

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

UNITED STATES OF AMERICA,)	
Complainant,)	8 U.S.C. § 1324a Proceeding
)	
v.)	OCAHO Case No. 99A00054
)	
WSC PLUMBING, INC.,)	Judge Robert L. Barton, Jr.
Respondent.)	

**ORDER GRANTING IN PART AND DENYING IN PART
COMPLAINANT’S FIRST AMENDED MOTION FOR
PARTIAL SUMMARY DECISION**

(November 29, 2000)

I. INTRODUCTION

The United States of America (Complainant) has filed an Amended Motion for Partial Summary Decision (C.’s Motion) with this court. In its Motion, Complainant contends—with respect to fifty-eight of the sixty-nine allegations contained in its Complaint—that no genuine issue of material fact exists as to whether WSC Plumbing, Inc. (Respondent) violated section 274A(a)(1)(B) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324a(a)(1)(B). Complainant supports its Motion by submitting photocopies of Respondent’s Employment Eligibility Verification Forms (I-9 forms), as well as photocopies of Respondent’s responses to Complainant’s First Request for Admissions. Respondent did not file a timely response to Complainant’s Amended Motion.

Complainant’s Amended Motion for Partial Summary Decision is **GRANTED IN PART** and **DENIED IN PART**. Specifically, I find that Respondent violated INA § 274A(a)(1)(B) with respect to fifty-five of the fifty-eight allegations referred to in Complainant’s Amended Motion. With respect to these fifty-five violations, the sole remaining issue in this proceeding is a determination of the appropriate civil money penalty to be imposed. However, I also find that a genuine issue of material fact still exists as to whether Respondent violated INA § 274A(a)(1)(B) with respect to the three allegations set forth at Count IV, ¶¶ A, B, and H of the Complaint.

II. BACKGROUND

On July 29, 1999, Complainant filed a Complaint (Compl.) with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that Respondent violated INA § 274A(a)(1)(B), which makes it a violation of law for an employer to hire an individual without complying with the employment eligibility verification procedures specified in INA § 274A(b) and its implementing regulations. The Complaint shows that on June 11, 1997, the Immigration and Naturalization Service (INS) issued a notice directing Respondent to produce its I-9 forms for inspection on June 20, 1997. Compl. “Allegations” at ¶¶ 3, 4, 17, 18. The Complaint also shows that INS served a Notice of Intent to Fine (NIF) on Respondent on May 22, 1998. Compl. “Jurisdiction” at ¶2. Respondent timely requested a hearing before the OCAHO. Id.

The Complaint contains six counts alleging a total of sixty-nine violations. Count I alleges that Respondent failed to make ten of its I-9 forms available for inspection by INS agents as directed. Compl. “Allegations” at ¶¶ 3, 4. Count II alleges that Respondent hired eight individuals without preparing I-9 forms in a timely manner. Compl. “Allegations” at ¶ 7. Count III alleges that Respondent hired three individuals without ensuring that those individuals completed section 1 of the I-9 form properly. Compl. “Allegations” at ¶ 10. Count IV alleges that Respondent hired forty-five individuals without properly completing section 2 of the I-9 form. Compl. “Allegations” at ¶ 13. Count V alleges that Respondent hired one individual without completing an I-9 form in a timely manner, Compl. “Allegations” at ¶ 16; in the alternative, Count V alleges, with respect to the same individual, that Respondent failed to make the I-9 form available for inspection by INS agents as directed. Compl. “Allegations” at ¶ 18. Count VI alleges that Respondent hired two individuals without completing I-9 forms in a timely manner, Compl. “Allegations” at ¶ 21; in the alternative, Count VI alleges that Respondent failed to ensure that the same two individuals properly completed section 1 of the I-9 form. Compl. “Allegations” at ¶ 22.

On October 30, 2000, Complainant filed a Motion for Partial Summary Decision. On November 3, 2000, Complainant filed an Amended Motion, in which it corrected an inadvertent scrivener’s error. In the initial Motion, Complainant mistakenly stated that it was seeking summary decision with respect to fifty-seven of the allegations in the Complaint, when in fact the Motion sought summary decision with respect to fifty-eight allegations; the Amended Motion simply corrects this misstatement. Complainant’s Amended Motion seeks judgment as a matter of law regarding Respondent’s liability for the fifty-eight violations alleged at the following Counts and employee subparagraphs of the Complaint:

- Count I ¶¶ A - J (ten individuals);
- Count II ¶¶ A - D (four individuals);
- Count III ¶ A (one individual);
- Count IV ¶¶ A - T, V-AG, AI-AS (forty-three individuals).

