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

March 17, 2020

UNITED STATES OF AMERICA, Complainant, v. VISIONTRON CORP., Respondent.	))))))))	8 U.S.C. § 1324a Proceeding OCAHO Case No. 19A00014

ORDER ON SUMMARY DECISION

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 are Complainant's Motion for Summary Decision and Respondent's Motion for Summary Decision. Respondent filed a response to Complainant's motion; Complainant did not file a response to Respondent's motion.

I. BACKGROUND

Respondent, Visiontron Corp., is a corporation registered in New York. Resp't Prehearing Statement at 1; Complainant Prehearing Statement at 2. On April 4, 2018, the Department of Homeland Security, Immigration and Customs Enforcement (Complainant or the government), conducted an inspection of Respondent's Forms I-9. On October 19, 2018, Complainant served Respondent with a Notice of Intent to Fine (NIF). Compl. Ex. A. Respondent timely requested a hearing. *Id.* at Ex. B. On March 4, 2019, Complainant filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) and charged Respondent with one count for failure to prepare and/or present I-9s for nine individuals, one count for failure to timely prepare and/or present I-9s for eight individuals, and a two-part count for failure to ensure proper completion and/or failure to properly complete I-9s for six individuals in Count IIIA and thirty-three individuals in Count IIIB. Complainant seeks $101,703.50 in penalties.

On November 20, 2019, Complainant and Respondent filed cross-motions for summary decision. On December 20, 2019, Respondent filed a response to Complainant's motion. All conditions precedent to this proceeding have been satisfied.

II. STANDARDS

A. Summary Judgment

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).

B. Civil Money Penalties

The Court assesses civil penalties for paperwork violations in accordance with the parameters set forth in 8 C.F.R. § 274a.10(b)(2) and 28 C.F.R. § 85.5. Complainant has the burden of proof with respect to penalties and "must prove the existence of an aggravating factor by a preponderance of the evidence." *3679 Commerce Place*, 12 OCAHO no. 1296 at 4 (citing *United States v. March Constr., Inc.*, 10 OCAHO no. 1158, 4 (2012); *United States v. Carter*, 7 OCAHO no. 931, 121, 159 (1997)).

The civil penalties for violations of § 1324a are intended "to set a meaningful fine to promote future compliance without being unduly punitive." *3679 Commerce Place*, 12 OCAHO no. 1296 at 7. To determine the appropriate penalty amount, "the following statutory factors must be

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[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.

considered: 1) the size of the employer's business, 2) the employer's good faith, 3) the seriousness of the violations, 4) whether or not the individual was an unauthorized alien, and 5) the employer's history of previous violations." *Id.* at 4 (citing 8 U.S.C. § 1324a(e)(5)). The Court considers the facts and circumstances of the individual case to determine the weight it gives to each factor. *United States v. Metro. Enters.*, 12 OCAHO no. 1297, 8 (2017). While the statutory factors must be considered in every case, section 1324a(e)(5) "does not mandate any particular outcome of such consideration, and nothing in the statute or the regulations requires . . . that the same weight be given to each of the factors in every case . . . or that the weight given to any one factor is limited to any particular percentage of the total." *United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6–7 (2011) (internal citations omitted). Further, the Court may also consider other, non-statutory factors as appropriate in the specific case. *3679 Commerce Place*, 12 OCAHO no. 1296 at 4 (citation omitted). Finally, Complainant's "penalty calculations are not binding in OCAHO proceedings, and the [Administrative Law Judge] may examine the penalties de novo if appropriate." *United States v. Alpine Staffing, Inc.*, 12 OCAHO no. 1303, 10 (2017).

III. DISCUSSION

A. Liability

In Count I, Complainant alleges that Respondent failed to prepare and/or present I-9s for nine employees. In Count II, Complainant alleges that Respondent failed to timely prepare and/or present I-9s for eight employees. Finally, Complainant alleges that Respondent failed to ensure proper completion of section 1 and/or failed to properly complete section 2 or 3 of the I-9 forms for six employees in Count IIIA and thirty-three employees in Count IIIB.

