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

July 22, 2013

UNITED STATES OF AMERICA, Complainant, v. SUPER 8 MOTEL & VILLELLA ITALIAN RESTAURANT, Respondent.	))))))))	8 U.S.C. § 1324a Proceeding OCAHO Case No. 12A00064

FINAL DECISION AND ORDER

Appearances:

Marvin J. Muller III, Esq.
for the complainant

Michael J. Berger, Esq.
for the respondent

I. PROCEDURAL HISTORY

This is an action pursuant to the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a (2006), in which the United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a two-count complaint alleging that Super 8 Motel & Villella Italian Restaurant (Super 8 or the company) violated 8 U.S.C. § 1324a(a)(1)(B).

Count I alleged that Super 8 hired Paulette Calandrelli and Anascasia Dergacheva and failed to prepare I-9 forms for them within three business days of their respective dates of hire, and/or failed to present their I-9s after being requested to do so by an authorized agency of the United

States. Count II alleged that Super 8 hired nineteen named individuals and failed to ensure that they properly completed section 1 of Form I-9 and/or failed itself to properly complete section 2 or section 3 of the form. Super 8 filed an answer denying the material allegations and requesting their dismissal for failure to provide adequate notice of specific facts and violations.

ICE subsequently filed a motion to amend the complaint by adding Count III to include additional allegations that were originally contained in the Notice of Intent to Fine (NIF) but inadvertently omitted from the complaint. Super 8 made no response to the motion and the amendment was accordingly granted to conform the complaint to the NIF. Count III asserted that Super 8 hired twenty-eight named individuals and failed to properly correct technical or procedural verification failures on I-9 forms that were returned to the company with a Notice of Technical or Procedural Failures letter. The penalty of $41,223.50 originally proposed in the NIF was unchanged.

Super 8 filed a timely answer to the amended complaint denying the material allegations and again requesting dismissal for failure to specify the alleged violations, and failure to provide a clear and concise statement of facts. The company also sought dismissal on the ground that Super 8 Motel and Villella Italian Restaurant were not the correct respondents. Both parties filed prehearing statements, after which Super 8 filed its first amended answer to the amended complaint. The first amended answer asserted twelve affirmative defenses, including failure to state a claim based on ICE's failure to provide specific facts identifying the violations.

A prehearing conference was subsequently conducted. The government was directed to file a supplemental statement identifying with specificity each of the violations upon which Counts II and III of its complaint were predicated, and explaining its calculation of the penalty assessment, with such supporting materials as necessary. Super 8 was given an opportunity to submit a response and supporting materials. ICE filed a supplemental prehearing statement, Super 8 filed a response, and the issues are ripe for resolution.

II. BACKGROUND INFORMATION

Super 8 Motel and Villella Italian Restaurant are located at 795 Rainbow Boulevard, Niagara Falls, New York. Notices of Inspection and immigration enforcement subpoenas were served upon the motel and restaurant on August 16, 2011. In response, Super 8 submitted a total of seventy-seven I-9s with attachments, a current Paychex Timesheet for the period August 6, 2011 to August 19, 2011, a list of terminated employees from July 1, 2010 to August 19, 2011, a completed company questionnaire, and a New York State Certificate of Authority.

The Certificate of Authority indicates that Super 8 was incorporated in 2009 under the name Waldorf Niagara, Inc./Super 8. The names of the employees ICE identified in its complaint all appear on Waldorf Niagara's payroll timesheet under various categories such as "front desk, "housekeeping," and "restaurant," so it appears that Super 8 and Villella Italian Restaurant operate as a single entity. The record reflects that a Notice of Technical or Procedural Violations was sent to Super 8 on September 21, 2011, and a Notice of Intent to Fine was served on the company on April 6, 2012. Super 8 made a timely request for hearing on April 18, 2012, and ICE filed its complaint on April 26, 2012. All conditions precedent to the institution of this proceeding have been satisfied.

III. EVIDENCE CONSIDERED

The government's supplemental prehearing statement was accompanied by a Memorandum to Case File Determination of Civil Money Penalty. In addition to this exhibit, I have considered the record as a whole, including the exhibits accompanying the parties' prehearing statements. ICE's prehearing statement was accompanied by exhibits: G-1) Notices of Inspection dated August 16, 2011 (2 pp.), G-2) Immigration Enforcement Subpoenas dated August 6, 2011 (4 pp.), G-3) Forms I-9 with accompanying documentation provided by Respondent (69 pp.), G-4) Paychex Timesheet dated August 10, 2011 (3 pp.), G-5) List of Terminated Employees from 7/1/10 to present (2 pp.), G-6) New York State Dept. of Taxation and Finance, Certificate of Authority, G-7) Notice of Technical or Procedural Failures dated September 21, 2011 (3 pp.), and G-8) Notice of Intent to Fine (2 pp.). Super 8's prehearing statement was accompanied by S corporation income tax returns for Waldorf Niagara, Inc. for 2010 and 2011 (47 pp.).

