh. G-3).

After reviewing the eleven Forms I-9 associated with Count II of the complaint, the Court finds that the Government has met its burden of proving the absence of genuine issues of material fact and is entitled to judgment as a matter of law as to three of the Forms I-9, and has not met its burden as to the remaining eight Forms I-9.

1. Failure to Ensure Proper Completion of Section 1 of the Form I-9

(E.B.), Individual 14 (C.L.), Individual 18 (M.O.), Individual 23 (K.T.), and Individual 25 (M.Z.).

a. No Alien Registration Number Listed

The Court finds that Respondent has met its burden of showing the absence of questions of material fact as to Respondent's failure to ensure that one employee, who indicated his or her status as a lawful permanent resident, listed an alien registration number on section 1 of the Form I-9.¹¹ The photocopy of this form indicates that the employee checked the box indicating that he or she is a lawful permanent resident but did not list his or her alien registration number in the allotted space. *See* Mot. Summ. Dec. Exh. G-3, at 257. Moreover, there is no indication that Respondent retained a document listing this employee's alien number and presented such a document to ICE; the List B and C documents listed and attached to the Form are a Social Security Card and Arizona identification card, which do not include this employee's alien number. *See id.* at 258, 260; Virtue Memorandum at 3. This is a substantive verification failure. *See United States v. Ketchikan Drywall Servs., Inc.*, 10 OCAHO no. 1139, 16 (2011).

In its Opposition, Respondent argues that for the Form I-9 without an alien number, "the original form had the correct number, but the supplemental form did not," and that this was a "mere clerical error." R's Opp'n 4. Exhibit G-3 appears to be the original Form I-9s, and the error is present in that Form. *See* Mot. Summ. Dec. Exh. G-3, at 9 (identifying Exh. G-3 as "Original I-9 Forms with identification documents," and Exh. G-7 as "Corrected I-9 Forms"), 257–60. Exhibit G-4 appears to be the corrected forms; however a Form for this employee is not included.

Respondent is, therefore, liable under § 1324a(a)(1)(B) for failing to ensure that an employee who indicated his or her status as a lawful permanent resident listed an alien registration number on section 1 of the Form I-9, and Complainant's Motion for Summary Decision as to this Form I-9 is GRANTED.

b. No Section 1 Attestation

The Court also finds that Complainant has met its burden of showing no question of material fact that Respondent did not ensure that two employees signed section 1 of the Form I-9.¹² The photocopies of these forms show that each employee did not enter a signature in section

¹¹ This Form I-9 is associated with the following individual listed in Count II of the Notice of Intent to Fine by his or her numerical order and initials: Individual 10 (F.R.).

¹² The two Forms I-9 found in violation in this subsection are associated with the following individuals listed in Count II of the Notice of Intent to Fine by their numerical order and their initials: Individual 5 (D.K.H.) and Individual 6 (J.R.L.A.).

1 of the form. Mot. Summ. Dec. Exh. G-3, at 152, 162. An employer must ensure that an employee signs section 1 of the Form I-9 on the date of hire. *See* 8 C.F.R. § 274a.2(b)(1)(i)(A).

In response to the motion, Respondent argues that the Forms I-9 without a signature were “in fact printed, but that does not make it unsigned.” R’s Opp’n 4. Moreover, Respondent asserts that “[i]t is well settled law that a person does not have to sign in cursive to be a bona-fide signature.” *Id.* However, in neither of the Forms I-9 at issue here did the employee print his or her name in place of a signature; although the employee’s name was printed at the top of the Form, the area for the “Signature of Employee” was left blank on both forms. *See* Mot. Summ. Dec. Exh. G-3, at 152, 162.

Therefore, Respondent is liable under § 1324a(a)(1)(B) for failing to ensure that two employees signed section 1 of the Form I-9, and Complainant’s Motion for Summary Decision as to this Form I-9 is GRANTED.

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

However, the Court finds that Complainant has not met its burden regarding the remaining eight alleged violations in Count II.¹³

As discussed above, Complainant asserts that “[f]or five I-9 Forms, the employer failed to review and verify a proper List A, B, or C document” and “[f]or three I-9 Forms, the employer failed to record the identification number of a proper List C document and there was no copy of the document retained with the I-9 Form presented,” but does not identify which Forms I-9 contain which violation. Gov’t Mem. 6.

Upon the Court’s review of the record, although each of the Forms appear to contain errors related to proper completion of Section 2, it appears that Respondent failed to record the identification number of a proper List C document for only *one* of the remaining Forms I-9 at issue in Count II.¹⁴ In the Form I-9 for Individual 7 (G.O.), the document listed under List C is

¹³ The eight Forms I-9 are associated with the following individuals listed in Count II of the Notice of Intent to Fine by their numerical order and their initials: Individual 1 (S.A.), Individual 2 (J.B.), Individual 3 (G.E.), Individual 4 (K.H.), Individual 7 (G.O.), Individual 8 (I.O.), Individual 9 (C.O.), and Individual 11 (A.R.).

¹⁴ The remaining Forms I-9 appear to each list and attach an appropriate List C document. *See* Mot. Summ. Dec. Exh. G-3, at 46–47 (Form I-9 for Individual 1 (S.A.) listing and attaching a social security signed before the Section 1 and 2 attestations), 64–66 (Form I-9 for Individual 2 (J.B.) listing and attaching a social security card in List C), 94–98 (Form I-9 for Individual 3 (G.E.) listing and attaching a social security card in List C), 135–37 (Form I-9 for Individual 4 (K.H.) listing and attaching a social security card in List C), 219–26 (Form I-9 for Individual 8

an “INS Auth[orization] Card.” *See* Mot. Summ. Dec. Exh. G-3, at 209. The photocopy of this supporting document shows that it is a restricted Social Security Card, as it contains a social security number with a notation that it is “VALID FOR WORK ONLY WITH INS AUTHORIZATION.” *Id.* at 211. Although an unrestricted Social Security Card is acceptable as proof of employment authorization, a Social Security Card that states that it is valid for work only with INS or DHS authorization is not acceptable as proof of employment authorization because it is restricted. *See* 8 C.F.R. § 274a.2(b)(1)(v)(C)(1); *see also* *Sivasankar*, 14 OCAHO no. 1354 at 4.

