

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

March 26, 2014

UNITED STATES OF AMERICA,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324a Proceeding
)	OCAHO Case No. 13A00074
)	
GOLF INTERNATIONAL D/B/A DESERT)	
CANYON GOLF,)	
Respondent.)	
_____)	

ORDER GRANTING PARTIAL SUMMARY DECISION AND SCHEDULE FOR
SUPPLEMENTAL FILINGS

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 (2012), in which the United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a four-count complaint alleging that Golf International d.b.a. Desert Canyon Golf (Golf International, Golf, or the company) violated 8 U.S.C. § 1324a(a)(1)(B).

Count I of the original complaint alleged that Golf International failed to ensure that William Landreth and Patrick O'Donnell properly completed section 1 of Form I-9, and/or that Golf International itself failed to properly complete section 2 or 3 of their forms; Count II alleged that Golf International failed to ensure that 126 employees properly completed section 1 of Form I-9, and/or that Golf International itself failed to properly complete section 2 or 3 of their forms; Count III alleged that Golf International failed to ensure that seven employees properly completed section 1 of Form I-9, and/or that Golf International itself failed to properly complete section 2 or 3 of their forms. Count IV alleged that Golf International failed to prepare or present Forms I-9 for James Brown, Bruce Butler, Martin Nadirsha, and Ricardo Ruiz Rodriguez after being requested by the government to do so. The total penalty sought was \$136,697. Golf filed a timely answer admitting in part and denying in part the factual allegations, and contending that the penalties proposed were neither justified nor appropriate.

The government subsequently amended its complaint to remove the names of Benjamin Bigelow, Jesse Brown, Colleen Fisher, Megan Mitchell, Brennan Omara, Jessica Raymond, Alex Szabo, Jesus Valencia, Ian Waldie, and Terri Yoder from Count II, to move the names of Ramon Guerra, Raul Martinez, Israel Mendivil, and Guadalupe Mercado from Count III to Count II, and to adjust its proposed penalties.¹ Prehearing procedures have been completed. Presently pending is the government's motion for partial summary decision.² Golf filed a timely response in opposition, and the motion is ready for resolution as to the issue of liability. A schedule will be provided for supplemental filings to address the question of penalties.

II. BACKGROUND

Golf International is a golf club located in Fountain Hills, Arizona. Its president is Frieder Ort. ICE served Golf with a Notice of Inspection (NOI) and administrative subpoena on August 14, 2012. Golf produced I-9 forms for 157 active and terminated employees, as well as the company's employee lists, payroll records, and other relevant documents. ICE issued the company Notice of Suspect Documents dated September 27, 2012. Golf says that in addition ICE simultaneously issued a Notice of Discrepancy and a Notice of Technical and Procedural Failures, and that the company corrected all the technical and procedural errors. ICE then served a Notice of Intent to Fine on Golf International on April 10, 2013, after which the company made a timely request for hearing on April 23, 2013. ICE filed a complaint with this office on May 13, 2013. All conditions precedent to the institution of this proceeding have been satisfied.

III. THE GOVERNMENT'S MOTION

The government seeks partial summary decision as to liability for the 129 violations alleged in the amended complaint. First, ICE contends that there are no genuine issues of material fact with respect to Counts I, II, and III, and that a simple visual inspection of the I-9s at issue establishes the violations in each of these counts. As to Count IV, ICE says that despite Golf's denials, its evidence shows that the company failed to timely produce the I-9s for the four employees named.

ICE says that the I-9s for William Landreth and Patrick O'Donnell, named in Count I, both contain substantive violations. No expiration date is provided for the driver's license entered under List B in section 2 of William Landreth's I-9. Regulations specify that an expiration date, if there is one, for a document must be shown in the appropriate space provided on the form. 8 C.F.R. § 274a.2(b)(1)(v). Patrick O'Donnell's I-9 shows that a United States Air Force identification card was entered as a List C document in section 2, but a military ID does not

¹ The amended complaint says the new penalty for Count II is "\$105,701.05.00." The government is invited to clarify this assertion in its supplemental filings.

² Although captioned as a motion for summary decision, the government's motion makes clear that it addresses only the liability issue and seeks to defer consideration of the penalty question.

establish work authorization unless the employee is enlisted for military service and the employer is the Armed Forces. 8 C.F.R. § 274a.2(b)(1)(v)(A)(7).

ICE says further that the I-9s for the 120 individuals named in Count II each contain one or more violations in section 2. The government first provides a general characterization of the number and character of the violations: on ninety-three of the forms, Golf failed to record document information and failed to attest to its review and verification of documents, leaving section 2 entirely blank. Eleven I-9s, in addition to a blank section 2, contain section 1 violations as well, including the employer's failure to ensure that the employee a) checked a box in section 1 to designate his or her immigration status; b) provided his or her alien number; or c) signed the section 1 attestation. Some forms reflect more than one such error or omission. On the sixteen remaining I-9s, section 2 is only partially filled out, and section 1 also contains violations. ICE also provides a more specific description of its Count II allegations, but the more specific description does not entirely conform to the initial, more general characterization. A full list of the allegations in Count II is set out in Appendix A.

ICE says its evidence shows that section 2 of the I-9s for the employees named in Count III, Oscar Dominguez Jimenez, Nicolino Martino, and Neftali Perez Rios, is also entirely blank. The company's employee list reflects that Oscar Dominguez Jimenez was hired March 9, 2010 and terminated March 16, 2010; Nicolino Martino was hired January 16, 2011 and terminated February 28, 2011; and Neftali Perez Rios was hired on November 17, 2009 and terminated on June 29, 2010.³

Finally, the government says its evidence demonstrates that Golf International paid wages to and unemployment taxes for James Brown, Bruce Butler, Martin Nadirsha, and Ricardo Ruiz Rodriguez, named in Count IV, but failed to prepare or present I-9s for these employees upon request at the time of inspection. The affidavit of ICE Auditor N. Ryan Miller reflects that the auditor arrived at this conclusion by comparing Golf International's Arizona Department of Economic Security (DES) submissions with the I-9 forms the company presented and the company's own employee list.

The government contends that Golf's employee list says Brown worked from January 19, 2007 until October 16, 2008, but that DES records show the company paid wages and unemployment taxes for him in the quarters ending on June 30, 2011, December 31, 2011, and March 31, 2012. The employee list shows that Bruce Butler was hired on August 1, 2012, and no termination date is shown. The company paid wages and unemployment taxes for him during the quarter ending on March 31, 2012. The DES records show wages and unemployment taxes paid for Martin Nardisha, and the employee list shows that he worked from October 1, 2010 until May 31, 2011. DES records show wages and unemployment taxes paid for Ricardo Ruiz Rodriguez in the calendar quarter ending on December 31, 2011, and his name appears on the employee list with a hire date of October 26, 2011 and a termination date of December 29, 2011.

The government's exhibits, previously provided with its prehearing statement, included G-1)

³ The government also contends that each of these three individuals was unauthorized for employment.

Notice of Inspection and Subpoena (4 pp.); G-2) Notice of Suspect Documents with attachment (4 pp.); G-3) I-9 forms provided at inspection, some with attachments (157 pp.); G-4) Employee Listing and Unemployment Tax Internet Wage Reports (7 pp.); G-5) Arizona Corporation Commission reports (5 pp.); and G-6) Affidavit of Auditor N. Ryan Miller with attachments (29 pp.). Exhibit G-7) Affidavit of Special Agent Elizabeth M. Griffith (2 pp.), was filed subsequently on September 27, 2013. ICE amended its prehearing statement on January 9, 2014 to include two additional pages inadvertently omitted from exhibit G-3 and one additional page inadvertently omitted from exhibit G-4.

IV. GOLF INTERNATIONAL'S RESPONSE

Golf International's response asserts that the government did not seem to care that the company corrected all the violations, the vast majority of which Golf contends were technical, not substantive. The company says it complied in good faith with the requirements, and that because it uses the E-Verify System⁴ it is entitled to a rebuttable presumption that it has not violated the law. Golf says summary decision is inappropriate because there are genuine issues of material fact respecting each of ICE's allegations.

First, the company says with respect to Count I that it did provide a copy of William Landreth's driver's license that clearly showed the document's expiration date, and that it believed in good faith that Patrick O'Donnell's U.S. Air Force identification card was a valid document that proved his citizenship and work authorization. Golf contends that its good faith belief entitles it to a presumption that it did not violate § 274A.

Golf International says further that it corrected every Count II violation found by the auditor, and that it submitted information for each of these employees to E-Verify. The company says it believed that the use of E-Verify was sufficient to accomplish the attestation requirement. The company argues that none of the violations demonstrates a willful failure, that the evidence demonstrates the company's good faith efforts to comply with the verification requirements, and that summary decision in the government's favor is inappropriate.

Golf International does not deny the fact that section 2 was blank on the I-9s of the three individuals named in Count III. The company says, however, that summary decision is inappropriate for this count because there are genuine issues of material fact with respect to whether these employees were authorized to work in the United States. Golf says that Oscar Dominguez Jimenez was hired March 12, 2010, and an E-Verify check was initiated for him as required, but when he was notified that the social security number did not match, he quit on March 15, 2010. Nicolino Martino was terminated immediately upon receipt of a

⁴ E-Verify is an internet-based employment eligibility verification system operated by DHS's Citizenship and Immigration Services (CIS) in cooperation with the Social Security Administration (SSA). The program provides a way to compare information from an employee's I-9 Form against data in DHS, SSA, and Department of State records to determine whether the information matches government records and whether a new hire is authorized to work in the United States.

Nonconfirmation about February 14, 2011. Golf says E-Verify confirmed that Neftali Perez Rios had documents permitting him to live and work in the United States, and the company could not have discovered the fraud he perpetrated.

Golf International says that although it was unable to locate the I-9 forms for James Brown and Bruce Butler, named in Count IV, when requested, it did subsequently locate and produce their I-9s. The company says it has no records of employing Ricardo Ruiz Rodriguez and that it is therefore unable to admit or deny liability regarding this individual's I-9. As a result, the company argues that there remain genuine issues of material fact regarding Count IV that preclude summary decision. Golf made no response to the government's allegation that the company failed to present an I-9 for Martin Nadirsha.

Exhibits filed with the company's prehearing statement include R-1) I-9 form for William C. Landreth and employment application for Patrick C. O'Donnell (2 pp.); R-2) I-9 forms (127 pp.); R-3) I-9 forms with attachments for Oscar Dominguez Jimenez, Ramon Guerra, Raul Martinez, Nicolino Martino, Israel Mendivil, Guadalupe Mercado, and Neftali Perez Rios (26 pp.); R-4) I-9s and attachments for James D. Brown and Bruce T. Butler (5 pp.); and R-5) employee list with E-Verify results (7 pp.).

V. DISCUSSION AND ANALYSIS

Contrary to Golf International's assertion that the vast majority of the violations are technical, all the violations charged in the complaint are substantive. The good faith defense provided by 8 U.S.C. § 1324a(b)(6) is available only for technical or procedural violations, and has no application to substantive violations. The difference between technical or procedural violations and those that are substantive is explained in a memorandum authored by Paul W. Virtue, *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) (the Virtue Memorandum or Interim Guidelines), available at 74 No. 16 Interpreter Releases 706 (Apr. 28, 1997).

The violations in the I-9s for William Landreth and Patrick O'Donnell, named in Count I, are both substantive in nature. The Virtue memo expressly provides that failure to enter the expiration date for a document is a technical violation if and only if a copy of the document is attached to the I-9 and presented at the time of inspection. While the company asserts that it did present a copy of Landreth's license, no evidence supports this assertion. Landreth's I-9 appears in the record as part of the government's exhibit G-3, and part of Golf's exhibit R-1. In neither case is a copy of the license attached to his I-9. There are no attachments to the government's copy and the only other document in Golf's exhibit 1 is a different individual's employment application. The company's subjective belief, moreover, that Patrick O'Donnell's Air Force ID was valid to demonstrate O'Donnell's work authorization is expressly contrary to regulations that clearly provide that a military identification card is acceptable to establish an employee's work authorization only when the employer is the Armed Forces. 8 C.F.R. § 274a.2(b)(v)(1)(A)(7). The documents acceptable to show an individual's identity and/or work authorization are those set out in 8 U.S.C. § 1324a(b)(1)(B),(C), and (D), and in 8 C.F.R. §

274A2(b)(1)(v). The documents are also enumerated in the List of Acceptable Documents attached to the I-9 form. ICE met its burden of establishing that it is entitled to summary decision for the violations alleged in Count I.

As ICE points out, visual examination of the I-9s for the individuals named in Count II confirms its assertion that section 2 is in fact blank on ninety-three of them. In addition, fourteen other forms similarly lack a signature in section 2 attesting to the review and verification of documents. Visual examination reflects that Sara Frimmel and Sonja Ort both checked a box in section 1 to indicate status as a lawful permanent resident, but failed to provide an A number. *See United States v. Occupational Res. Mgmt.*, 10 OCAHO no. 1166, 17 (2013) (stating that failure to ensure that the employee enters an alien number “prevents the government from verifying the employee’s work authorization status”).⁵ The I-9s for Warren Fullerton and Jennifer Phillips reflect that Golf recorded information only in List B, and failed to record information in List A or List C. Regulations require that the employer examine and enter either a List A document, or both a List B and a List C document. 8 C.F.R. § 274a.2(b)(1)(v). Stephen Holzapfel’s I-9 shows that Golf entered an Arizona driver’s license under List B, but did not provide the expiration date or attach a copy of the license. Golf failed in addition to ensure that Rudy Lopez, Anne Ort, Martin Ort, and Kyle Roe signed the section 1 attestation. *See United States v. Super 8 Motel & Villela Italian Rest.*, 10 OCAHO no. 1191, 10 (2013) (stating that the employees’ failure to attest to any status defeats the purpose of the verification process). On the forms for Larry Dewanz, David Paz, Robert Schmitz, and Jose Soto, Golf failed to ensure that the employee checked a box in section 1 to identify his or her status as a U.S. citizen, lawful permanent resident, or alien authorized for work.

While Golf International contends that its participation in E-Verify entitles it to a presumption that it has not violated the law, the E-Verify program provides no such blanket protection. An employer’s first responsibility in that program is, in fact, to properly complete an I-9 form for each new employee. As ICE points out, the E-Verify Memorandum of Understanding that must be signed by a participating employer provides that “The Employer understands that participation in E-Verify does not exempt the Employer from the responsibility to complete, retain, and make available for inspection Forms I-9 that relate to its employees.” *See The E-Verify Program for Employment Verification Memorandum of Understanding*, USCIS (last revised Sept 1, 2009).

ICE also satisfied its burden of establishing that it is entitled to summary decision as to liability for the violations alleged in Count III. While there may well be genuine factual issues in dispute

⁵ 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>.

as to whether Oscar Dominguez Jimenez, Nicolino Martino, and Neftali Perez Rios were authorized for employment in the United States, those disputes are not material to the issue of liability because their resolution is unnecessary to this decision. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986) (a genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit). There is no genuine issue of material fact as to whether or not section 2 on the I-9s for each of these employees is totally blank. Visual examination of the forms so reflects, and liability is established for the violations on the face of the I-9 forms for Oscar Dominguez Jimenez, Nicolino Martino, and Neftali Perez Rios.

Regulations impose an affirmative duty upon employers to prepare and retain I-9 forms for employees and to make those forms available for inspection on three days' notice. 8 C.F.R. § 274a.2(b)(2)(ii). Golf International acknowledges that it did not present I-9 forms for James Brown and Bruce Butler on three business days' notice as required. Thus there appears to be no genuine issue of material fact as to whether Golf International timely presented the I-9 forms for these two employees, and the company's belated presentation of forms for them does not satisfy the regulatory requirement. *See United States v. A&J Kyoto Japanese Rest., Inc.*, 10 OCAHO no. 1186, 7 (2013). It is not apparent, moreover, why Golf International insists that it has no records of employment for Ricardo Ruiz Rodriguez. The company's own employee list reflects that this employee was hired on October 26, 2011 and terminated on December 29, 2011. Golf paid wages for him in the calendar quarter ending December 31, 2011, but no I-9 was presented for him at the time of the inspection. Golf International made no response to the government's allegation that the company did not present an I-9 for Martin Nadirsha, whose name appears on the company's employee list with a hire date of October 1, 2010 and a termination date of May 31, 2011. DES reports nevertheless reflect that wages were paid to this individual in the calendar quarter ending on December 31, 2011. Nadirsha's name also appears on Golf's exhibit R-5, with an indication that he was hired on March 12, 2010 and that E-Verify found him authorized for employment on March 15, 2010. Whatever the actual dates of his employment, no I-9 for Nadirsha was presented at the time of inspection, and the government is entitled to summary decision as to liability for the four violations alleged in Count IV.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Golf International d.b.a. Desert Canyon Golf is a golf club located in Fountain Hills, Arizona.
2. The Department of Homeland Security, Immigration and Customs Enforcement served Golf International d.b.a. Desert Canyon Golf with a Notice of Inspection (NOI) on August 14, 2012.
3. The Department of Homeland Security, Immigration and Customs Enforcement issued a Notice of Suspect Documents dated September 27, 2012 to Golf International d.b.a. Desert Canyon Golf.
4. The Department of Homeland Security, Immigration and Customs Enforcement served Golf International d.b.a. Desert Canyon Golf with a Notice of Intent to Fine on April 10, 2013.

5. Golf International d.b.a. Desert Canyon Golf made a request for hearing on April 23, 2013.
6. The Department of Homeland Security, Immigration and Customs Enforcement filed a complaint with the Office of the Chief Administrative Hearing Officer on May 13, 2013.
7. Golf International d.b.a. Desert Canyon Golf failed to provide an expiration date for William Landreth's driver's license in section 2 of his I-9 form, and no copy of the license was presented to ICE at the time of inspection.
8. The I-9 form for Patrick O'Donnell shows that a United States Air Force identification card is entered under List C in section 2 of the form.
9. Golf International d.b.a. Desert Canyon Golf failed to sign section 2 of Form I-9 for 107 individuals listed in Count II.
10. Golf International d.b.a. Desert Canyon Golf failed to ensure that Sara Frimmel and Sonja Ort provided an alien number after checking a box in section 1 indicating status as a lawful permanent resident.
11. Golf International d.b.a. Desert Canyon Golf recorded only a List B document on the I-9s for Warren Fullerton and Jennifer Phillips, and did not record either a List A or a List C document.
12. Golf International d.b.a. Desert Canyon Golf recorded a driver's license under List B on Stephen Holzapfel's I-9 form, and failed to include the expiration date or attach a copy of the license.
13. Golf International d.b.a. Desert Canyon Golf failed to ensure that Rudy Lopez, Anne Ort, Martin Ort, and Kyle Roe signed section 1 of their respective I-9 forms.
14. Golf International d.b.a. Desert Canyon Golf failed to ensure that Larry Dewanz, David Paz, Robert Schmitz, and Jose Soto checked a box in section 1 to indicate status as a U.S. citizen, lawful permanent resident, or alien authorized for work.
15. No employer signature appears in section 2 of the I-9s for Oscar Dominguez Jimenez, Nicolino Martino, and Neftali Perez Rios.
16. Golf International d.b.a. Desert Canyon Golf failed to present Forms I-9 for James Brown, Bruce Butler, Ricardo Ruiz Rodriguez, and Martin Nadirsha within three government business days of the Notice of Inspection as requested by the Department of Homeland Security, Immigration and Customs Enforcement.

B. Conclusions of Law

1. Golf International d.b.a. Desert Canyon Golf is an entity within the meaning of 8 U.S.C. § 1324a(a)(1) (2012).
2. Golf International d.b.a. Desert Canyon Golf filed a timely request for hearing.
3. All conditions precedent to the institution of this proceeding have been satisfied.
4. Golf International d.b.a. Desert Canyon Golf is liable for 125 violations consisting of failure to ensure that employees properly completed section 1 of Form I-9, and/or failure to properly complete section 2 of their forms itself.
5. Golf International d.b.a. Desert Canyon Golf is liable for four violations consisting of failure to prepare and/or present I-9 forms for employees after being requested by the government to do so.
6. Golf International d.b.a. Desert Canyon Golf is liable for a total of 129 violations of 8 U.S.C. § 1324a(a)(1)(B).

ORDER

Liability is established for all the violations alleged in the complaint. ICE may have until April 16, 2014 to file its penalty request and Golf's response may be filed on or before May 7, 2014.

SO ORDERED.

Dated and entered this 26th day of March, 2014.

Ellen K. Thomas
Administrative Law Judge