IV. STANDARDS APPLIED

A. Statutory and Regulatory Provisions

The INA imposes an affirmative duty upon employers to prepare and retain certain forms for employees hired after November 6, 1986 and to make those forms available for inspection on three days' notice. 8 C.F.R. § 274a.2(b)(2)(ii). Regulations designate the I-9 form as the Employment Eligibility Verification Form to be used. 8 C.F.R. § 274a.2(a)(2). The form must be completed for each new employee within three business days of the hire, 8 C.F.R. § 274a.2(b)(1)(ii), and each failure to properly prepare, retain, or produce the forms upon request constitutes a separate violation, 8 C.F.R. § 274a.10(b)(2). Section 1 of the form consists of an employee attestation, in which the employee provides information under penalty of perjury about his or her status in the United States, 8 C.F.R. §§ 274a.2(a)(3), (b)(1)(i)(A), and section 2 consists of an employer attestation under penalty of perjury that specific documents were

examined to establish the individual's identity and eligibility for employment. 8 C.F.R. § 274a.2(a)(3), (b)(1)(ii)(A)-(B).

An employer is obligated to ensure that the employee properly completes section 1, 8 C.F.R. § 274a.2(b)(1)(i)(A), as well as to ensure that the company itself completes section 2 properly. 8 C.F.R. 274a.2(b)(1)(ii)(B). Employers are required to examine either a List A document, or both a List B and a List C document for each employee. 8 C.F.R. § 274a.2(b)(1)(v). List A documents are those that establish both identity and employment eligibility, 8 C.F.R. § 274a.2(b)(1)(v)(A); List B documents establish identity only, 8 C.F.R. § 274a.2(b)(1)(v)(B); while List C documents establish only employment eligibility, 8 C.F.R. § 274a.2(b)(1)(v)(C). The instructions for the I-9 form[1] include lists of the specific documents that are acceptable for each purpose, as does the *Handbook for Employers*, U.S. Citizenship and Immigration Services (rev. Apr. 3, 2009).[2]

A J-1 visa holder is an exchange visitor, a nonimmigrant authorized to work for a specific employer incident to status. *See Handbook*, *supra*, at 33-35, 54. Regulations require that to verify the eligibility of such an alien, the employer must review the employee's foreign passport along with an I-94 or an I–94A bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status. 8 C.F.R § 274a.2(b)(1)(v)(A)(5). The *Handbook* explains further that for a J-1 exchange visitor, Form I-94 or I-94A should be accompanied by an unexpired DS-2019 form, issued by the Department of State, that identifies the individual's sponsor.[3] *See Handbook*, *supra*, at 54.

B. Potential Defenses

An employer will be deemed to have complied with the verification requirements despite certain technical or procedural violations in the paperwork, if the employer made a good faith attempt to comply with the requirements. 8 U.S.C. § 1324a(b)(6). When an employer has committed technical or procedural violations, the employer must be provided a period of not less than ten business days to correct them. 8 U.S.C. § 1324a(b)(6)(B)(ii). This defense has no application, however, to substantive violations.

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[1] The I-9 Form in effect at the time Super 8 hired its employees was revised in April 2009.

[2] There is a more recent revision of the *Handbook*, but the 2009 edition was in effect during the period pertinent to this case.

[3] A J-1 exchange visitor working outside the program indicated on Form DS-2019 also requires a letter from the responsible school officer.

A memorandum by Paul W. Virtue distinguishes technical and procedural violations from those that are substantive. *See* Paul W. Virtue, INS Acting Exec. Comm. of Programs, *Interim Guidelines: Section 274A(b)(6) of the Immigration & Nationality Act Added by Section 411 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (Mar. 6, 1997), *available at* 74 Interpreter Releases 706 app. 1 (Apr. 28, 1997) [hereinafter the *Virtue Memorandum*]. Violations that the *Virtue Memorandum* characterize as substantive rather than technical or procedural include failure to prepare or present an I-9; failure to check a box indicating whether an employee attests to being a U.S. citizen, lawful permanent resident, or alien authorized to work; and review of improper List A, B, or C documents.

OCAHO case law also recognizes in some circumstances a defense of substantial compliance for certain paperwork requirements. *See United States v. Candlelight Inn*, 4 OCAHO no. 611, 212, 232-33 (1994).[4] As explained in *United States v. Jonel, Inc*., the defense is narrowly construed because it is necessary to be cautious in departing from the goal of full compliance when neither the statute nor the regulations provides for any such defense. 7 OCAHO no. 967, 733, 746 & n.10 (1997) (observing that some other agencies have promulgated regulations defining such a defense). It is long and well established, for example, that attaching photocopies of documents to a facially incomplete I-9 form does not constitute substantial compliance. *See United States v. N. Mich. Fruit, Co.*, 4 OCAHO no. 667, 680, 693-94 (1994) (citing *United States v. Manos and Assos.*, 1 OCAHO no. 130, 877, 889-91 (1989) (copying documents is permissive and supplemental to the mandatory verification process, not an alternative to it)); *see also United States v. J.J.L.C., Inc.*, 1 OCAHO no. 154, 1089, 1094-95 (1990).

V. LIABILITY

A. Count I

The record reflects that the names Paulette Calandrelli and Anascasia Dergacheva appear on the

[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 database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage. htm# PubDecOrders.

company's Paychex Timesheet for the pay period August 6, 2011 to August 19, 2011. The timesheet shows Callandrelli's date of hire as January 1, 2009 and indicates that her year-to-date wages and tips totaled $5762. Dergacheva was hired on May 28, 2011 and her year-to-date wages and tips totaled $2287.38. The I-9s presented to ICE in response to the Notice of Inspection did not include forms for these two individuals, and Super 8 does not dispute that fact. The company is accordingly liable for the violations alleged in Count I.

B. Count II

1. The Government's Supplemental Prehearing Statement

ICE's supplemental statement sets forth with particularity its allegations with respect to the nineteen substantive violations alleged in Count II. The government asserts that on Diana Melendez' I-9, section 2 contains an invalid List C document ("NYS Benefit Card") with no expiration date; Section 2 of Christine Harbeson's I-9 similarly contains an invalid List C document ("NYS Benefit Card"); Section 1 of the I-9 for Dziyana Hrabiantsova contains no attestation of the worker's status as a U.S. citizen, lawful permanent resident, or alien authorized for work; Section 1 of the I-9 for Petya Ivanova does not show the employee's name, and is not dated, and section 2 does not say when the employee began work; and Section 1 of Boryana Atanasova's I-9 fails to show an alien number or admission number, and section 2 contains an invalid List B document ("Republic of Bulgaria ID Card") without an expiration date.

ICE asserts further that Section 1 of the form for Milijana Markovic lists a foreign address for the employee and section 2 contains a List A document that expired prior to the completion of the form; Section 2 of Elena Kudelina's I-9 contains an invalid List A document with no expiration date and no Certificate of Eligibility for Exchange Visitor (J-1) Status Form DS-2019; Alexey Tumanov's I-9 similarly contains an invalid List A document without a Certificate of Eligibility for Exchange Visitor (J-1) Status Form DS-2019; Obbie Scott's I-9 contains an incomplete List C document in section 2 that is not on the list of acceptable documents; and Section 2 of Joshua Rhinehardt's[5] I-9 contains an incomplete List B document that is not on the list of acceptable documents.

In addition, Section 1 of the I-9 form for Dmitry Patkin is missing the employee's signature and date; Section 1 of the I-9 form for Michael Nest is missing the employee's signature and date, and section 2 contains an incomplete List B document that is not on the list of acceptable documents; Section 2 of the I-9 for Konstantin Dolgov contains an invalid List A document and

[5] The complaint lists this individual's name as Joshua Rhinehart, but the I-9 for this individual reflects that his name is actually Joshua Rhinehardt.

no Certificate of Eligibility for Exchange Visitor (J-1) Status Form DS-2019; Section 2 of the I-9 for Shannon Rung contains incomplete List B and List C documents that are not on the list of acceptable documents; Section 1 of the I-9 for Jovana Jankovic lists a foreign address and does not contain the employee's signature and date; and for Kristina Gushchina, section 1 of the form is not dated and section 2 contains an invalid List A document and no Certificate of Eligibility for Exchange Visitor (J-1) Status Form DS-2019.

The government asserts in addition that the I-9 for Joshua Herbig reflects no attestation in section 1 of his status as a U.S. citizen, lawful permanent resident, or alien authorized for work, and section 2 reflects that Herbig was hired on April 1, 2010 but the form was not completed until May 1, 2010; on the form for Jeffrey Dexter, section 2 contains an incomplete List B document that is not on the list of acceptable documents; and, finally, the I-9 for Valentina Balakina contains an invalid List A document and no Certificate of Eligibility for Exchange Visitor (J-1) Status Form DS-2019.

2. Super 8's Response

Super 8's response asserts, in addition to the issues it raised in response to the government's prehearing statement,[6] that that certain of the allegations in Count II are false, and should be dismissed. Specifically, the company asserts that the List A document entered in Milijana Markovic's I-9 did not expire prior to completion of the form and will not expire until 2020. The company says further that Joshua Rhinehardt was under the age of eighteen and unable to present another list B document and therefore presented his school record "Student General Employment Certificate, " a copy of which is attached to his I-9. Super 8 asserts that the documents attached to Shannon Rung's I-9 are sufficient to establish her identity and employment eligibility because the ID card issued by the Niagara Falls, NY police department is a government-issued ID and contains a photograph (List B), and an official Seneca Nation License is a Native American tribal document (List C).