Respondent alleges several affirmative defenses. First, Respondent argues that, based on the language of the government's subpoena, it did not believe it was required to provide I-9 forms for four employees in Count I. Next, Respondent asserts that it was not required to produce I-9s for its owners, so the Court should dismiss the violations related to its owners' I-9s. Respondent also contends that it was not required to retain I-9s for two employees. Finally, Respondent argues that the statute of limitations bars violations related to multiple employees' I-9s.

1. Count I

As regards the allegation that Respondent failed to prepare and/or produce I-9s for nine employees in Count 1, Respondent contends that it did not believe it was required to produce I-9s for the four employees hired in 2018 because Complainant's subpoena only requested quarterly tax returns for 2016 and 2017. The subpoena did not mention 2018. Respondent subsequently produced the I-9s for these four employees. Resp't Mot. Ex. H; C's Mot. at 7.[3] Complainant argues that the Notice of Inspection (NOI) covered the period from October 1, 2016 to the date of the NOI, March 28, 2018. Complainant attached an undated, unsigned NOI that contains no proof of service. C's Mot. Ex. A. Complainant served the subpoena on March 28,

[3] Complainant's Motion for Summary Decision and exhibits thereto will be abbreviated as "C's Mot. Ex #." Respondent's Motion for Summary Decision and exhibits thereto will be abbreviated as "R's Mot. Ex. #."

2018, seeking payroll records, employee information, quarterly tax returns from 2016 to 2017, and articles of incorporation. R's Mot. Ex. I. The subpoena required Respondent to provide the information on April 4, 2018, and the undated NOI states that the government would inspect the I-9s on April 4, 2018. *Id.*; C's Mot. Ex. A.

The government must provide an employer with notice at least three business days prior to an inspection of Forms I–9. 8 C.F.R. § 274a.2(b)(ii). At the time of inspection, an employer must make its I-9s available. *Id.* "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 [§ 1324a(b)(3)]. No Subpoena or warrant shall be required for such inspection[.]" *Id.* It is undisputed that Respondent did not produce the I-9s for these four employees at the time of inspection, but did produce eighty-two other Forms I-9. Aff. of J. Torsiello Jr at 3; C's Mot. Ex. G-6. The explanation that the subpoena only requested documents from 2016 and 2017 is unconvincing as the subpoena did not address production of the Forms I-9. The regulations and the NOI address production of Forms I-9, and require that all Forms I-9 be produced at the time of inspection. As such, the Court finds that Respondent is liable for failing to produce these four I-9s.

Additionally, the record reflects that Respondent failed to prepare and/or present I-9s for the five remaining employees listed in Count I. Respondent contends that one violation in Count I is barred by the statute of limitations. As discussed below, the statute of limitations does not apply to continuing violations for failure to prepare and/or present an I-9. *See infra* Section 2.c. As such, Respondent is liable for failing to present I-9s for nine individuals in Count I.

2. Counts II and III

The parties dispute liability for a number of individuals in counts II and III as to company ownership, retention requirements and statute of limitations.

a. Liability for Owners

Respondent contends that it is not liable for the violations related to the I-9s of Joseph Torsiello Jr., Anthony Torsiello, and Bryan Torsiello because all three individuals are shareholders of the company. Aff. of J. Torsiello Jr. at 1. Complainant alleges that Respondent failed to timely prepare an I-9 for Anthony Torsiello and failed to ensure proper completion and/or properly complete I-9s for Bryan and Joseph Torsiello Jr.

"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. Intelli Transport Servs.*, 13 OCAHO no. 1319, 4 (2018) (quoting *United States v. Alpine Staffing, Inc.*, 12 OCAHO no. 1303, 11 (2017)); *United States v. Speedy Gonzalez Constr. Inc.*, 11 OCAHO no. 1228, 9 (2014). Respondent provided Joseph Torsiello Jr.'s affidavit which states that he is a shareholder and the president of Visiontron and his two sons are also shareholders and owners of Visiontron. Aff. J. Torsiello Jr. at 1. Respondent provided the stock certificates showing that all three individuals are shareholders of Visiontron. Resp. to C's Mot. Ex. I. Further, Anthony Torsiello signed section 2 of many of the I-9s as the Vice President of Visiontron. C's Mot. Ex. G-2. As such, the Court finds that Joseph Torsiello Jr.,