Complainant contends that it is entitled to summary decision with respect to these fifty-eight alleged violations on the basis of admissions contained in Respondent’s responses to Complainant’s

First Request for Admissions. Complainant's First Request for Admissions appears as Exhibit CX-GGG of Complainant's Motion, while Respondent's responses appear as Exhibit CX-HHH. According to Complainant, Respondent's admissions, as well as the evidence of the actual I-9 forms produced by Respondent on June 20, 1997, demonstrate the absence of a genuine issue of material fact as to whether Respondent violated INA § 274A(a)(1)(B).

Respondent did not file a timely response to Complainant's Amended Motion for Partial Summary Decision. On November 6, 2000, Respondent filed a motion for an extension of time in which to respond, and on November 9, 2000, I issued an order granting Respondent until November 21, 2000, to file its response. However, on November 21, 2000, Respondent did not file its answer to the Motion but rather requested a further ten-day extension. On November 22, 2000, I issued an Order in which I denied Respondent's second request for an extension of time. Also on November 22, 2000, Respondent submitted a document to this office by facsimile transmission that purports to explain Respondent's position regarding elements of Complainant's Amended Motion. The subject-matter of Respondent's November 22 submission reveals that it is essentially a late-filed response to Complainant's Amended Motion; as such, it will not be accepted for filing and has not been considered during the present adjudication of that Motion. Consequently, Complainant's Amended Motion for Partial Summary Decision is now ripe for adjudication.

III. STANDARD OF REVIEW

The OCAHO Rules of Practice and Procedure (OCAHO Rules) permit me to "enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." See 28 C.F.R. § 68.38(c). OCAHO Rule 68.38(c) is similar to Federal Rule of Civil Procedure (FRCP) 56(c), which provides for summary judgment in cases before the federal district courts. Consequently, FRCP 56(c) and federal case law interpreting it are useful in deciding whether summary decision is appropriate under the OCAHO rules. See United States v. Aid Maintenance Company, Inc., 6 OCAHO no. 893, 810, at 813 (1996), 1996 WL 73594, at *3; United States v. Tri Component Product Corp., 5 OCAHO no. 821, 765, at 767 (1995), 1995 WL 813122, at *2.

According to authoritative Supreme Court precedent, only facts that might affect the outcome of the proceeding are deemed "material." See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Moreover, an issue of material fact must have a "real basis in the record" to be considered "genuine." See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). In deciding whether a genuine issue of material fact exists, the court must view all facts and all reasonable inferences to be drawn from them "in the light most favorable to the non-moving party." Id. at 587.

The party requesting summary decision bears the initial burden of asserting the absence of any genuine issues of material fact by "identifying those portions of 'the pleadings, depositions, 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.” See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting in part FRCP 56(c)) (emphasis added). After the moving party has met its initial burden, the nonmoving party must then come forward with “specific facts showing that there is a genuine issue for trial.” Matsushita, 475 U.S. at 587. In seeking to satisfy this burden, the nonmoving party may not rely on mere conclusory allegations or denials contained in its pleadings; however, the nonmoving party’s evidence need not be produced “in a form that would be admissible at trial....” Celotex Corp., 477 U.S. at 324.

IV. ANALYSIS

The express language of FRCP 56(c), coupled with a wealth of OCAHO decisional law, makes clear that a motion for summary decision may be based, in whole or in part, upon the nonmoving party’s admissions. See, e.g., United States v. Walden Station, Inc., 8 OCAHO no. 1053, 810, at 813 (2000), 2000 WL 773098, at *2; Mikhailine v. Web Sci Technologies, Inc., 8 OCAHO no. 1033, 513, at 518 (1999), 1999 WL 1893876, at *4.¹ At the same time, a court must be mindful of the fact that, in proceedings involving alleged paperwork violations, an employer’s admission that it failed to complete its I-9 forms properly does not necessarily constitute an admission that the

¹ OCAHO precedents appearing in bound volumes or on OCAHO’s website are cited according to the following format:

Ruan v. United States Navy, 8 OCAHO no. 1046, 714, at 716 (2000).