“[A] party seeking summary judgment always bears the initial responsibility of informing the [] court of the basis for its motion, and identifying those portions of ‘the pleadings, deposition, answers to interrogatories, and admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence of a genuine issue of material fact.” *Celotex Corp.*, 477 U.S. at 323 (citation omitted); *see also* Fed. R. Civ. P. 56(c)(1)(A) (“A party asserting that a fact cannot be or is genuinely disputed must support the assertion by . . . citing to particular parts of materials in the record . . .”). Given that Complainant’s briefing describing the errors found in these Forms I-9 does not match the errors reflected in the Court’s review of the record, and Complainant has not identified which Forms I-9 correspond to the errors it describes, Complainant has not met its initial burden of informing the Court of the basis for its motion, nor provided Respondent with an opportunity to properly formulate a response. *See Ogunrinu v. Law Res. & Arnold & Porter Kaye Scholer LLP*, 13 OCAHO no. 1332j, 10 (2021) (“Requiring parties to assert which facts they believe are not in dispute with citations to the record to support those facts places the opposing parties on notice as to the predicate for potentially granting or denying the motion. It informs the court concerning the scope and posture of the case.”). Although OCAHO ALJs routinely review Forms I-9 and find liability where violations are clear on their face even in the absence of articulation by Complainant, under these circumstances where Complainant’s articulation of error conflicts with the Court’s review, the Court declines to impose its own judgment as to which errors to assign to each Form I-9. *See United States v. Stanford Sign & Awning*, 10 OCAHO no. 1145, 8 (2012) (declining to “try and identify the specific I-9 forms complained about, then guess which particular error or errors the government is relying on with respect to each form”); *United States v. Super 8 Motel & Villella Italian Rest.*, 10 OCAHO no. 1191, 11 (2013) (“In order to establish liability for a particular violation, it is first necessary for the government to state with specificity what the violation is.”).

As such, the Court finds that Complainant has not met its burden of showing no question of material fact and that it is entitled to judgment as a matter of law as to the remaining eight

(I.O.) listing and attaching a birth certificate in List C), 216–18 (Form I-9 for Individual 9 (C.O.) listing and attaching a social security card in List C), 261–64 (Form I-9 for Individual 11 (A.R.) listing and attaching a social security card in List C).

Forms I-9 in Count II, and Complainant's Motion for Summary Decision as to these Forms I-9 is DENIED.

C. Penalty Assessment Will be Bifurcated

Since summary judgment is denied as to twenty alleged violations, the Court bifurcates the issues of liability and penalty assessment until the remaining charges have been resolved. Accordingly, the Court will not assess Respondent's penalties until it issues a final order in this matter. The decision to bifurcate proceedings is in the Court's discretion. *United States v. Eriksmoen Cottages, Ltd.*, 14 OCAHO no. 1355, 8 (2020) (citing *Hernandez v. Farley Candy Co.*, 5 OCAHO no. 781, 464, 465 (1995)).

IV. CONCLUSION

The Court holds that Complainant's Motion for Summary Decision is GRANTED with respect to thirteen violations listed in Count I of the complaint and with respect to three violations listed in Count II of the complaint.

The Court DENIES Complainant's Motion for Summary Decision with respect to twelve alleged violations under Count I of the complaint and eight violations under Count II of the complaint. The Court finds that Complainant did not prove the absence of genuine issues of material fact, or that it is entitled to judgment as a matter of law, with respect to these alleged violations. The Court orders the parties to meet and confer as to the remaining violations and provide the Court with its position as to these violations. If the parties cannot resolve the remaining violations, the Complainant may submit additional briefing or, alternatively, indicate its intent to resolve the matter in a hearing. Should the Court resolve this case on the basis of supplemental briefing, it will also enter an order regarding penalties. Accordingly, the Court will permit the parties to submit current financial information relevant to the calculation of penalties.

The joint submission and any supplemental briefing and updated financial information relating to penalties is due 60 days from the date of this Order. Replies are due 30 days after submission of the briefs and updated financial information.

V. ORDERS

IT IS SO ORDERED that Complainant's Motion for Summary Decision is GRANTED with respect to thirteen violations of § 1324a(a)(1)(B) under Count I of the complaint and three violations of § 1324a(a)(1)(B) under Count II of the complaint.

IT IS FURTHER ORDERED that Complainant's Motion for Summary Decision is DENIED with respect to twelve alleged violations under Count I of the complaint and eight alleged violations under Count II of the complaint.

IT IS FURTHER ORDERED that the parties are notified of the potential dismissal of the alleged violation under Count I of the complaint relating to the Form I-9 associated with Wanita Jones.

IT IS FURTHER ORDERED that the issues of liability and penalty assessment are bifurcated until the material factual issues regarding liability are resolved.

IT IS FURTHER ORDERED that a joint submission regarding attempts to resolve the remaining violations, and any supplemental briefing related to the violations and updated financial information relating to penalties is due 60 days from the date of this Order. Replies are due 30 days after submission of the briefs and updated financial information.

SO ORDERED.

Dated and entered on March 15, 2023.

Honorable Jean C. King
Chief Administrative Law Judge