Bryan Torsiello, and Anthony Torsiello are owners of Visiontron and Respondent is not liable for violations related to their I-9s.

b. Retention period

Respondent contends that it is not liable for violations related to the I-9s of two employees, H.M. and C.P., because Respondent was not required to retain their I-9s. *See* Appx. Complainant argues that the employer completed and signed Section 2 on April 2, 2018, and absent proof of the termination, Respondent is liable. An employer must retain an employee's Form I-9 for "three years after the date of hire or one year after the date the individual's employment is terminated, whichever is later[.]" 28 C.F.R. § 274a.2(b)(2)(i)(A). Respondent hired H.M. on April 28, 2014 and provided a computer print-out indicating that it terminated him on October 31, 2016. R's Mot. Ex. F. Thus, Respondent was required to retain his I-9 until October 31, 2017. Respondent hired C.P. on August 1, 2014 and provided a computer print-out indicating that it terminated him on November 11, 2016. *Id.* at Ex. G. Thus, Respondent was required to retain his I-9 until November 11, 2017. Further, the payroll information from 2017 does not reflect that these two individuals were employed in 2017, at least. C's Mot. Ex. G-4 and G-5. Complainant claims that it served the NOI on March 28, 2018, and conducted the investigation on April 4, 2018. C's Prehearing Statement at 2. Thus, Respondent was not required to retain these two I-9s in 2018 because the retention period for these two I-9s expired in 2017. As such, Respondent is not liable for violations related to the I-9s for these two employees. *See* Appx.

c. Statute of Limitations

Respondent contends that the statute of limitations bars Complainant's claims regarding the I-9s of multiple employees because Respondent hired the employees more than five years before Complainant filed the Complaint.

Section 1324a does not establish a time limit for when proceedings under its provisions must be commenced. 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. St. Croix Personnel Servs., Inc.*, 12 OCAHO no. 1289, 10–11 (2016); *see also Ojeil v. Ishk*, 7 OCAHO no. 984, 988–89 (citing *United States v. Curran Eng'g Co.*, 7 OCAHO no. 975, 874, 879 (1997)). Therefore, a complaint is timely if filed within five years of the date on which a violation first accrued. *United States v. Leed Constr.*, 11 OCAHO no. 1237, 6 (2014) (citing *United States v. H & H Saguaro Specialists*, 10 OCAHO no. 1144, 6 n.5 (2012)).

The accrual date of a violation depends on the specific violation. Generally, paperwork violations are "continuous" violations until they are corrected or until the employer is no longer required to retain the Form I-9 pursuant to IRCA's retention requirements. *See* §274a.2(b)(2)(i)(A); *Curran Eng'g*, 7 OCAHO no. 975 at 895; *see also United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1061, 11 (2000). However, 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." *WSC Plumbing*, 9 OCAHO no. 1061 at 11–12 (quoting *Curran Eng'g*, 7 OCAHO no. 975 at 897). Therefore, "depending upon which section or sections of each I-9 form Respondent failed to complete in a

timely manner, the five-year statute of limitations began to run on either the first business day after hiring or the fourth business day after hiring." *Id.* at 12; *see also Curran Eng'*g, 7 OCAHO no. 975 at 897. Unlike other kinds of paperwork violations, timeliness verification failures cannot be cured. *WSC Plumbing*, 9 OCAHO no. 1061 at 15 ("Once the requisite deadlines for completion of the I-9 form have passed, the timeliness violation is 'perfected,' and the employer is powerless to 'cure' it."); *see also United States v. Durable, Inc.*, 11 OCAHO no. 1229, 12–13 (2014); *United States v. New China Buffet Rest.*, 10 OCAHO no. 1133, 5 (2010).