- (1) “Ruan v. United States Navy” refers to the case name.
- (2) “8 OCAHO” refers to the volume number of the relevant bound volume containing OCAHO precedents. Decisions published on OCAHO’s website are also catalogued according to these volume numbers.
- (3) “no. 1046” refers to the reference number assigned to the specific decision. Each published OCAHO decision bears a chronological reference number. In the example, “no. 1046” simply reflects that Ruan is the 1,046th OCAHO decision that has been published.
- (4) “714” refers to the page number of the relevant bound volume upon which the cited decision begins. Thus, in the example, Ruan begins on page 714 of bound volume 8.
- (5) “at 716” refers to the pinpoint citation for the language or concept that is being cited.
- (6) When citing looseleaf opinions that have been published on OCAHO’s website but that have not yet been paginated for publication in a bound volume, no first page is indicated in the citation. Instead, such cases are cited only by reference number and pinpoint citation. Thus, in the following citation, United States v. Allen Holdings, Inc., 9 OCAHO no. 1059, at 2 (2000), “at 2” refers to the pinpoint citation within the looseleaf opinion.

Published OCAHO decisions are available on Westlaw (database identifier FIM-OCAHO), or on OCAHO’s website (<http://www.usdoj.gov/eoir/OcahoMain/ocahosibpage.htm#Published>).

employer violated INA § 274A(a)(1)(B). Specifically, INA § 274A(b)(6), which codifies section 411(b) of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, indicates that an employer's "technical or procedural" verification failures are not considered violations of INA § 274A(a)(1)(B) if they are inadvertent and infrequent.

INS has not yet promulgated a final agency rule elucidating precisely which verification failures should be considered "technical or procedural" as opposed to "non-technical or substantive," although a proposed rule has been pending since 1998. See 63 Fed. Reg. 16,909 et. seq. (April 7, 1998). In the meantime, enforcement of the paperwork requirements of INA § 274A(b) has been guided by INS' Interim Guidelines, published on March 6, 1997. These Guidelines, which bind INS attorneys until the agency promulgates its final rule, list the types of violations that INS District Counsel should consider "technical or procedural" for purposes of enforcement.

Although the INS Guidelines are not entitled to Chevron-style deference, see Christensen v. Harris County, 120 S. Ct. 1655, at 1662 (2000) (stating that "interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law—do not warrant Chevron-style deference."), INS is obligated to comply with its own guidelines and policy statements. Thus, although INS' Interim Guidelines are not binding in this proceeding as to whether a verification failure is "technical or procedural," since the Guidelines bind the INS, an employer which admits that it failed to fill out an I-9 form properly may nonetheless demonstrate the existence of a genuine issue of material fact—as to the existence of a violation of INA § 274A(a)(1)(B)—if the alleged paperwork violation is "technical or procedural" within the meaning of INS' own Interim Guidelines. With this in mind, I now proceed to adjudicate the merits of Complainant's Amended Motion.

A. Allegations in Count I

Complainant argues that no genuine issue of material fact exists as to whether Respondent failed to produce I-9 forms for inspection with respect to the ten employees listed at Count I, ¶¶ A-J of the Complaint. Complainant's assertion is based on Respondent's admissions that it failed to produce the requested documents. See C.'s Motion (CX-GGG and CX-HHH, Nos. 9, 13, 17, 21, 25, 29, 33, 37, 41, and 45).

Respondent has conclusively admitted that it did not produce the ten I-9 forms in question. An employer's failure to produce an I-9 form upon request is a clear violation of the statutory directive contained in INA § 274A(b)(3), and is not a "technical or procedural" verification failure within the meaning of INA § 274A(b)(6). I therefore conclude that Respondent has violated INA § 274A(a)(1)(B) with respect to the ten allegations contained in Count I of the Complaint, and Complainant's Amended Motion for Partial Summary Decision is GRANTED with respect to those ten allegations.