Super 8 contends further that the allegations respecting Dziyana Hrabiantsova, Petya Ivanova, and Milijana Markovic should be dismissed because the errors were technical and procedural only, and the company was not given ten days to correct them. The company notes that Hrabiantsova did not check a box in section 1, but did make entries in the lines next to the box and documents were attached to the I-9 that showed the individual's status. The company asserts that absence of a name on Petya Ivanova's I-9 form is cured by the name on the attached documents, which corroborate the employee's name, and that the omission of a date is a technical or procedural violation. Similarly, Super 8 contends that the absence of an address in the United

[6] The company contends that Super 8 and Villella do not exist as legal entities and that the penalties are excessive.

States for Milijana Marovic is a technical and procedural violation as well.

Super 8 says further that it substantially complied with the verification requirements with respect to the I-9s for Valentina Balakina, Jeffrey Dexter, Konstantin Dolgov, Elena Kudelina, Shannon Rung, Alexey Tumanov, and Petya Ivanova because documents attached to their I-9s establish both identity and employment authorization for each of these employees. The documents attached to Dziyana Hrabiantsova's I-9 similarly indicate the individual's authorized status, and although the status box in section 1 for Hrabiantsova was not checked for "An Alien Authorized to Work Until," the line next to it stating "A# and Admission #" was filled out, thus indicating Hrabiantsova's status as an alien authorized to work until a certain date. Super 8 contends that it satisfied the test set out in *Northern Michigan Fruit*, 4 OCAHO no. 667 at 697, and is entitled to an affirmative defense of substantial compliance with respect to the errors in these I-9s.

3. Discussion and Analysis

Visual inspection of the I-9s for the individuals named in Count II reflects that, contrary to Super 8's assertion, there are substantive violations on each of the nineteen forms for which no defense has been shown. That the forms for particular individuals may also contain some technical or procedural violations as well has no effect on the government's ability to pursue a remedy for the substantive violations.

First, the company's suggestion that copying documents can substitute for proper completion of section 2 or constitute substantial compliance with the statute, must be rejected. Any reliance on Super 8's part on the fact that it copied documents is misplaced because regulations make clear that copying, or electronic imaging, and retaining documents does not relieve an employer from the requirement of properly completing section 2. 8 C.F.R. § 274a.2(b)(3). OCAHO case law uniformly holds that copying and retaining documents without recording the relevant information on the I-9 form itself does not comply with the regulations and does not satisfy the employer's responsibility to properly complete the Form I-9. *See, e.g.*, *United States v. Seven Elephants Distrib. Corp.*, 10 OCAHO no. 1173, 4 (2013). Failure to properly complete the section 2 attestation, notwithstanding Super 8's claims to the contrary, remains a substantive violation because copying and retaining documents does not constitute substantial compliance. Super 8's response, moreover, appears to confuse the showing required to establish an affirmative defense of substantial compliance with the minimum assertions required to withstand a motion to strike that defense altogether. While Judge Schneider declined to strike the substantial compliance defense the employer asserted in *Northern Michigan Fruit*, he nevertheless emphasized that the respondent would still have a heavy burden of establishing such a defense. 4 OCAHO no. 667 at 697-98. An employer who satisfies the five requirements Judge Schneider set out is thus entitled only to the opportunity to provide additional evidence, not necessarily to the defense itself. *Id.*

Thus while ICE apparently did misread the expiration date in Milijana Markovic's Serbian passport, which appears to be valid until February 24, 2020, a Serbian passport by itself is still not a valid list A document and no valid list B or C documents are entered on Markovic's I-9 either.[7] A foreign passport may be a valid list A document if, inter alia, 1) it contains a temporary I-551 stamp or temporary I-551 notation, or, in the case of a nonimmigrant alien authorized to work for a specific employer incident to status, it is accompanied by Form I-94 or I-94A and Form DS-2019. The entry in section 2 of Markovic's I-9 identifies "Passport" as the document examined, and "visa USA" as the issuing authority, and accordingly does not identify a valid list A document. The I-9 for Elena Kudelina similarly contains an entry that identifies "Passport" as the document, with an illegible entry for the issuing authority that may be "USSR." The document attached reflects that the Russian Federation issued Kudelina's passport, which is not by itself a valid list A document.[8]

For certain of the employees with J-1 visas, Alexey Tumanov, Konstantin Dolgov, Kristina Gushchina, and Valentina Balakina, ICE correctly notes that Super 8 entered invalid list A documents in section 2 of the form. Visual examination of the I-9s for Dziyana Hrabiantsova, Petya Ivanova, Dmitry Patkin, and Jovana Jankovic reflects that they too have copies of J-1 visas attached, and they were also exchange visitors. Under list A on each of these eight forms is an entry consisting solely of the words "visa," "passport/visa," or "visa USA." A visa is not a valid list A document. *Cf. United States v. Ronning Landscaping, Inc.*, 10 OCAHO no. 1149, 14 (2012). While in some instances copies of other documents are attached to Super 8's I-9s, the necessary entries are not made on the forms, and Super 8 is liable for failure to properly complete section 2 of the I-9s for Alexey Tumanov, Konstantin Dolgov, Krisinta Gushchina, Valentina Balakina, Dziyana Hrabiantsova, Petya Ivanova, Dmitry Patkin, and Jovana Jankovic.

Super 8 is also liable for the violations related to the I-9s of Diana Melendez, Christine Harbeson, and Shannon Rung because the company entered a "NYS benefit Card" under List C on the form. While such a card may be sufficient to establish an individual's identity, it does not establish an individual's authorization to work and is not acceptable for that purpose. *See* 8 C.F.R § 274a.2(b)(1)(v)(B)(1)(v). On the form for Jeffrey Dexter, a "NYS benefit Card" was entered under List B. The card contains a photograph and is an identification card issued by a

[7] The documents attached to Markovic's I-9 are a Serbian passport and a Social Security card that states "valid for work only with DHS authorization."

[8] ICE alleges that Kudelina's I-9 is also missing the required DS-2019 form for J-1 visa holders. The documents attached to Kudelina's I-9 are a Russian passport and a Social Security Card that states "Valid For Work Only With DHS Authorization." These documents do not necessarily demonstrate that Kudelina had J-1 status.

government agency, 8 C.F.R § 274a.2(b)(1)(v)(B)(1)(v), but no expiration date was entered on the form and the *Virtue Memorandum* states that failure to include an expiration date for a List B or C document is considered a substantive violation unless a legible copy is maintained with the form and presented during inspection. *Virtue Memorandum, supra*, at appx. A. The only document attached to Jeffrey Dexter's I-9 form is a birth certificate, and Super 8 is thus liable for the violation related to his I-9.

Super 8 is also liable for the violation related to the I-9 of Obbie Scott because a "U.S. Armed Forces" card is not a valid List C document that establishes an individual's work authorization. While a military ID is a valid list B document, 8 C.F.R. § 274a.2(B)(1)(iv), it is not acceptable as a list C document. [9] Super 8 is liable as well for the violation related to the I-9 of Boryana Atanasova because a "Republic of Bulgaria" card is not a valid List B document. *See Occupational Res. Mgmt., Inc.*, 10 OCAHO no. 1166, 21-22 (2013) (finding that a "Mexico ID" card is not an acceptable List B document and noting that the few exceptions where non-U.S. documents are acceptable are spelled out in the regulations); *see also Ketchikan*, 10 OCAHO no. 1139, 19-20 (2011) (finding that a "Mexico Consult" card was not a valid List B identification document).

Super 8 is liable for failure to ensure that Joshua Herbig and Michael Nest properly completed section 1 of their I-9s. Joshua Herbig failed to check a status box in section 1, a substantive violation. *See Virtue Memorandum, supra*, at app. A. By not checking any box, Herbig essentially did not attest to any particular status despite signing section 1. Michael Nest similarly failed to attest to his status because he failed to sign and date section 1. These violations are particularly serious because an employee's failure to attest to his or her status defeats the purpose of the verification process. *See, e.g.*, *Ketchikan*,10 OCAHO no. 1139 at 10; *United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1062, 7 (2000); *United States v. Fortune E. Fashion, Inc.*, 7 OCAHO no. 992, 1075, 1080 (1998) (finding that an employee's omission of his or her immigration status defeats the whole purpose of the verification process).

Super 8 is also liable for the violation in the I-9 for Joshua Rhinehardt because the only entry on the form under list B is the phrase "working paper," followed by a social security number. Rhinehardt's I-9 reflects that he was born on March 26, 1994 and was sixteen years old when he was hired on May 15, 2011. A copy of a general certificate of employment for the University of the State of New York was attached to Rhinehardt's I-9, and is a valid school record for an individual under the age of eighteen. While the regulations permit an individual under eighteen to present a school record to establish identity, 8 C.F.R. 274a.2(B)(v)(b)(2)(i), the employer is still obligated to identify the document properly on the face of the I-9, and copying the document

[9] If the employer is the U.S. Armed Forces, however, a military ID card can establish both work authorization and identity. 8 CFR § 274a.2(A)(7).

does not excuse the employer from properly filling out section 2. Entering the phrase "working paper" on the form does not satisfy this requirement.

C. Count III

1. The Government's Supplemental Statement

ICE's supplemental statement describes the Count III violations by pointing to its exhibit G-7, the Notice of Technical or Procedural Failures issued to Super 8 on September 21, 2011. The exhibit indicates that the notice was accompanied by twenty-eight I-9 forms on which the technical or procedural failures alleged were circled in ink. The notice directed Super 8 to correct the failures and to initial and date the corrections on the forms. The government says further that on October 7, 2011, Super 8 returned the I-9s with additional information entered in the circled areas, but that the company failed to initial and date the corrections. The government concludes that the uncorrected technical errors are considered substantive violations.

ICE states that, in addition, Super 8 backdated the corrections on the I-9s for Viktoryia Pahodskaya, Jacinta Morinello, Angelo Morinello, Ella Khayrullina, Radostina Makaveeva, Victorya Miranenka, Anastasiya Susha, Michelle Lickers, Diana Dunkina, Robert Ventry, Cynthia Swayze, Jamie Williams, Chris Sweeney, Rick Napoletano, Jeffrey Janese, Marshell Nelson, Alexander Nabatov, Michael Mt. Pleasant, Gina Frey, Julie Brierley, Erica Benns, and Daniel Bacon, Jr.

2. Super 8's Response

Super 8's response asserts that all twenty-eight of the violations alleged in Count III should be dismissed because it substantially complied with all the requirements of the INA, corrected all the procedural and technical errors as requested, and did all that was necessary because the law does not require an employer to initial and date each correction. The company points out that certain of the I-9s were actually in compliance, and further argues that even though it backdated some of the corrections, it was not educated or informed that backdating would not correct the errors. The Notice of Technical or Procedural Failures, furthermore, does not instruct the employer not to correct the errors by backdating.

3. Discussion

In order to establish liability for a particular violation, it is first necessary for the government to state with specificity what the violation is. *See United States v. Stanford Sign and Awning, Inc.*, 10 OCAHO no. 1145, 7 (2012). ICE was accordingly directed after the prehearing conference to state with specificity each violation alleged in Count III, and it has not done so. Instead, ICE says

only that Super 8 failed to correct technical or procedural errors because it did not initial and date each correction, and because the company backdated twenty-two of the corrections. The *Virtue Memorandum*, however, says that failure to date and sign a correction to a technical or procedural error does not alone convert the error into a substantive violation. *See Virtue Memorandum, supra*, at 6 n.7. ICE cited no legal authority for the proposition that failure to date and initial corrections made after being served with a notice of technical and procedural failures results in a substantive violation, or how its assertions are to be reconciled with the language of the *Virtue Memorandum*. *Cf. Stanford Sign*, 10 OCAHO no. 1145 at 8-9.

While this office is not bound by the *Virtue Memorandum*, ICE is so bound and failure to follow its own guidance is grounds for dismissal of claims that are not in alignment with those guidelines. *See Occupational Res. Mgmt.*, 10 OCAHO no. 1166 at 6-7. ICE actually did little more than point to the I-9s and the "additional information written into the circled areas." Because the original I-9s are not part of the record, I am unable to compare the corrected I-9s to the originals or to reconcile ICE's assertions with the *Virtue Memorandum*.

Super 8 has asserted virtually since the onset of this case that Count III did not state with specificity what violations occurred on each I-9, therefore depriving the company of adequate notice of the alleged violations. In its first amended answer to the amended complaint, Super 8 again argued that the government failed to provide any facts identifying the alleged violations as required by 28 C.F.R. § 68.7(b)(3), and requested that these allegations be dismissed. After the prehearing conference, the government was instructed to identify with specificity each of the violations in Counts II and III; it did so for Count II but not for Count III. I have no intention of guessing what violations ICE intended to allege or how to reconcile them with the *Virtue Memorandum*. The government was given an opportunity to clarify its allegations. It has not done so. Count III will be dismissed.

VI. PENALTY

Civil money penalties are assessed according to the parameters set forth in 8 C.F.R. § 274a.10(b)(2): the minimum penalty for each violation occurring after September 29, 1999, is $110, and the maximum penalty is $1100. In assessing the penalty, the following factors must be considered: 1) the employer's size of business, 2) the employer's good faith, 3) the seriousness of the violation, 4) whether the individual was an unauthorized alien, and 5) any history of previous violations. 8 U.S.C. § 1324a(e)(5). The statute does not require that equal weight be given to each factor, or rule out consideration of additional factors. *See United States v. Hernandez*, 8 OCAHO no. 1043, 660, 669 (2000).

The government has the burden of proof regarding both liability and penalty, and must prove the existence of any aggravating factor by a preponderance of the evidence. *See United States v. Nebeker, Inc., d/b/a Aire Serv*, 10 OCAHO no. 1165, 4 (2013) (citing *United States v. Am. Terrazo Corp.*, 6 OCAHO no. 877, 577, 581 (1996)). An employer will be penalized only once for each I-9, despite the presence of other violations. *See Occupational Res. Mgmt., Inc.*, 10 OCAHO no. 1166 at 16 n.13 (reasoning that once a single substantive violation was detected on an I-9, there was no need to consider additional violations).

A. The Government's Position

ICE's Memorandum to Case File, Determination of Civil Money Penalty states that the government calculated the base fine by dividing forty-nine, the total number of substantive paperwork violations, by seventy-nine, the total number of I-9s subject to review. Super 8 had a violation percentage of sixty-two, which resulted in a base fine penalty amount of $935.

ICE then mitigated the penalty based on the size of Super 8's business, the seriousness of the violations, and the absence of unauthorized workers, but aggravated the fine based on Super 8's lack of good faith. The government states that the respondent exercised limited care in preparing the I-9s, and contends further that the company had sufficient assets and capitalization to comply with the law, but nevertheless had a "significant error rate." ICE says that it is does not know whether the company had ever received formal training on how to complete I-9s but that during the inspection, the requirements of the law were reviewed and a copy of the M-274 Handbook was provided in order to ensure future compliance. Super 8's lack of a history of previous violations was treated as neutral.

B. Super 8's position

Super 8's supplemental memorandum does not address the penalty, but its first amended answer to the amended complaint contends that the fine will "substantially impact the financial status of a small business such as Respondent." Super 8 submitted the company's S Corporation tax returns for 2010 and 2011 with its prehearing statement. The 2010 tax return showed an ordinary business income loss of $12,000, and the 2011 tax return showed a loss of $129,163.

C. Discussion and Analysis

ICE aggravated the fine based on Super 8's lack of good faith as demonstrated by the company's error rate and the fact that it had "sufficient assets…to comply with the law" but failed to do so. OCAHO case law holds, however, that a lack of good faith can be established only by a showing that the respondent engaged in culpable conduct beyond mere failure to comply with the verification requirements. *See El Azteca*, 10 OCAHO no. 1172 at 4 (citing *United States v.*

Karnival Fashion, Inc., 5 OCAHO no. 783, 477, 480 (1995) (modification by the Chief Administration Hearing Officer)). The record does not show such culpable conduct, and ICE has not met its burden in aggravating the fine based on this factor.

I cannot concur, moreover, with ICE's characterization of the violations in Counts I and II as anything less than serious. OCAHO case law is clear that failure to prepare or present an I-9 is one of the most serious violations. *See United States v. Reyes*, 4 OCAHO no. 592, 1, 10 (1994) ("[F]ailure to prepare I-9s [is] serious because that failure frustrates the national policy . . . intended to [ensure] that unauthorized aliens are excluded from the workplace."). While less serious, an employer's improper verification of documents in section 2 and an employee's failure to attest to his or her status in section 1 are still serious violations. *See United States v. DJ Drywall, Inc.*, 10 OCAHO no. 1136, 12-13 (2010). While the violations are all serious, most of the statutory penalty factors nevertheless are favorable to Super 8: it is a small business that had no unauthorized workers, the company did not act in bad faith, and it has no history of previous violations.

Super 8 is liable for two violations in Count I and nineteen violations in Count II, so the permissible penalties for the violations found in this case range from $2310 to $23,100. Because Super 8 is found liable only for twenty-one violations rather than the forty-one alleged in the amended complaint, the government's calculation of the baseline fine under its guidelines would have to be commensurately reduced based on a 27% violation rate rather than the 62% rate ICE initially employed. Such a recalculation would result in a baseline penalty of $440 for each violation. While the figure appears somewhat on the low side in light of the seriousness of the violations, taking into account the business losses reflected on Super 8's tax returns for 2010 and 2011 as well as the record as a whole, I decline to alter that amount and therefore direct that Super 8 pay civil money penalties in the amount of $9240.

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Super 8 Motel and Villella Italian Restaurant are both located at 795 Rainbow Boulevard, Niagara Falls, New York.

2. The Department of Homeland Security, Immigration and Customs Enforcement served Super 8 and Villella Italian Restaurant with Notices of Inspection and immigration enforcement subpoenas on August 16, 2011.

3. The Department of Homeland Security, Immigration and Customs Enforcement issued a

Notice of Technical or Procedural Violations to Super 8 Motel and Villella Italian Restaurant on September 21, 2011.

4. The Department of Homeland Security, Immigration and Customs Enforcement served a Notice of Intent to Fine upon Super 8 Motel and Villella Italian Restaurant on April 6, 2012.

5. Super 8 Motel and Villella Italian Restaurant, on April 18, 2012, made a request for hearing.

6. The Department of Homeland Security, Immigration and Customs Enforcement filed a two-count complaint with this office on April 26, 2012.

7. The Department of Homeland Security, Immigration and Customs Enforcement filed a motion to amend its complaint on June 20, 2012, seeking to add a third count asserting twenty-eight violations; the motion was granted on July 25, 2012.

8. Super 8 Motel and Villella Italian Restaurant filed an answer to the amended complaint August 9, 2012, and a first amended answer to the amended complaint on October 31, 2012.

9. This office issued a memorandum of case management conference on December 18, 2012 that directed The Department of Homeland Security, Immigration and Customs Enforcement to file a supplemental statement identifying with specificity each of the violations upon which Counts II and III of its complaint were predicated, and explaining its calculation of the penalty with such supporting materials as appropriate; Super 8 Motel and Villella Italian Restaurant was given an opportunity to respond and provide supporting material.

10. The Department of Homeland Security, Immigration and Customs Enforcement filed a supplemental statement on January 11, 2013 and Super 8 Motel and Villella Italian Restaurant filed a response on February 25, 2013.

11. The Department of Homeland Security, Immigration and Customs Enforcement's supplemental statement filed on January 11, 2013 did not state with specificity precisely what the uncorrected technical or procedural errors alleged in Count III of its amended complaint consisted of.

12. Super 8 hired Paulette Calandrelli and Anascasia Dergacheva and failed to present I-9s for them after being requested to do so by an authorized agency of the United States.

13. Super 8 Motel and Villella Italian Restaurant hired Diana Melendez, Christine Harbeson, Dziyana Hrabiantsova, Petya Ivanova, Boryana Atanasova, Milijana Markovic, Elena Kudelina, Alexey Tumanov, Obbie Scott, Joshua Rhinehardt, Dmitry Patkin, Michael Nest, Konstantin

Dolgov, Shannon Rung, Jovana Jankovic, Kristina Gushchina, Joshua Herbig, Jeffrey Dexter, and Valentina Balakina, and failed to ensure that the employees properly completed section 1 and/or failed itself to properly complete section 2 of the employees' I-9s.

B. Conclusions of Law

1. Super 8 Motel and Villella Italian Restaurant is an entity within the meaning of 8 U.S.C. § 1324a(a)(1) (2006).

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

3. An employer must comply with the verification requirements by ensuring that an employee completes section 1 of the Form I-9, and by itself completing section 2. 8 C.F.R § 274a.2(b)(1)(i)(A), (ii)(B) (2013).

4. In completing section 2, the employer must review documents that, alone or together, establish the employee's identity and work authorization. 8 C.F.R § 274a.2(b)(1)(v) (2013).

5. Documents that establish both an employee's identity and work authorization "[i]n the case of a nonimmigrant alien authorized to work for a specific employer incident to status," include "a foreign passport with a Form I–94 or Form I–94A bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, as long as the period of endorsement has not yet expired and the proposed employment is not in conflict with any restrictions or limitations identified on the Form." 8 C.F.R § 274a.2(b)(1)(v)(A)(5) (2013).

6. The government has the burden of proof regarding both liability and penalty, and must prove the existence of any aggravating factor by a preponderance of the evidence. *See United States v. Nebeker, Inc., d/b/a Aire Serv*, 10 OCAHO no. 1165, 4 (2013) (citing *United States v. Am. Terrazo Corp.*, 6 OCAHO no. 877, 577, 581 (1996)).

7. An employer is liable for only one violation per I-9, despite the presence of other violations. *See Occupational Res. Mgmt., Inc.*, 10 OCAHO no. 1166, 16 n.13 (2013) (reasoning that once a single substantive violation was detected on an I-9, there was no need to consider additional violations).

8. Failure to date and sign a correction to a technical or procedural violation does not alone convert the error into a substantive violation. *See United States v. Stanford Sign and Awning, Inc.*, 10 OCAHO no. 1145, 8-9 (2012); s*ee also* Paul W. Virtue, INS Acting Exec. Comm. of Programs, *Interim Guidelines: Section 274A(b)(6) of the Immigration & Nationality Act Added by Section 411 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996*

(Mar. 6, 1997), *available at* 74 Interpreter Releases 706 app. 1, 6-7 nn.7 & 8 (Apr. 28, 1997) ("Initialing and dating corrections is important for proper correction of the failure. However, failure to initial and date a correction does not render a failure substantive.").

9. The affirmative defense of substantial compliance should not be used to defeat the policies underlying the statutory provisions of the verification requirements. *See United State v. Jonel*, 7 OCAHO no. 967, 733, 745-47 (1997).

10. The Department of Homeland Security, Immigration and Customs Enforcement failed to set out with specificity the underlying technical and procedural violations in Count III as directed by the administrative law judge, and Count III will accordingly be dismissed.

11. Super 8 Motel and Villella Italian Restaurant committed twenty-one violations of 8 U.S.C. § 1324a(a)(1)(B) (2006).

12. In assessing the appropriate amounts of civil money penalties for violations of 8 U.S.C. § 1324a(b), due consideration must be given to the following factors: 1) the employer's size of business, 2) the employer's good faith, 3) the seriousness of the violation, 4) whether or not the individual was an unauthorized alien, and 5) the history of previous violations. 8 U.S.C. § 1324a(e)(5) (2006).

13. A poor rate of I-9 compliance is insufficient to show a lack of good faith absent some culpable conduct going beyond mere failure to comply with the verification requirements. *See United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 477, 480 (1995) (modification by the Chief Administration Hearing Officer).

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

Super 8 is liable for twenty-one violations of 1324a(a)(1)(B) and is ordered to pay a civil money penalty of $9240.

SO ORDERED.

Dated and entered this 22nd day of July, 2013.

_____
Ellen K. Thomas
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.