Regarding the violations related to the I-9s for four employees in Count II, Respondent hired all of these employees between 1992 and 2004. *See* Appx. The I-9s for these four employees only involve timeliness violations, as Respondent completed section 2 on all four I-9s between April 1 and April 4, 2018, prior to the inspection on April 4, 2018. As these violations are frozen in time, they accrued on the first or fourth day after hiring between 1992 and 2004. In Count III, Respondent hired eleven employees between 1999 and 2012 and the I-9s related to these employees contain only timeliness violations, as the employee did not complete section one within one day of hire and/or Respondent did not complete section 2 within three days of hire. *See* Appx. Complainant filed the Complaint on March 4, 2019. Thus, claims regarding only timeliness violations that accrued prior to March 4, 2014 are not cognizable. *See Leed Constr.*, 11 OCAHO no. 1237 at 6. As such, the five year statute of limitations applies and Respondent is not liable for the alleged violations related to four I-9s in Count II and eleven alleged violations in Count III. *See* Appx.

Respondent also contends that the statute of limitations applies to one violation in Count I and several other violations in Count III because the individuals were hired more than five years ago. As explained above, substantive violations, including, but not limited to, failure to prepare or present an I-9, the employer's failure to sign section 2, failure to verify proper List A, B, or C documents, and failure to complete section 3 after the employee's employment authorization expired, continue until cured. *Curran Eng'g*, 7 OCAHO no. 975 at 895 (citing *United States v. Rupson of Hyde Park, Inc.*, 7 OCAHO no. 940, 331, 332(1997); *United States v. Big Bear Market*, 1 OCAHO no. 285 (1989)). Thus, the statute of limitations applies to substantive violations after the employer has cured those violations, and the statute of limitations begins to run from the cure date. *United States v. Ojeil & Ishk*, 7 OCAHO no. 984, 982–83 (1998). Thus, the statute of limitations does not apply to the remaining violations because they involve uncured continuing substantive violations or substantive violations that accrued less than five years before the government filed the complaint.

d. Remaining Violations

Regarding the remaining six violations in Count IIIA and the nineteen violations in Count IIIB, all of the I-9s contain at least one substantive violation and twelve contain multiple substantive paperwork violations, including but not limited to, failure to complete section 3, the employer's failure to sign section 2, failure to verify proper List A, B, or C documents, no checkmark for employee's authorization status in section 1, and no employee signature in section 1. Further, all of these I-9s were completed in April 2018, more than three days after hire. *See* Appx.

In sum, Respondent is liable for nine violations in Count I, three violations in Count II, five violations in Count IIIA, and nineteen violations in Count IIIB, for a total of thirty-six violations of § 1324a.

B. Penalties

Respondent argues that Complainant's proposed penalty amount is arbitrary, capricious, and excessive and asks the Court to impose a lesser penalty based on the five statutory factors. Complainant mitigated the penalty based on the size of the business. Complainant treated the seriousness of the violations, history of violations, and good faith as neutral factors. Complainant aggravated the penalty for the six violations in Count IIIA based on the presence of unauthorized workers. For the six violations in Count IIIA, Complainant seeks $1,901 per violation. For the remaining violations, Respondent seeks $1,805.95 per violation.

1. Size of Business and History of Violations

Respondent is a small business with fewer than 100 employees. Aff. of J. Torsiello; R's Mot. Ex. D. Respondent's president and payroll records indicate that it employs fifty-nine individuals. Aff. of J. Torsiello; R's Mot. Ex. D. OCAHO has generally considered companies with fewer than 100 employees to be small businesses. *United States v. Fowler Equipment Co., Inc.*, 10 OCAHO no. 1169, 6–7 (2013). Thus, the Court finds that mitigation is warranted based on the size of Respondent's business.

Complainant treated the history of violations factor as neutral as Respondent did not have a history of violations. However, "never having violated the law before does not necessarily warrant additional leniency, and it is still appropriate to treat [the history of violations factor] as a neutral one." *New China Buffet Rest.*, 10 OCAHO no. 1133 at 6. As such, the history of violations is a neutral factor.

2. Good Faith

Complainant treated the good faith factor as neutral. However, in its motion, Complainant argues that Respondent acted in bad faith by backdating seven I-9s in Count II. Specifically, Complainant contends that the dates on the forms predate the date of hire of the individual verifying the information on the form or the form itself did not exist when it was purportedly completed.

To support an assertion of bad faith, Complainant must present "evidence of culpable conduct that goes beyond the mere failure of compliance with the verification requirements." *United States v. Integrity Concrete, Inc.*, 13 OCAHO no. 1307, 13 (2017). OCAHO case law states that "backdating alone, without more, is insufficient to support a finding by a preponderance of the evidence that good faith was lacking." *Id.* (quoting *United States v. Speedy Gonzalez Constr., Inc.*, 11 OCAHO no. 1243, 4 (2015)). A.C. and L. T. both signed section 1 within two days of their dates of hire. C's Mot. Ex. G-2. The date on the bottom left corner of section 1 of their Forms I-9 indicates that page one of both I-9s was in existence at the time each employee signed section 1. *Id.* Respondent signed section 2 of both I-9s in April 2018. *Id.* As such there is no

indication that Respondent backdated either I-9. Thus, the Court finds there is no evidence that Respondent acted in bad faith. While Respondent is not liable for the remaining five violations, the same is true for these violations.

Nevertheless, the absence of bad faith does not show good faith. *United States v. Guewell*, 3 OCAHO no. 478, 814, 820 (1992). Instead, the "primary focus of a good faith analysis is on the respondent's compliance *before* the investigation." *United States v. Jula888, LLC*, 12 OCAHO no. 1286, 10 (2016). "Accordingly, OCAHO precedent 'looks primarily to the steps an employer took before issuance of the NOI, not what it did afterward.'" *Integrity Concrete, Inc.*, 13 OCAHO no. 1307 at 12 (quoting *United States v. Hartmann Studios, Inc.*, 11 OCAHO no. 1255, 12 (2015)). Respondent completed section 2 of all of the I-9s at issue in April 2018, after Complainant served the subpoena and allegedly served the NOI.

Further, Respondent alleges it properly completed I-9s for four employees in Count I (M.M., S.S., J.C., and O.A.), but based on the language of Complainant's subpoena, it did not believe Complainant sought I-9s for individuals hired in 2018. *See* Appx. Respondent provided these four I-9s to Complainant after the complaint was filed. C's Mot. at 7; R's Mot. Ex. H. A visual inspection of these four I-9s shows that they were all timely completed and contained no substantive errors. R's Mot. Ex. H. Complainant provided an undated NOI as an exhibit. C's Mot. Ex. G-1. The NOI states that Complainant would inspect Respondent's I-9s on April 4, 2018 and Respondent must also provide any supporting documents copied in connection with the I-9s. *Id*. Additionally, Complainant served a subpoena seeking documents from 2016 and 2017. R's Mot. Ex. I.

OCAHO case law has looked at whether an employer honestly exercised reasonable care and diligence to ascertain what the law requires and to conform its conduct to the law. *United States v. Sunshine Bldg. Maint., Inc.*, 7 OCAHO no. 997, 1122, 1177 (1998). Based on a visual inspection, Respondent timely and properly completed the four I-9s; however, it did not present them at the inspection. Accordingly, the Court finds that the good faith factor is neutral for these violations. In most of the remaining violations, a Form I-9 was prepared, but Respondent did not complete section 2 until just before the inspection. As noted above, however, mere failure of compliance is not sufficient for a finding of bad faith, thus the good faith factor is neutral.

3. Seriousness

Complainant treated the seriousness factor as neutral, but argues in its motion that the violations are serious. "Paperwork violations are always potentially serious." *United States v. Skydive Acad. Haw. Corp.*, 6 OCAHO no. 848, 235, 245 (1996). The Court evaluates the seriousness of violations "on a continuum since not all violations are necessarily equally serious." *United States v. Solutions Group Int'l, LLC*, 12 OCAHO no. 1288, 10 (2016) (quoting *United States v. Siam Thai Sushi Rest.*, 10 OCAHO no. 1174, 4 (2013)). "The complete failure to prepare a Form I-9 for an employee is among the most serious of paperwork violations[.]" *Id.* (citations omitted). Furthermore, "while not as serious as total failure to prepare the form, failure to prepare an I-9 within three business days of hiring an employee is still a serious violation." *United States v. Metro. Warehouse, Inc.*, 10 OCAHO no. 1207, 7 (2013) (citations omitted). Additionally, the failure to sign the section 2 employer attestation is "among the most serious of

possible violations." *Solutions Group*, 12 OCAHO no. 1288, at 11 (quoting *United States v. Hartmann Studios, Inc.*, 11 OCAHO no. 1255, 14 (2015)). An employer's failure to ensure that the employee checks the section 1 box attesting to their employment authorization status is serious "because if the employee fails to provide information sufficient to disclose his or her immigration status on the face of the form, the employee's signature attests to nothing at all." *United States v. Pegasus Family Rest., Inc.*, 12 OCAHO no. 1293, 9 (2016). Failure to ensure that the employee signs the section 1 attestation is also serious because the employee "has not attested to being authorized to work in the United States." *Id.* (citation omitted). Further, an employer's failure to re-verify an individual's employment authorization eligibility after the expiration of their previous employment authorization is serious and undermines the purpose of the employment eligibility verification requirements. All of the violations at issue are serious, thus, the Court will aggravate the penalties based on the seriousness of violations.

4. Presence of Unauthorized Workers

Complainant aggravated the penalties for the violations in Count IIIA based on the presence of unauthorized workers. Complainant provided the declaration of its auditor, Dariusz Solecki, who states that he ran Respondent's employees' names and alien numbers through several databases and the database results showed that for the individuals in Count IIIA, the alien number provided either belonged to another individual or was never issued at all. C's Mot. at G-8. Complainant also provided a copy of the database results which confirm Solecki's findings. *Id.* at G-2. As such, Complainant has met its burden to prove the presence of six unauthorized workers listed in Count IIIA, and the penalties are aggravated as to these workers.

5. Penalty Range

The applicable penalty range depends on the date of the violations and the date of assessment. *See* § 274a.10(b)(2); 28 C.F.R. § 85.5. If the violation occurred between September 29, 1999 and November 2, 2015, the minimum penalty amount is $110 and the maximum is $1,100. § 274a.10(b)(1)(C). For violations that occur after November 2, 2015, the adjusted penalty range as set forth in § 85.5 applies. *See* § 85.5. If the penalty is assessed after January 29, 2018, the minimum penalty is $224 and the maximum is $2,236. *Id.*

As previously discussed, paperwork violations are continuing violations until they are corrected or until the employer is no longer required to retain the Form I-9 pursuant to IRCA's retention requirements. *See* § 274a.2(b)(2)(i)(A); *Curran Eng'g*, 7 OCAHO no. 975 at 895; *see also United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1061, 11 (2000). Thus, if a timeliness violation involves only the employee's failure to sign section one of the I-9, the violation occurred on the first business day after hiring. *Curran Eng'g*, 7 OCAHO no. 975 at 897. If the violation involves the employer's failure to sign section 2, the violation occurred on the fourth business day after hiring. *Id.* Further, violations are assessed when the government serves the NIF. *United States v. Farias Enter. LLC*, 13 OCAHO no. 1338, 7 (2020).

Here, all but two of the violations for which Respondent is liable occurred after November 2, 2015. In Count II, Respondent failed to timely prepare I-9s for two employees who were hired prior to November 2, 2015. *See* Appx. Since these two violations are for failure to timely

prepare the I-9, the violations are frozen in time and occurred on the first or fourth day after hiring. Thus, these two violations occurred prior to November 2, 2015 and the $110-$1,100 penalty range applies to both violations. The remaining violations all occurred after November 2, 2015 and/or are continuing violations, so the $224-$2,236 penalty range applies.

Complainant's proposed penalties are more than eighty percent of the maximum of the range that it considered. OCAHO case law directs that penalties approaching the maximum should be reserved for the most egregious violations. *See Fowler Equip.*, 10 OCAHO no. 1169 at 6. The penalty is high in the range because of the formula Complainant uses to calculate the base fine, that is, the percentage of violations as compared to the number of employees. This calculation gives the strongest weight to a factor that is not explicitly set out in the statute, and relegates the statutory factors to relatively small five percent adjustments. As a consequence, the most aggravated cases are those with the highest percentage of violations, regardless of the other factors. The rate of violations is a factor to be considered along with other factors. Considering a totality of the circumstances as set forth in the evidence of record and pleadings, Complainant's proposed penalty is disproportionate to the Form I-9 violations and mitigating factors present in this case. Accordingly, this Court will make adjustments to the fines based upon the five statutory factors. For the majority of violations, using a mid-range penalty as a base penalty, the Court considers the small business mitigating factor is partially offset by the aggravating factor of the seriousness of the violations. The seriousness factor weighs more heavily because of the rate of violations, and fact that in more than three quarters of the Forms, section 2 was signed days before the inspection and after the subpoena was served. Finally regarding the violations in Count IIIA, the presence of unauthorized workers is an aggravating factor.

For the two violations that occurred prior to November 2, 2015, the Court will impose a fine of $645. For the majority of violations that occurred after November 2, 2015, the Court will impose a fine of $1,290 per violation. The Court will impose a fine of $1,525 for the violations in Count IIIA. *See* Appx.

IV. CONCLUSION

Complainant's Motion for Summary Decision is GRANTED IN PART and Respondent's Motion for Summary Decision is GRANTED IN PART. Respondent is liable for nine violations in Count I, three violations in Count II, six violations in Count IIIA, and nineteen violations in Count IIIB. After considering the statutory factors and the totality of the evidence, the undersigned finds that Complainant's proposed penalty should be adjusted. The penalty amount for thirty-seven violations of § 1324a is $47,850.

V. FINDINGS OF FACT

1. On March 28, 2018, the Department of Homeland Security, Immigration and Customs Enforcement, served Visiontron Corporation with a subpoena for payroll records, state tax returns for 2016 and 2017, and its articles of incorporation.

2. On October 19, 2018, the Department of Homeland Security, Immigration and Customs Enforcement, served Visiontron Corporation with a Notice of Intent to Fine.

3. On March 4, 2019, the Department of Homeland Security, Immigration and Customs Enforcement, filed a complaint with the Office of the Chief Administrative Hearing Officer.

4. Visiontron Corporation presented Forms I-9 for four employees after the Department of Homeland Security, Immigration and Customs Enforcement, filed the complaint.

5. Visiontron Corporation was not required to retain I-9s for two employees.

6. Anthony Torsiello, Bryan Torsiello, and Joseph Torsiello Jr. are owners and shareholders of Visiontron Corporation.

7. Visiontron Corporation failed to prepare and/or present I-9s for nine employees.

8. Visiontron Corporation failed to timely prepare and/or present I-9s for three employees.

9. Visiontron failed to ensure proper completion of section 1 and/or failed to properly complete sections 2 or 3 for twenty-five employees.

VI. CONCLUSIONS OF LAW

1. Visiontron Corporation is an entity within the meaning of 8 U.S.C. § 1324a(a)(1).

2. All conditions precedent to the institution of this proceeding have been satisfied.

3. Visiontron Corporation is liable for thirty-seven violations of § 1324a(a)(1)(b).

4. An Administrative Law Judge "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).

5. "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)).

6. "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)).

7. "[T]he party opposing the motion for summary decision 'may not rest upon 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)).

8. 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, 261 (1994) (citations omitted).

9. An employer must ensure that the employee completes section 1 of the I-9 within one day of hire, and the employer must complete section 2 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) (2018).

10. The Court assesses penalties for paperwork violations in accordance with the parameters set forth in 8 C.F.R. § 274a.10(b)(2) and 28 C.F.R. § 85.5.

11. The government has the burden of proof with respect to penalties and "must prove the existence of an aggravating factor by a preponderance of the evidence." *United States v. 3679 Commerce Place, Inc.*, 12 OCAHO no. 1296, 4 (2017).

12. The Court considers the facts and circumstances of each individual case to determine the weight it should give to each factor. *United States v. Metro. Enters*., 12 OCAHO no. 1297, 8 (2017).

13. The Court may also consider other, non-statutory factors as appropriate in the specific case. *United States v. 3679 Commerce Place, Inc*., 12 OCAHO no. 1296, 4 (2017).

14. The government's "penalty calculations are not binding in OCAHO proceedings, and the [Administrative Law Judge] may examine the penalties de novo if appropriate." *United States v. Alpine Staffing, Inc.*, 12 OCAHO no. 1303, 10 (2017).

15. OCAHO precedent states that failure to timely complete the Form I-9 is serious, though marginally less serious than failure to complete a form or have the employer or employee sign the form. *United States v. Metro. Warehouse, Inc.*, 10 OCAHO no. 1207, 7 (2013).

16. Under OCAHO precedent, "never having violated the law before does not necessarily warrant additional leniency, and it is still appropriate to treat [the history of violations factor] as a neutral one." *United States v. New China Buffet Rest.*, 10 OCAHO no. 1133, 6 (2010).

17. Paperwork violations are continuing violations until they are corrected or until the employer is no longer required to retain the Form I-9 pursuant to IRCA's retention requirements. *See* § 274a.2(b)(2)(i)(A); *United States v. Curran Eng'g Co., Inc*., 7 OCAHO 975, 895 (1997).

18. "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. Intelli Transport Servs.*, 13 OCAHO no. 1319, 4 (2018) (quoting *United States v. Alpine Staffing, Inc.*, 12 OCAHO no. 1303, 11 (2017)).

19. The five year statute of limitations codified at 28 U.S.C. § 2462 is applicable to proceedings under § 1324a. *United States v. St. Croix Personnel Servs., Inc.*, 12 OCAHO no. 1289, 10–11 (2016).

20. A complaint is timely if filed within five years of the date on which a violation first accrued. *United States v. Leed Constr.*, 11 OCAHO no. 1237, 6 (2014) (citing *United States v. H & H Saguaro Specialists*, 10 OCAHO no. 1144, 6 n.5 (2012)).

21. "[D]epending upon which section or sections of each I-9 form Respondent failed to complete in a timely manner, the five-year statute of limitations began to run on either the first business day after hiring or the fourth business day after hiring." *United States v. WSC Plumbing Inc.*, 9 OCAHO no. 1061, 12 (2000).

22. Penalties are assessed when the Department of Homeland Security, Immigration and Customs Enforcement serves the Notice of Intent to Fine. *United States v. Farias Enter. LLC*, 13 OCAHO no. 1338, 7 (2020).

23. 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. WSC Plumbing, Inc.*, 9 OCAHO no. 1061, 11–12 (2000) (quoting *United States v. Curran Eng'g*, 7 OCAHO no. 975, 895, 897 (1997)).

24. If the violation occurred before November 2, 2015, the minimum penalty amount is $110 and the maximum is $1,100. 8 C.F.R. § 274a.10(b)(2). For violations that occur after November 2, 2015, the adjusted penalty range as set forth in 28 C.F.R. § 85.5 applies. If the penalty is assessed after January 29, 2018, the minimum penalty is $224 and the maximum is $2,236. 28 C.F.R. § 85.5.

To the extent that any statement of fact is deemed to be a conclusion of law or any conclusion of law is deemed to be a statement of fact, the same is so denominated as if set forth as such.

ORDER

Complainant's Motion for Summary Decision is GRANTED IN PART. Respondent's Motion for Summary Decision is GRANTED IN PART. Respondent is liable for thirty-seven violations of § 1324a(a)(1)(B) and is directed to pay civil penalties in the total amount of $47,850. Respondent shall cease and desist from violating § 1324a.

The parties are free to establish a payment schedule to minimize the impact of the penalty on Respondent's operations.

SO ORDERED.

Dated and entered on March 17, 2020.

_____

Jean C. King
Chief Administrative Law Judge

Appeal Information

This order shall become the final agency order unless modified, vacated, or remanded by the Chief Administrative Hearing Officer (CAHO) or the Attorney General.

Provisions governing administrative reviews by the CAHO are set forth at 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. pt. 68. Note in particular that a request for administrative review must be filed with the CAHO within ten (10) days of the date of this order, pursuant to 28 C.F.R. § 68.54(a)(1).

Provisions governing the Attorney General's review of this order, or any CAHO order modifying or vacating this order, are set forth at 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. pt. 68. Within thirty (30) days of the entry of a final order by the CAHO, or within sixty (60) days of the entry of an Administrative Law Judge's final order if the CAHO does not modify or vacate such order, the Attorney General may direct the CAHO to refer any final order to the Attorney General for review, pursuant to 28 C.F.R. § 68.55.

A petition to review the final agency order may be filed in the United States Court of Appeals for the appropriate circuit within forty-five (45) days after the date of the final agency order pursuant to 8 U.S.C. § 1324a(e)(8) and 28 C.F.R. § 68.56.