B. Allegations in Count II

Complainant argues that no genuine issue of material fact exists as to whether Respondent failed to prepare I-9 forms in a timely manner for the four employees listed at Count II, ¶¶ A-D of the Complaint. The legal bases for these allegations are the INS regulations appearing at 8 C.F.R. §§ 274a.2(b)(1)(i)(A), requiring employers to ensure that job applicants complete section 1 of the I-9 form properly “at the time of hire,” and 274a.2(b)(1)(ii)(B), requiring employers to complete section 2 of the I-9 form within three business days of hire. Complainant’s assertion is based on Respondent’s admissions that it (1) failed to ensure that each of the employees at issue completed section 1 of the I-9 form on the date of hire and (2) failed to complete section 2 of those employees’ I-9 forms within three business days of hire. See C.’s Motion (CX-GGG and CX-HHH, Nos. 52, 53, 68, 69, 76, 77, 84, and 85). With respect to three of the allegations at issue, however, Respondent claims that it completed section 2 of the relevant I-9 forms within eight or nine days of hire, and thus showed good faith compliance with the requirements of INA § 274A(b). See C.’s Motion (CX-HHH, Nos. 53, 69, and 85).

Respondent has admitted that it did not prepare the four I-9 forms at issue within the time periods set by regulation. Unlike the “failure to produce” violations alleged in Count I, however, “timeliness” violations such as those alleged in Count II may constitute “technical or procedural” verification failures under INS’s own Interim Guidelines. Specifically, those Guidelines indicate that an employer who commits a good faith timeliness violation can seek shelter under INA § 274A(b)(6) only if “the date that the particular section should have been completed falls on or after September 30, 1996,” the effective date of IIRIRA. Interim Guidelines at 7 (§ A.4.). In this instance, I agree with INS’s conclusion that, if the particular section of the I-9 form at issue “should have been completed” before September 30, 1996, the employer’s good faith attempt to comply will not prevent the imposition of liability pursuant to INA § 274A(a)(1)(B).

Respondent has admitted that the four individuals listed at Count II, ¶¶ A-D of the Complaint were hired on July 15, 1996, September 25, 1996, July 3, 1996, and September 18, 1996, respectively. See C.’s Motion (CX-GGG and CX-HHH, Nos. 46, 62, 70, and 78). In each case, the relevant sections of the I-9 form should have been completed before September 30, 1996, but were not. As a result, I find that those violations are not “technical or procedural” verification failures within the meaning of INA § 274A(b)(6). Therefore, Respondent has violated INA § 274A(a)(1)(B) with respect to the four allegations contained in Count II, ¶¶ A-D of the Complaint, and Complainant’s Amended Motion for Partial Summary Decision is GRANTED with respect to those four allegations.

C. Allegation in Count III

Complainant argues that no genuine issue of material fact exists regarding Respondent’s failure to ensure that the individual listed in Count III, ¶ A of the Complaint properly completed section 1 of the I-9 form. Complainant’s assertion is based on Respondent’s admission, in response to Complainant’s First Request for Admissions, that the I-9 form at issue did “not contain a check

mark at any of the status attestation boxes in Section 1.” See C.’s Motion (CX-GGG and CX-HHH, No. 122).

Respondent has admitted that it did not ensure proper completion of section 1 of the I-9 form at issue. Moreover, a visual examination of the relevant I-9 form, see C.’s Motion (CX-H), substantiates this assertion. An employer’s failure to ensure that an employee attests to his immigration status in section 1 of the I-9 form is not a “technical or procedural” verification failure; indeed, OCAHO Judges have repeatedly held that such attestation failures are among the most serious paperwork violations. See, e.g., United States v. Jonel, Inc., 8 OCAHO no. 1008, 175, at 200 (1998), 1998 WL 804705, at *18; United States v. Fortune East Fashion, Inc., 7 OCAHO no. 992, 1075, at 1079-80 (1998), 1998 WL 746002, at *4. Therefore, I hold that Respondent has violated INA § 274A(a)(1)(B) with respect to the allegation contained in Count III, ¶ A of the Complaint, and Complainant’s Amended Motion for Partial Summary Decision is GRANTED with respect to that allegation.

