

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

April 14, 2016

UNITED STATES OF AMERICA,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324a Proceeding
)	OCAHO Case No. 12A00005
)	
INTERNATIONAL PACKAGING, INC.,)	
Respondent.)	
_____)	

ORDER RESOLVING MOTIONS FOR PARTIAL SUMMARY DECISION AND
SCHEDULE FOR SUPPLEMENTAL FILINGS

Appearances:

Terry M. Louie
for the complainant

DeAnne M. Hilgers
for the respondent

I. PROCEDURAL HISTORY

The Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that International Packaging, Inc. (International Packaging, IPI, or the company) engaged in ninety-five violations of the employment eligibility verification requirements 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).

Count I asserts that the company failed to prepare or present I-9 forms for twenty-one named employees, and Count II alleges that seventy-four of IPI’s I-9 forms had substantive errors. International Packaging filed an answer admitting to eleven of the violations alleged in Count I and sixteen of the violations alleged in Count II, but denying the remaining allegations and

raising ten affirmative defenses. Presently pending are the parties' cross motions¹ for partial summary decision, together with a group of procedural motions. The government's motion to submit the Supplemental Declaration of ICE Auditor Eric Robertson is granted; all other procedural motions are denied.

II. BACKGROUND INFORMATION

International Packaging was cofounded by Fred Butkovich and others in 1972, and is now run by Butkovich's children, Jon Butkovich and Mary Jo Morales. Jon Butkovich is the president and chief executive officer of IPI, and Mary Jo Morales is the company's general manager and chief financial officer. The company is located in Brooklyn Park, Minnesota, a suburb of Minneapolis, and describes itself as a provider of packaging marketing, promotional products, finseal overwrapping, and retail shrink-wrapping services.

The government issued a Notice of Inspection (NOI) and subpoena to IPI on February 17, 2011. During the course of the inspection, ICE issued the company a Notice of Suspect Documents (NSD) on March 15, 2011, and the company followed up with the reverification process for the nineteen employees named in the NSD, ultimately terminating all nineteen. ICE also issued the company a Notice of Technical and Procedural Failures (NTPF) on May 3, 2011, after which IPI corrected the fifty-three technical violations identified in the NTPF within the ten-day period allotted for them to do so. On August 16, 2011, the government issued IPI a Notice of Intent to Fine (NIF), and on August 23, 2011, IPI filed its request for hearing. All conditions precedent to the institution of this proceeding have been satisfied.

III. STATUTORY AND REGULATORY PROVISIONS INVOLVED

A. The Copying of Employee Documents

An employer is permitted, but not required, to copy the documents an employee presents for I-9 purposes. 8 U.S.C. § 1324a(b)(4); 8 C.F.R. § 274a.2(b)(3). Until August 23, 2010, the regulation unambiguously provided that if an employer made such copies, the copies had to be retained with the I-9 form. The section was amended, effective August 23, 2010, by a new final rule set out at 75 Fed. Reg. 42575-01 (July 22, 2010). The summary states that the purpose of the new rule is to amend the regulation "to provide that employers and recruiters or referrers for a fee who are required to complete and retain the Form I-9, Employment Eligibility Verification, may sign this form electronically and retain this form in an electronic format." *Id.* The new rule permits employers to complete, sign, scan, and store I-9s electronically "as long as certain

¹ IPI's cross-motion is captioned as a counter-motion.

performance standards set forth in this final rule for the electronic filing system are met.” *Id.* The final rule says it makes minor changes to an interim final rule promulgated in 2006.

The interim rule, effective June 15, 2006, 71 Fed. Reg. 34510-01 (June 15, 2006) notes that it implements statutory changes by establishing standards for electronic signatures and the electronic retention of I-9 forms, and invites public comment.² After publication of the interim rule, a commenter asked if I-9 forms could be stored with an employee’s other records, and other commenters also asked about storage of employee documents. *See* Electronic Signature and Storage of Form I-9, Employment Eligibility Verification, 75 Fed. Reg. 42575-01, 42576 (July 22, 2010) (to be codified at 8 C.F.R. pt. 274a). The response stated that “Form I-9 and verification documentation may be stored in a separate Form I-9 file or as part of the employee’s other employment records.” *Id.* The notice nevertheless also said that the interim final rule “merely provided an additional option for employers to sign and store the Form I-9 and supporting documents electronically rather than by retaining paper, microfilm or microfiche copies.” *Id.*

The text of 8 C.F.R. § 274a.2(b)(3) now provides that if a copy or electronic image of an employee’s documents is made, “it must either be retained with the Form I-9 or stored with the employee’s records and be retrievable consistent with paragraphs (e), (f), (g), (h), and (i) of this section.” Paragraphs (e), (f), (g), (h), and (i) are all addressed to the standards for electronic retention of the forms, including storage systems, security systems, and electronic signatures.

The current Employer Handbook, however, now provides that an employer may, but is not required to, retain the document copies with the I-9 form. The Handbook also qualifies the statement by providing that the copies must be retained with the I-9 or stored with the employee’s records. *See* Handbook for Employers, Form M-274 (rev. 04/30/13). This provision differs from the undated version of the Handbook in IPI’s exhibit E accompanying the affidavit of Mary Jo Morales, which says, “You may choose to copy or scan documents an employee presents when completing Form I-9, which you may, but are not required to, retain with his or her Form I-9.” Respondent’s Answer, Morales Aff. Ex. E. An ensuing paragraph says in addition that “USCIS recommends that employers who choose to retain copies of employees’ documentation keep those copies together with their Forms I-9.” *Id.*

B. The “Good Faith” Defense to Certain Paperwork Violations

A narrow but complete affirmative defense may be available for certain technical or procedural paperwork violations where an employer made a good faith attempt to comply with a particular recordkeeping requirement. 8 U.S.C. § 1324a(b)(6). Congress added this “good faith” defense, colloquially known as the “Bono Amendment,” in 1996. *See* Illegal Immigration Reform and

² The interim rule involved no changes to the provision directing that if a copy or electronic image of employee documents was made, it must be retained with the I-9 form.

Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104-208, § 411, 110 Stat. 3009 (Sept. 30, 1996). The provision says with respect to certain technical or procedural violations, that an employer must be given a period of not less than ten days to correct the failure voluntarily. 8 U.S.C. § 1324a(b)(6)(A), (B). The defense has no application, however, to substantive violations.

C. The Virtue Memorandum

The distinction between substantive violations and those that are technical and procedural is elaborated in a Memorandum from Paul W. Virtue, INS Acting Exec. Comm'r of Programs, *Interim Guidelines: Section 274A(b)(6) of the Immigration & Nationality Act Added by Section 411 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (Mar. 6, 1997) (the Virtue Memorandum or Interim Guidelines), *available at* 74 Interpreter Releases 706 app. 1 (Apr. 28, 1997). The Ninth Circuit has held that the Virtue Memorandum is entitled to *Skidmore* deference.³ *See Ketchikan Drywall Servs., Inc. v. ICE*, 725 F.3d 1103, 1112-13 (9th Cir. 2013).

Violations in section 1 of the form that the Interim Guidelines characterize as substantive rather than technical or procedural in nature include inter alia: the lack of an employee signature, lack of a check mark in any box, employee attestation not completed within three days of hire, and employee attestation to status as a lawful resident or authorized alien without providing an alien number and/or expiration date, unless the employer included the A number in section 2 or on a legible copy of the document produced at the time of the inspection.

Violations in section 2 that the Interim Guidelines characterize as substantive include: the lack of an employer signature in the attestation, listing of improper documents to establish identity or employment eligibility, and the lack of a complete document title, identification number, and/or expiration date where no legible copy of the document is retained with the I-9 and presented at the inspection. Virtue Memorandum, apps. A & B.

IV. THE POSITIONS OF THE PARTIES

A. The Government's Motion for Partial Summary Decision

The government's motion seeks partial summary decision as to liability for both counts in the complaint. ICE says first that IPI failed to produce I-9 forms for any of the twenty-one individuals named in Count I on the scheduled date of inspection, February 23, 2011, but even assuming, as Mary Jo Morales contends, that there was an extension until March 2, 2011, the company did not produce these I-9 forms on March 2, 2011, either. The government acknowledges that some I-9 forms were produced on February 23/24, 2011, and some on March

³ *See Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

2, 2011, but says it was not until after ICE Auditor Eric Robertson reviewed those forms that he discovered twenty-one other I-9s were missing.

Robertson says in his declaration that he learned about the existence of twenty-one additional employees from his examination of payroll records and other documents. He identified what appeared to be nine current employees, Tracy Arnsdorf, Jon Butkovich, Dale Carpentier, John Carriere, Jodi Diede, Paul Harris, Lee Herman, Jesus Hernandez, and Clint Postolka, and twelve former employees, Carolina Avila, Mario Castillo, Yamir Gonzalez, Debra Harding, Dominik Harris, Alyssa Hopp, Chantelle Johnson, Jose Morgan, Corey Newman, Mireya Pina, Michael Rome, and Carla Vivar, for whom no I-9 had been produced. On March 9, 2011, Robertson sent IPI a request for the I-9 forms for the nine who appeared to be current employees, and these were provided by IPI on March 14, 2011, together with the forms for Yamir Gonzalez and Debra Harding. Robertson's declaration says he did not make an additional request for the forms for the former employees because he was more concerned about the current employees.

The government says further that sixty-seven of the seventy-four violations in Count II involve the company's failure to enter a document title, identification number, or expiration date for a List A, List B, or List C document in section 2 of Form I-9, and that no copies of the documents were attached to the I-9s or presented with the forms.⁴ Pursuant to the Virtue Memorandum, such omissions are classified as technical or procedural if, and only if, a legible copy of the document is retained with the I-9 form and presented at the I-9 inspection, which did not happen here. ICE points to OCAHO case law establishing that late-produced supporting documents are not considered in determining whether the employer properly completed the I-9 forms, citing *United States v. Ketchikan Drywall Services, Inc.*, 10 OCAHO no. 1139, 7-9 (2011).⁵

The government asserts that there is no merit to any of the company's purported affirmative defenses. First, ICE says it took no action to waive the initial February 23, 2011, deadline for presenting I-9s for the individuals named in Count I. Second, ICE says it did not waive any

⁴ ICE says in addition that thirteen of these sixty-seven forms contain other substantive violations as well.

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>.

rights by not expressly compelling the production of copies of the employees' supporting documents in the subpoena, and says further that the good faith affirmative defense provided by 8 U.S.C. § 1324a(b)(6) applies only to technical and procedural violations, and all the violations alleged in the complaint are substantive in nature. The government contends that simple visual examination of the I-9 forms themselves reveals all the violations alleged in Count II, and all are substantive. Finally, ICE says the defense of "insufficient process" is unavailing as well because service was properly made and there was nothing improper about requesting the supporting documents in a cover letter rather than in the subpoena.

Although the government's motion is itself addressed only to issues of liability, its brief nevertheless also contends that baseline penalties of \$935 for each violation are appropriate pursuant to internal agency guidance. ICE says that while the company's size is a mitigating factor, the seriousness of the violations is an aggravating factor and the remaining statutory factors should be treated as neutral. A Memorandum to Case File, Determination of Civil Money Penalty (Ex. G-45) accompanying the motion sets out the procedure and rationale for the penalty sought.

B. IPI's Opposition to the Government's Motion, and Cross-Motion for Partial Summary Decision Respecting Count II

IPI argues that there are genuine issues of material fact precluding summary decision. The company says the government failed to establish that IPI was obliged to provide its I-9s prior to March 2, 2011, and that there is a genuine issue as to what the deadline actually was. Mary Jo Morales says she understood from her conversation with Auditor Eric Robertson that the due date was extended until March 2, 2011, and argues that the company complied with all deadlines during the investigation. IPI also argues that the government failed to prove that it never received the so-called "missing" forms.

The affidavit of Mary Jo Morales says that I-9s were completed for every employee before the NOI, except for one individual whom she considered more of an independent contractor. She prepared Arnsdorf's I-9 after the NOI. The company acknowledges liability for eleven of the violations in Count I involving failure to timely present the I-9 forms for Tracy Arnsdorf, Jon Butkovich, Dale Carpentier, John Carriere, Jodi Diede, Yamir Gonzalez, Debra Harding, Paul Harris, Lee Herman, Jesus Hernandez, and Clint Postolka, but says the government cannot prove it never received the I-9s for Carolina Avila, Mario Castillo, Dominik Harris, Alyssa Hopp, Chantelle Johnson, Jose Morgan, Corey Newman, Mireya Pina, Michael Rome, and Carla Vivar.

IPI also acknowledges liability for sixteen of the violations alleged in Count II, but contends that it cannot be held liable for most of the violations in that count because ICE's subpoena failed to properly request copies of the employees' supporting documents. The subpoena did not include or even mention the employees' verification documentation. The company points to 8 U.S.C. § 1324a(e)(2), which authorizes the government to compel the production of evidence by

subpoena, and argues that while the production of the I-9 forms themselves may be compelled without the necessity of a subpoena pursuant to 8 C.F.R. § 274a.2(b)(2)(ii), other documents can be compelled only by subpoena.

The company argues that the necessity of a subpoena is reinforced by the regulatory change in July 2010 that now expressly permits the storage of verification documents “in a separate Form I-9 file or as part of the employee’s other employment records.” Respondent’s Memorandum at 8, citing 8 C.F.R. § 274a.2(b)(3) (quoting 75 Fed. Reg. 42576 (July 22, 2010)). IPI points out that the new regulation no longer requires verification documents to be kept with the I-9 form, and argues that the provision in the 2008 ICE Guidance (Ex. G-59) saying that copies must be retained with the Form I-9 and presented at the I-9 inspection is accordingly superseded by regulation. The declaration of DeAnne Hilgers states that IPI offered to provide ICE with copies of the verification documentation and did so on September 30, 2011; the company contends that ICE should have accepted these documents and given the company ten days in which to cure technical or procedural errors. IPI accordingly denies that most of the violations in Count II are substantive, or are even violations at all.

The affidavit of DeAnne Hilgers states that the affiant was told by ICE agents at a Federal Bar Association worksite enforcement conference in Chicago that requesting supporting documents in a cover letter⁶ is not consistent with standard ICE practice. Attached to the affidavit are redacted sample documents in which the attachments to three other subpoenas explicitly request photocopies of the employees’ documents. The affidavit of Mary Jo Morales says that the affiant consulted an attorney prior to 2003 who advised her to copy the employees’ supporting documents, and to keep the document copies separately from the I-9s. The attorney also advised her not to turn over documents unless they were “specifically and properly requested.” Respondent’s Answer, Morales Aff. at 1. Morales says she did not produce the document copies with the I-9s because the subpoena IPI received did not ask for copies of the documents. The affidavit of Richard L. Breitman states that the affiant is the lawyer who advised Mary Jo Morales to keep the copies of supporting documents separately, and to provide only the documents specifically requested.

IPI also contests the allegations in Count II respecting the I-9s for four other employees. First, the company notes that while Guadalupe Acosta Flores did not check a box in section 1 of her I-9, she did enter her alien number next to the words Lawful Permanent Resident, and did sign the attestation. Pursuant to *Ketchikan*, 10 OCAHO no. 1139 at 16, this constitutes substantial compliance with the verification requirements and is not a violation. IPI points out that Holly Hoy was hired in part to assist in completing I-9 forms, and says she was authorized to act as an agent for the employer in doing so. Hoy completed section 1 of her I-9 on her own behalf, and

⁶ The cover letter here requests presentation of the original I-9s, “including photocopies taken of documents presented in order to fulfill the employment requirements.” The subpoena does not mention the supporting documents.

then, consistent with her duties, completed section 2 on behalf of IPI. IPI says further that Leah Olson, a minor under the age of eighteen, is not limited to presenting a document on List B, but may present a clinic, doctor, or hospital record instead. IPI argues that because insurance information is routinely part of clinic, doctor, or hospital records, an insurance card is also an acceptable document for List B purposes. IPI points out that failure to indicate in column B that an individual is under eighteen is a technical violation, and no opportunity was provided for the company to correct this error. Finally, IPI says that Liliana Renteria attested in section 1 to being a lawful permanent resident, and presented a permanent resident card with a number, and IPI retained a copy of her verification documentation.

IPI cross-moves for partial summary decision with respect to sixty-seven of the violations alleged in Count II. The company says that an employer is not obligated to attach copies of the employees' supporting documents to their I-9 forms, and that the final rule promulgated in July 2010 expressly permits an employer to store copies of employees' supporting documents with the employee's other records. According to the company, ICE was obligated to compel production of the employees' supporting documents by subpoena, and having failed to do so must afford the company the benefit of the good faith defense.

Finally, IPI says the fine proposed is disproportionate to any liability because the company is a small family owned business. The affidavit of CPA Stuart Johnson says the company has been struggling financially for at least four years, has virtually no income, and is deeply in debt. The company points out that it demonstrated good faith both during and after the audit, that it has enrolled in E-Verify, that it completed I-9 forms for each employee, had no unauthorized employees, and has no history of previous violations. IPI says all these factors should weigh in favor of mitigation, particularly in light of the company's precarious financial situation.

C. The Government's Response to IPI's Cross-Motion

ICE says that dismissal of Count II is unwarranted, and that nothing in the statute or the regulations requires the issuance of a subpoena as the only means of obtaining documents from an employer. ICE says the word "may" means exactly that, and that while issuance of a subpoena is permitted, it is not required. The government points in addition to regulations providing that the copying and retention of documents does not relieve the employer from the obligation of fully completing section 2 of Form I-9, citing 8 C.F.R. § 274a.2(b)(3), and says the omissions on the I-9 forms are substantive violations where no copies of the documents were retained with the I-9s or presented at the time of the inspection.

The government agreed to withdraw the allegation involving the I-9 form for Guadalupe Acosta Flores, but argues that permitting employees such as Holly Hoy to verify their own employment eligibility undercuts the core requirement of the law that an individual's employment eligibility documents be independently verified by the employer. ICE points out that the I-9 for Leah Olson not only did not indicate that she was a minor under the age of eighteen, but also reflected

an improper List B document because the insurance card she presented was not issued by a clinic, doctor, or hospital. Finally, the government says the section 1 attestation on Liliana Renteria's I-9 is defective without an alien number in either section, and the information entered in section 2 for List B and C documents is incomplete.

ICE points out that IPI admitted the violations in Count I for Tracy Arnsdorf, Jon Butkovich, Dale Carpentier, John Carriere, Jodi Diede, Yamir Gonzalez, Debra Harding, Paul Harris, Lee Herman, Jesus Hernandez, and Clint Postolka, and the Declaration of Eric Robertson shows that the government never received the I-9s for Carolina Avila, Mario Castillo, Dominik Harris, Alyssa Hopp, Chantelle Johnson, Jose Morgan, Corey Newman, Mireya Pina, Michael Rome, and Carla Vivar, so summary decision as to liability is accordingly warranted for Count I as well as Count II.

V. EVIDENCE CONSIDERED

Exhibits accompanying the government's motion include: G-1) Articles of Incorporation (5 pp.); G-2) Cover letter and Notice of Inspection dated February 17, 2011 (2 pp.); G-3) Subpoena dated February 17, 2011 (3 pp.); G-4) handwritten notes of Eric Robertson, Auditor, dated February 17, 2011; G-5) handwritten notes of Eric Robertson, Auditor, dated February 18, 2011; G-6) email exchange between Eric Robertson, Auditor, and Mary Jo Morales dated February 24, 2011, and post-it notes (4 pp.); G-7) Post-it note; G-8) email exchange between Eric Robertson, Auditor, and Mary Jo Morales dated February 24-28, 2011; G-9) email dated March 1, 2011 from Mary Jo Morales to Eric Robertson, Auditor; G-10) email dated March 1, 2011 from Mary Jo Morales to Eric Robertson, Auditor; G-11) emails dated March 3, 2011 between Eric Robertson, Auditor, and Mary Jo Morales; G-12) email dated March 3, 2011, between Mary Jo Morales to Eric Robertson, Auditor (3 pp.); G-13) letter dated March 9, 2011, from Christopher J. Oelkers, Supervisory Special Agent, to Mary Jo Morales, and attached email (2 pp.); G-14) post-it note; G-15) email exchange dated March 14, 2011, between Mary Jo Morales and Eric Robertson, Auditor; G-16) Notice of Suspect Documents dated March 15, 2011, and attachments (5 pp.); G-17) handwritten notes of Eric Robertson, Auditor, dated March 15, 2011; G-18) email dated March 24, 2011 from Mary Jo Morales to Eric Robertson, Auditor; G-19) post-it note; G-20) email exchange between Mary Jo Morales and Eric Robertson, Auditor, dated March 30-31, 2011; G-21) handwritten notes of Eric Robertson, Auditor; G-22) email exchange between Mary Jo Morales and Eric Robertson, Auditor, dated April 14 and 15, 2011 (3 pp.); G-23) email exchange between Mary Jo Morales and Eric Robertson, Auditor, dated April 18, 2011 (2 pp.); G-24) email exchange between Mary Jo Morales and Eric Robertson, Auditor, dated April 18, 2011; G-25) email exchange between Mary Jo Morales and Eric Robertson, Auditor, dated March 29, and April 21, 2011 (2 pp.); G-26) letter dated April 22, 2011 from Christopher J. Oelkers, Supervisory Special Agent, to Mary Jo Morales; G-27) letter dated April 22, 2011, from Christopher J. Oelkers, Supervisory Special Agent, to Mary Jo Morales, with attachments (4 pp.); G-28) letter dated April 25, 2011, from Mary Jo Morales to Eric Robertson, Auditor (2 pp.); G-29) letter dated April 25, 2011, from Mary Jo Morales to Eric Robertson, Auditor; G-30)

email exchange between Mary Jo Morales and Eric Robertson, Auditor, dated April 26, 2011; G-31) email exchange between Mary Jo Morales and Eric Robertson, Auditor, dated May 2 and 3, 2011; G-32) Notice of Technical and Procedural Failures dated May 3, 2011 (3 pp.) G-33) email exchange between Mary Jo Morales and Eric Robertson, Auditor, dated May 6, 2011 (2 pp.); G-34) email exchange between Mary Jo Morales and Eric Robertson, Auditor, dated May 12, 2011; G-35) email exchange between Mary Jo Morales and Eric Robertson, Auditor, dated May 17, 2011; G-36) letter dated May 17, 2011, from Mary Jo Morales to Eric Robertson, Auditor (4 pp.); G-37) email exchange between Mary Jo Morales and Eric Robertson, Auditor, dated May 18, 2011; G-38) Notice of Intent to Fine, Request for Hearing, and attachments (10 pp.); G-39) charts of errors and nine I-9 forms (14 pp.); G-40) seventy four I-9 forms (74 pp.); G-41) 2011 payroll records for IPI (20 pp.); G-42) 2010 payroll records for IPI (28 pp.); G-43) 2009 payroll records for IPI (31 pp.); G-44) 2008 payroll records for IPI (36 pp.); G-45) Memorandum to Case File (4 pp.); G-46) two subpoenas dated February 15, 2011, and March 4, 2011, with related documents (7 pp.); G-47) materials from Minnesota Department of Employment and Economic Development and Minnesota Secretary of State (53 pp.); G-48) Report of Investigation No. 001 (3 pp.); G-49) Report of Investigation No. 002 and Report of Investigation No. 008 (7 pp.); G-50) Report of Investigation No. 003 (4 pp.); G-51) Report of Investigation No. 004 (4 pp.); G-52) Report of Investigation No. 005 (3 pp.); G-53) Report of Investigation No. 006 (3 pp.); G-54) Report of Investigation No. 007 (4 pp.); G-55) M274 Handbook for Employers (56 pp.); G-56) Receipt for Property, Form 6051R, dated February 24, 2011; G-57) Receipt for Property, Form 6051R, dated March 2, 2011; G-58) Receipt for Property, Form 6051R, dated March 14, 2011; and 59) ICE Guide to Administrative Form I-9 Inspections and Civil Money Penalties, dated November 25, 2008 (46 pp.).

Attachments accompanying IPI's answer include the affidavit of DeAnne M. Hilgers with attachments consisting of 1) redacted and undated cover letter, Notice of Inspection and Subpoena (4 pp.), 2) redacted and undated cover letter, Notice of Inspection and Subpoena (4 pp.), and 3) redacted and undated cover letter, Notice of Inspection and Subpoena (4 pp.); the affidavit of Richard L. Breitman; the affidavit of Jon Butkovich with attachments consisting of 1) 2007 tax returns (32 pp.), 2) 2008 tax returns (32 pp.), and 3) 2009 tax returns (39 pp.); the affidavit of Mary Jo Morales with attachments consisting of A) an I-9 for Jon Butkovich, B) Notice of Inspection dated February 17, 2011, C) Subpoena (3 pp.), D) cover letter dated February 17, 2011, E) page 25 of an undated Handbook for Employers, F) an email exchange dated April 15, 2011, G) an E-Verify document (2 pp.), H) an E-Verify document, I) an email exchange dated February 24, 2011 and a receipt (2 pp.); and the affidavit of CPA Stuart Johnson. Exhibits accompanying IPI's response to the government's motion include the declaration of DeAnne M. Hilgers with seventy-three pages of employee supporting documents.

VI. DISCUSSION AND ANALYSIS

Regardless of whether the deadline for presenting I-9s was extended until March 2, 2011, IPI admitted that it did not present the I-9s for Tracy Arnsdorf, Jon Butkovich, Dale Carpentier, John Carriere, Jodi Diede, Yamir Gonzalez, Debra Harding, Paul Harris, Lee Herman, Jesus Hernandez, and Clint Postolka until March 14, 2011. The declaration of Eric Robertson establishes that the government never received the I-9s for Carolina Avila, Mario Castillo, Dominik Harris, Alyssa Hopp, Chantelle Johnson, Jose Morgan, Corey Newman, Mireya Pina, Michael Rome, and Carla Vivar. Summary decision as to liability is accordingly warranted for Count I.

International Packaging's cross-motion for partial summary decision as to sixty-seven violations in Count II will be denied. Nothing in the Virtue Memorandum requires an employer to copy an employee's documents, to retain them with the employee's I-9, or to present them at the time of inspection. Rather, the Memorandum provides a potential affirmative defense for an employer who chooses to do so. There is accordingly no conflict between the amended version of 8 C.F.R. § 1324a.2(b)(3) and the Virtue Memorandum. If an employer chooses not to copy employee documents in the first place, or chooses not to retain the copies with the I-9 and to present them for inspection, the defense is simply unavailable. Because copying documents is wholly optional and voluntary on the employer's part, the government has no way of knowing in advance of an inspection whether or not a particular employer even has such documents, and there appears to be no basis for a requirement that the government request such copies when issuing a NOI, whether by subpoena or otherwise. Rather, as with any affirmative defense, if an employer wants to invoke the defense, the burden is on the employer to come forward with facts to establish it.

Thus in *United States v. Platinum Builders of Central Florida, Inc.*, 10 OCAHO no. 1199, 6-7 (2013), where the NOI asked only for I-9 forms and made no request at all for copies of documents that might have been presented during the I-9 process, the company's late production of such documents was held to be unavailing. Platinum Builders argued that had the government requested the supporting documents, the company could have provided them, and that many of the violations alleged would then have been viewed as technical and procedural. While this may be true, the government is not required to request specific documents that might provide an employer with a basis for an affirmative defense to possible violations that might or might not be uncovered during the course of an inspection.

The document copies that IPI produced in September 2011 are accordingly not considered. As the Virtue Memorandum makes clear, the particular omissions on an I-9 form that may potentially be cured by presentation of a document are limited to those instances when the information is contained "on a legible copy of a document retained with the Form I-9 and presented at the I-9 inspection." Virtue Memorandum, apps. A & B. Where the document was neither retained with the I-9 form nor presented at the I-9 inspection, it is not relevant to the

inquiry and the proffered documents will not be considered further. That the 2011 Employer Handbook says documents are no longer required to be kept with the I-9s does not prevent an employer from choosing to keep them with the I-9s, nor does it amend the Virtue Memorandum to extend the reach of the defense provided therein to encompass document copies that are not kept with the I-9 or presented at the time of inspection.

Visual examination of the I-9 forms for the employees named in Count II reflects that International Packaging, Inc., failed to enter the document title or issuing authority for a List B document in section 2 of the forms for sixty two individuals, including Alma Alcaraz, Richard Anderson, Antonio Andolini, Jose Armando, Chad Arnold, Jhermayne Bundy, Amanda Cady, Ronnie Caldwell, Jr., Raeann Carpentier, Miriam Castillo, Maria Contreras, Anahi Escamillo, Olga Espanol, Ernest Flax, Ross Frederickson, Mark Gavenda, James Gibbons, Fred Goodrie, Brian Hammond, Cornelious Harris, Cary Hart, Thomas Hatch, Leonard Hoy, Tommy Humphries, Eduardo Ibarra, Breanna Jensen, Bernard Jeska, Jr., Sharon Johnson, Paul Julien, Aleksandr Kenigsberg, Khermarin Keo, James Klesk, Kenneth Kolkind, Stephen Kulikowski, Chao Lee, William Luvert, Antelmo Martinez (Lopez), Michael McDade, Mary McVay Durant, Mary Jo Morales, Casey Neal, Dale Neraasen, Timothy Nichols, Andrew Nickel, Ricardo Ortiz, Jeffrey Patterson, Melissa Phonekeo, Mark Pirkl, Andrew Potvin, Liliana Renteria (Gonzalez), Dulce Reyes, Rebecca Reyes, Paul Rosemeyer, Philip Searles, Jessica Stefanick, Thuy Vu, Ronnie Walker, Herman Walker, Jr., Anthony Watson, Susan Wetzell, Cimen Yang, and Nansy Yang; copies of the supporting documents were not retained with their I-9s or presented at the time of inspection. In some instances, there are additional substantive violations apparent on the form. *See* Appendix A.

The alleged violation involving the I-9 for Guadalupe Acosta Flores will be dismissed because her I-9 substantially complied with the verification requirements. While the matter is not free from doubt, the statutory scheme appears to contemplate that an individual employee's documents are to be independently verified by the employer, not by the employee, and Holly Hoy's signing both sections of her I-9 is accordingly held to be a violation. Violations are also found in the I-9s for Leah Olson and Liliana Renteria. An insurance card is not a proper List B document for Olson, an individual under the age of eighteen, because an insurance card is not a document issued by a clinic, doctor, or hospital. While the omission of an alien number in section 1 of Renteria's I-9 might have been cured had the number appeared in section 2, the number does not appear on the form. Section 2 of Renteria's I-9 contains no entry under List A, and the information entered under List B is incomplete because it does not include the issuing authority for a List B document.

International Packaging is accordingly liable for seventy-three of the seventy-four violations alleged in Count II.

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. International Packaging, Inc., is engaged in the business of providing packaging marketing, promotional products, finseal overwrapping, and retail shrink-wrapping services in Brooklyn Park, Minnesota, a suburb of Minneapolis.
2. Jon Butkovich is the president and chief executive officer of International Packaging, Inc., and Mary Jo Morales is the company's general manager and chief financial officer.
3. The Department of Homeland Security, Immigration and Customs Enforcement issued a Notice of Inspection and subpoena to International Packaging, Inc. on February 17, 2011, with a cover letter.
4. The cover letter accompanying the Notice of Inspection and subpoena issued to International Packaging, Inc. on February 17, 2011, requested the company to "provide International Packaging, Inc.'s original I-9 forms to our office . . . by 4:00 PM, February 23, 2011, including photocopies taken of documents presented in order to fulfill the employment requirements."
5. International Packaging, Inc. presented I-9 forms to the Department of Homeland Security, Immigration and Customs Enforcement on February 23/24, 2011, and on March 2, 2011.
6. After reviewing the I-9s presented by International Packaging, Inc., and examining payroll records and other documents, Immigration and Customs Enforcement Auditor Eric Robertson identified twenty-one current and former employees for whom no I-9s were presented.
7. On March 9, 2011, Immigration and Customs Enforcement Auditor Eric Robertson sent International Packaging, Inc., a request for the presentation of the missing I-9s for current employees, and these were provided by International Packaging, Inc. on March 14, 2011.
8. Immigration and Customs Enforcement Auditor Eric Robertson did not make a follow-up request to International Packaging, Inc., for the missing I-9s for former employees.
9. Neither the Notice of Inspection nor the subpoena issued to International Packaging, Inc. on February 17, 2011, made any express mention of copies of documents presented by employees to fulfill I-9 procedures.
10. During the course of its inspection, the Department of Homeland Security, Immigration and Customs Enforcement, issued a Notice of Suspect Documents (NSD) to International Packaging, Inc., on March 15, 2011.

11. International Packaging, Inc. followed up with the reverification process for the nineteen employees named in the Notice of Suspect Documents, and ultimately terminated all nineteen.
12. During the course of its inspection, the Department of Homeland Security, Immigration and Customs Enforcement, issued a Notice of Technical and Procedural Failures to International Packaging, Inc., on May 3, 2011.
13. International Packaging, Inc., corrected all fifty-three of the technical and procedural violations identified in the Notice of Technical and Procedural Failures within the ten-day period allotted for them to do so.
14. The Department of Homeland Security, Immigration and Customs Enforcement, issued a Notice of Intent to Fine to International Packaging, Inc., on August 16, 2011.
15. International Packaging, Inc. filed a request for hearing on August 23, 2011.
16. International Packaging, Inc., admitted that it did not timely present the I-9 forms for Tracy Arnsdorf, Jon Butkovich, Dale Carpentier, John Carriere, Jodi Diede, Yamir Gonzalez, Debra Harding, Paul Harris, Lee Herman, Jesus Hernandez, and Clint Postolka.
17. The Declaration and Supplemental Declaration of Eric Robertson establish that the government never received the I-9 forms for Carolina Avila, Mario Castillo, Dominik Harris, Alyssa Hopp, Chantelle Johnson, Jose Morgan, Corey Newman, Mireya Pina, Michael Rome, and Carla Vivar.
18. Visual examination of the I-9 forms for the employees named in Count II reflects that International Packaging, Inc., failed to enter the document title or issuing authority for a List B document in section 2 of the forms for sixty two individuals, and copies of the individual's documents were not retained with their I-9s or presented at the time of inspection.
19. Examination of their I-9 forms reflects that International Packaging, Inc., failed to ensure that Dora Mitre, Ashley Smith, Amanda Thao, and Bao By Xiong checked a box in section 1 of the form to indicate their immigration status.
20. Examination of the I-9 form for Hugh Bradley reflects that a social security number is entered under List C in section 2, but no List B document is entered.
21. Examination of the I-9 form for Holly Hoy reflects that the individual signed both the section 1 and the section 2 attestations.

22. Examination of the I-9 form for Benjamin Myre reflects that a birth certificate is entered as a List A document in section 2, a social security card is entered under List C, and no List B document is entered.
23. Examination of the I-9 for Leah Olson reflects that a health insurance card is entered as a List B document in section 2.
24. Examination of the I-9 form for Timothy Sandberg reflects that section 2 is blank.
25. Examination of the I-9 form for Jody Sletten reflects that only a List C document is entered in section 2.
26. Examination of the I-9 form for Amanda Thao reflects that no document title is entered for a List B document.

B. Conclusions of Law

1. International Packaging, Inc., is an entity within the meaning of 8 U.S.C. § 1324a(a)(1).
2. International Packaging, Inc., made a timely request for hearing and all conditions precedent to the institution of this proceeding have been satisfied.
3. International Packaging, Inc., is liable for ninety-four violations of 8 U.S.C. § 1324a(b) and 8 C.F.R. § 274a.2(b).
4. The 2010 amendment to 8 C.F.R. § 274a.2(b)(3) provides that if a copy or electronic image of an employee's documents is made, it must either be retained with the I-9 or stored with the employee's records and be retrievable consistent with paragraphs (e), (f), (g), (h), and (i) of that section; paragraphs (e), (f), (g), (h), and (i) are all addressed to the standards for electronic retention of the forms, including storage systems, security systems, and electronic signatures.
5. The Handbook for Employers, M-274 (rev. 04/30/13) provides at page 29 that an employer may, but is not required to, retain the document copies with the I-9 form, and qualifies the statement by providing that the copies must be retained with the I-9 or stored with the employee's records.
6. The Handbook for Employers, M-274 (rev. 01/05/11) and (rev. 06/01/11) both provide at page 25 that "You may choose to copy or scan documents an employee presents when completing Form I-9, which you may, but are not required to, retain with his or her Form I-9;" it says in addition that "USCIS recommends that employers who choose to retain copies of employees' documentation keep those copies together with their Forms I-9."

7. Nothing in the Virtue Memorandum requires an employer to copy an employee's documents, to retain document copies with the employee's I-9, or to present document copies at the time of inspection; the Memo simply provides an affirmative defense for an employer who chooses to do so.

8. An employer's tardy production of copies of employees' supporting documents will not be considered nunc pro tunc as production at the time of inspection. *United States v. Platinum Builders of Central Florida, Inc.*, 10 OCAHO no. 1199, 6-7 (2013).

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

ICE's allegation respecting the I-9 for Guadalupe Acosta Flores is dismissed. The government's Motion for Partial Summary Decision is otherwise granted. International Packaging, Inc. is liable for twenty-one substantive violations as alleged in Count I and for seventy-three of the seventy-four substantive violations alleged in Count II, for a total of ninety-four violations. IPI's motion for Partial Summary Decision as to Count II is denied.

The parties will be given an opportunity to update and supplement their filings with respect to the issue of penalties. IPI may have until May 16, 2016 to present any additional evidence or updates as to its current status, and, if the company does so, the government may have until June 10, 2016, to file a response.

Nothing in this order is intended to preclude the parties from resolving the penalty issue by agreement during this period, and they are encouraged to attempt such a resolution.

SO ORDERED.

Dated and entered this 14th day of April, 2016.

Ellen K. Thomas
Administrative Law Judge