D. Allegations in Count IV

Complainant argues that no genuine issue of material fact exists as to whether Respondent failed to complete section 2 of the I-9 form properly with respect to forty-three individuals listed at Count IV, ¶¶ A-T, V-AG, AI-AS of the Complaint. As with all the other allegations that are the subject of the present Motion, Complainant’s assertion is based on Respondent’s admissions that it (1) failed, with respect to twenty-seven of the I-9 forms, to include a document identification number at List B of section 2, C.’s Motion (CX-GGG and CX-HHH, Nos. 148, 153, 158, 163, 168, 178, 183, 188, 198, 203, 208, 213, 218, 223, 233, 250, 255, 260, 270, 285, 300, 305, 315, 320, 325, 345, 350, and 355); (2) failed, with respect to eleven I-9 forms, to record either a List A or List B document in section 2, C.’s Motion (CX-GGG and CX-HHH, Nos. 193, 228, 245, 265, 275, 280, 290, 295, 310, 330, and 340); (3) failed, with respect to three I-9 forms, to provide an employer attestation date in section 2, C.’s Motion (CX-GGG and CX-HHH, Nos. 138, 143, and 173); and (4) failed, with respect to one I-9 form, to record either a List A or List C document in section 2. See C.’s Motion (CX-GGG and CX-HHH, No. 335).

According to INS’ Interim Guidelines, an employer’s failure to provide a required document identification number in section 2 of an I-9 form is not a “technical or procedural” verification failure unless a legible copy of the document at issue is attached to the I-9 form. Likewise, an employer’s failure to indicate that it inspected a necessary document at all is unquestionably “substantive.” However, the Guidelines also indicate that the absence of an employer attestation date in section 2 of the I-9 form is a “technical or procedural” verification failure for purposes of INA § 274A(b)(6).

The twenty-seven I-9 forms that lack required identification numbers are not accompanied by legible copies of the required documents. By failing to provide List B document identification numbers—either on the I-9 forms or by attaching legible copies of the documents themselves—Respondent has failed to demonstrate that it inspected valid documentation at the time of hire. Consequently, I find that Respondent has violated INA § 274A(a)(1)(B) with respect to

those twenty-seven I-9 forms. Moreover, I find that Respondent has violated INA § 274A(a)(1)(B) with respect to the eleven I-9 forms that contain no indication that Respondent inspected necessary List A, B, or C documents at all. Thus, Complainant's Amended Motion for Partial Summary Decision is GRANTED with respect to the forty allegations contained in Count IV, ¶¶ C-G, I-T, V-AG, and AI-AS of the Complaint.

However, viewing all facts and reasonable inferences to be drawn from them in the light most favorable to Respondent, I find that Complainant has failed to show that Respondent violated INA § 274A(a)(1)(B) when it failed to provide an employer attestation date in section 2 of its I-9 forms, as alleged in Count IV, ¶¶ A, B, and H of the Complaint. See C.'s Motion (CX-K, CX-L, CX-R). As previously noted, INS' Interim Guidelines categorize an employer's failure to provide an attestation date in section 2 of the I-9 form as a "technical or procedural" verification failure, which constitutes a violation of law under INA § 274A(a)(1)(B) only if Respondent fails to cure it after fair notice by INS or if it is part of a pattern or practice of such failures. In this instance, I agree with INS' characterization that such a verification failure is "technical or procedural." Consequently, I find that Complainant has not met its burden of demonstrating—with respect to the three allegations contained in Count IV, ¶¶ A, B, and H of the Complaint—the absence of a genuine issue of material fact as to whether Respondent violated INA § 274A(a)(1)(B), and Complainant's Amended Motion for Partial Summary Decision is DENIED with respect to those three allegations.

V. CONCLUSION

In conclusion, Complainant's Amended Motion for Partial Summary Decision is GRANTED IN PART and DENIED IN PART. Specifically, the Motion is granted with respect to the fifty-five allegations appearing at the following counts and employee subparagraphs of the Complaint:

- Count I ¶¶ A-J (ten individuals);
- Count II ¶¶ A-D (four individuals);
- Count III ¶ A (one individual);
- Count IV ¶¶ C-G, I-T, V-AG, AI-AS (forty individuals).

With respect to these fifty-five violations, the sole remaining issue in this proceeding is a determination of the appropriate civil money penalty to be imposed. Complainant's Motion is denied, however, with respect to the three allegations appearing at Count IV, ¶¶ A, B, and H of the Complaint.

This Order does not purport to address the issue of penalty. Specifically, a finding that Respondent violated INA § 274A(a)(1)(B) with respect to an individual does not constitute approval of the civil money penalty requested by Complainant in connection with that violation.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE