

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

September 30, 2016

UNITED STATES OF AMERICA,)	
Complainant,)	
)	
v.)	8 U.S.C. § 1324a Proceeding
)	OCAHO Case No. 15A00070
)	
ST. CROIX PERSONNEL SERVICES, INC.)	
Respondent.)	
_____)	

FINAL DECISION AND ORDER

Appearances:

Terry M. Louie
For Complainant

DeAnne M. Hilgers
For Respondent

I. INTRODUCTION

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). The United States Department of Homeland Security, Immigration and Customs Enforcement (ICE, Complainant, or the government) filed a two-count complaint against St. Croix Personnel Services, Inc. (SCPS, Respondent, or the company). The company filed an answer and the parties completed prehearing procedures.

Presently pending is ICE’s Motion for Partial Summary Decision, to which SCPS filed a response. As discussed in detail below, the government’s motion will be granted in part and denied in part.

II. BACKGROUND AND PROCEDURAL HISTORY

SCPS is a corporation authorized to conduct business in the State of Minnesota. On September 6, 2013,¹ ICE served SCPS with a Notice of Inspection and an Immigration Enforcement Subpoena. The notice informed Respondent that a review of its Employment Eligibility Verification Forms I-9 (Forms I-9) was scheduled for September 12, 2013. SCPS provided the government with the requested Forms I-9 and payroll records on September 12, 2013.

On April 7, 2014, ICE personally served SCPS with a Notice of Intent to Fine, which includes an attachment setting forth two charges. The first charge alleged that Respondent failed to prepare and/or present a Form I-9 for one employee, Kenneth Schissel, in violation of 8 U.S.C. § 1324a(a)(1)(B). The second charge alleged that Respondent failed to ensure that the following sixteen employees properly completed section 1 of their Forms I-9 and/or that the company itself failed to properly complete sections 2 or 3 of these employees' Forms I-9, in violation of 8 U.S.C. § 1324a(a)(1)(B): (1) Tim Batson, (2) Lucia Cortes,² (3) Christy Cotroneo,³ (4) Thomas Cotroneo, (5) Leah Dale, (6) Kathryn Deloia, (7) Michael Hofmeister, (8) Cory Lynch,⁴ (9) Alyssa Montbriand, (10) Alba Quinones, (11) Beatriz Sandoval, (12) John Sherman,⁵ (13) Russell Stafne, (14) Teng Thao, (15) Melissa Yang, and (16) Senghoung Yongpao. The Notice of Intent to Fine also set forth that Respondent hired all seventeen employees after November 6, 1986. Complainant sought a total fine amount of \$16,689.75. In a letter dated April 7, 2014, Respondent requested a hearing before an Administrative Law Judge.

On July 30, 2015, ICE filed a complaint consisting of two Counts with the Office of the Chief Administrative Hearing Officer (OCAHO), which fully incorporated the two charges in the

¹ The Notice of Inspection is dated September 9, 2013, but the certificate of service indicates it was served on September 6, 2013.

² According to this employee's Form I-9 and the attached identity and employment authorization documents, her last name is "Cortez." The undersigned will therefore refer to her as "Lucia Cortez."

³ According to this employee's Form I-9, "Cotroneo" is her maiden name and her last name is Williams. The undersigned will refer to her as "Christy Cotroneo Williams."

⁴ Mr. Lynch is referred to as "Corwin Lynch" and "Cory Lynch" throughout the record.

⁵ According to this employee's Form I-9 and the attached identity and employment authorization documents, his last name is "Scherman." The undersigned will therefore refer to him as "John Scherman."

Notice of Intent to Fine. Count I of the complaint alleges that Respondent failed to prepare and/or present a Form I-9 for one employee and Count II alleges that Respondent failed to ensure that the sixteen named employees properly completed section 1 of their Forms I-9 and/or that SCPS failed to properly complete sections 2 or 3 of their Forms I-9. The complaint also requested that OCAHO order SCPS to pay the proposed penalty of \$16,689.75.

SCPS filed an “Answer and Affirmative Defenses” on September 4, 2015. SCPS admitted it was in violation of 8 U.S.C. § 1324a(a)(1)(B), for failing to prepare and/or present a Form I-9 for Kenneth Schissel, as charged in Count I. *See* Respondent’s Answer at 2. SCPS also admitted it was in violation of 8 U.S.C. § 1324a(a)(1)(B), for failing to ensure that the following eight employees named in Count II timely completed section 1 of their Forms I-9 and for failing itself to timely complete sections 2 or 3 of these employees’ Forms I-9: (1) Tim Batson; (2) Alyssa Montbriand; (3) Alba Quinones; (4) Beatriz Sandoval; (5) Russell Stafne; (6) Teng Thao; (7) Melissa Yang; and (8) Senghoung Yongpao. *Id.* at 2-3. The company denied “all remaining allegations” contained in Count II, specifically, the violations relating to Lucia Cortez, Christy Cotroneo Williams, Thomas Cotroneo, Leah Dale, Kathryn Deloia, Michael Hofmeister, Cory Lynch, and John Scherman. *Id.* at 3. SCPS further contested ICE’s proposed penalty amount.

Respondent asserted the following as affirmative defenses: 1) ICE failed to state a claim upon which relief may be granted; 2) the eight Count II violations for which Respondent denied liability are barred by the five-year statute of limitations set forth at 28 U.S.C. § 2462;⁶ 3) Thomas Cotroneo and Cory Lynch are not subject to the Form I-9 requirements because they are owners of the company; 4) SCPS’s “substantial compliance” with the Form I-9 requirements; 5) the penalty is excessive; and 6) SCPS’s cooperation during the I-9 inspection. *Id.* at 3-4. Respondent presented supporting facts only with respect to its arguments concerning the statute of limitations and the exception to the I-9 requirements for owners.⁷ SCPS also requested that the Administrative Law Judge impose the “statutory minimum fine” of \$110 for each of the nine violations in Counts I and II to which the company admitted liability. *Id.* at 5. SCPS attached

⁶ The statute provides:

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

⁷ OCAHO’s Rules of Practice and Procedure, *see* 28 C.F.R. pt. 68 (2016), require a “statement of facts supporting each affirmative defense.” *Id.* § 68.9(c)(2). Moreover, SCPS’s assertions that the penalty is excessive and that it cooperated with ICE during the I-9 inspection do not constitute defenses to liability, but rather are considerations in determining the appropriate penalty.

the following proposed exhibits to its answer: Ex. 1) the Notice of Inspection and Immigration Enforcement Subpoena; Ex. 2) SCPS's response to the Notice of Inspection and copies of the Forms I-9 with the attached identity and employment authorization documents for Lucia Cortez, Christy Cotroneo Williams, Thomas Cotroneo, Leah Dale, Kathryn Deloia, Michael Hofmeister, Cory Lynch, and John Scherman; and Ex. 3) SCPS's response to the Immigration Enforcement Subpoena.

ICE filed its prehearing statement on October 19, 2015, in which it proposed, *inter alia*, nine factual stipulations. The proposed factual stipulations relate generally to the procedural history of the case, as well as to the dates of hire and the "I-9 initiation date/completion date" for the sixteen employees named in Count II. *See* Complainant's Prehearing Statement at 3.⁸ ICE contends that the statute of limitations does not bar liability for any of the seventeen employees named in Counts I and II of the complaint. *Id.* at 4. In addition, Complainant asserts that because Thomas Cotroneo and Cory Lynch are on SCPS's payroll, they are subject to the Form I-9 requirements. *Id.*

On November 10, 2015, Complainant filed a Motion for Partial Summary Decision (Complainant's Motion) along with Proposed Stipulations and a Proposed Order for Partial Summary Decision.

On November 20, 2015, SCPS filed its prehearing statement and a "Response to Complainant's Motion for Partial Summary Decision" (Respondent's Response). In its prehearing statement, Respondent reiterated its admission of liability as to Count I, specifically, that it failed to "timely present" a Form I-9 for Kenneth Schissel upon request by ICE. *See* Respondent's Prehearing Statement at 1. The company again conceded, as in its answer, that it failed to ensure that eight of its employees timely complete section 1 of their Forms I-9 and/or that SCPS failed to timely complete section 2 of these employees' forms. *Id.* at 2. Respondent also reasserted its arguments that it was not required to prepare Forms I-9 for Thomas Cotroneo and Corwin Lynch because they are owners of the company and that the statute of limitations bars the violations relating to the remaining eight Count II employees, including Mr. Cotroneo and Mr. Lynch. Finally, SCPS opposed the proposed penalty amount for the nine violations to which it admitted liability.

On April 13, 2016, a telephonic prehearing conference was held. Importantly, counsel for both parties stated that they did not want an opportunity to provide additional briefing on the penalty amount and requested that the Administrative Law Judge issue a single decision disposing of all liability and penalty issues. Administrative Law Judge Paddack, who previously presided over

⁸ Proposed factual stipulation number four provides, "A Notice of Inspection had previously been served on Team Personnel Services, Inc. (Team Personnel), on January 24, 2012." Complainant's Prehearing Statement at 3. ICE does not elaborate anywhere in the record on the relevance of this proposed fact to the proceedings at hand.

this case, subsequently issued an Order and Memorandum of Telephonic Prehearing Conference, which memorializes this request.

III. POSITIONS OF THE PARTIES

A. The Government's Motion

1. Liability

ICE agrees with SCPS that the company is liable for the one violation charged under Count I, failing to prepare and/or present a Form I-9 for Kenneth Schissel. Complainant's Motion at 2. Complainant also provides the hire dates and "I-9 initiation date/completion date" for the sixteen employees listed under Count II. Based on the hire dates of Tim Batson, Alyssa Montbriand, Alba Quinones, Beatriz Sandoval, Russell Stafne, Teng Thao, Melissa Yang, and Senghoung Yongpao, ICE asserts that 28 U.S.C. § 2462's statute of limitations does not apply to these employees' forms because all eight individuals were hired within five years of the filing of the complaint. *Id.* at 3. Complainant further recognizes that SCPS conceded in its answer that it is liable for failing to timely complete these employees' Forms I-9 and therefore contends that ICE is entitled to summary decision as to liability for these nine violations. *Id.*

Complainant also states that SCPS has not presented any evidence, such as affidavits, to show that Thomas Cotroneo and Cory Lynch are exempt from the I-9 requirements. *Id.* at 4. Moreover, citing *United States v. Ojeil & Ishk*, 7 OCAHO no. 984 (1998), and *United States v. Leed Construction*, 11 OCAHO no. 1237 (2014),⁹ ICE contends that the Forms I-9 belonging to Lucia Cortez, Christy Cotroneo Williams, Thomas Cotroneo, Leah Dale, Kathryn Deloia, Michael Hofmeister, Cory Lynch, and John Scherman are not barred by the five-year statute of limitations. ICE proffered the following dates to support this position:

	Hire date	I-9 initiation date/completion date
Lucia Cortez	07/01/05	02/13/12
Christy Cotroneo Williams	07/19/99	02/13/12

⁹ 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>.

Thomas Cotroneo	04/01/99	03/28/12
Leah Dale	08/13/03	03/28/12
Kathryn Deloia	07/26/99	09/11/12
Michael Hofmeister	05/13/02	03/28/12
Cory Lynch	05/01/09	03/28/12
John Scherman	10/01/07	02/16/12

Complainant's Proposed Stipulations at 2-3.

The government argues that these Forms I-9 are not time barred because the forms were not initiated and completed "for many years and thus were not 'cured' until well within five years of the filing of the complaint," which was on July 30, 2015. Therefore, ICE considers Respondent liable for failing to ensure timely completion of section 1 and for failing to timely complete section 2 of these I-9s.

B. SCPS's Response

1. Liability

SCPS concedes that ICE is entitled to summary decision with respect to the company's liability for failing to prepare and/or present a Form I-9 for Kenneth Schissel under Count I and for failing to timely complete the Forms I-9 of (1) Tim Batson, (2) Alyssa Montbriand, (3) Alba Quinones, (4) Beatriz Sandoval, (5) Russell Stafne, (6) Teng Thao, (7) Melissa Yang,¹⁰ and (8) Senghoung Yongpao under Count II. *See* Respondent's Response at 2. The company also stipulates to the hire dates and I-9 initiation/completion dates of all sixteen Count II employees that ICE presented in its Motion and Proposed Stipulations. *Id.* at 1.

However, SCPS avers that ICE is not entitled to summary decision with respect to liability for the remaining eight employees named in Count II. In support of this argument, SCPS underscored the following dates:

	Hire Date	Form I-9 Completed
Lucia Cortez	07/01/05	02/13/12
Christy Cotroneo Williams	07/19/99	02/13/12
Tom Cotroneo	04/01/99	03/28/12
Leah Dale	08/13/03	03/28/12
Kathryn Deloia	07/26/99	09/11/12
Michael Hofmeister	05/13/02	03/28/12
Cory Lynch	05/01/99	03/28/12
John Scherman	10/01/07	02/16/12

¹⁰ Respondent referred to this employee as "Melissa Vang."

Respondent's Response at 4.

Based on this information, SCPS states that the statute of limitations for these eight Forms I-9 began to run "no later than October 5, 2007,"¹¹ and, therefore, these I-9s are barred by the statute of limitations because more than five years have passed since this date. *Id.* at 5. SCPS contends that timeliness failures "are not continuing violations but are frozen in time at the moment the deadline passes for timely completion." *Id.* at 4. ICE therefore is incorrectly relying on a "calculation applicable to a continuing violation to claim that the Form I-9 must be 'cured' more than five years before the Complaint is filed." *Id.* at 5.

In addition, SCPS argues that Thomas Cotroneo and Corwin Lynch are not employees for whom the company was required to prepare Forms I-9 because they are owners of the company and "cannot be hired or fired by anyone and regularly and consistently exercise control over the daily operations of the company." *Id.* at 2. In support of this argument, SCPS presented affidavits from Gregory Heck, Corwin Lynch, and Thomas Cotroneo.

Gregory Heck is the Vice President and Shareholder of Harrington Langer & Associates, which is a "full-service accounting firm," located in St. Paul, Minnesota. *See* Respondent's Response, Heck Aff. 1. Mr. Heck attests to having "personal knowledge of the corporate and financial structure of" SCPS because he has provided accounting services to Respondent for sixteen years. He states that the company is organized as an "S" corporation, meaning that although SCPS files its own tax returns, the owners are responsible for the company's tax obligations. *Id.* Mr. Heck avers that Corwin Lynch, Thomas Cotroneo, and James Toner "are the owners of the company, and that they have paid the tax obligations for the company in their personal tax returns." *Id.* at 2.

Corwin Lynch attests to being an owner of SCPS since approximately 1999. He also states that he is responsible for the company's tax liability because of SCPS's structure as an S corporation. Mr. Lynch's "primary duties include developing and maintaining client relationships for the company, determining strategy, assigning duties to implement strategy, and similar executive functions," and he has the "authority to make unilateral decisions regarding external operations." *Id.*, Lynch Aff. 2. He avers that he does not perform daily operational tasks, such as completing Forms I-9 and that he is not subject to being hired or fired because an agreement among SCPS's owners governs his status with the company. *Id.*

Thomas Cotroneo also attests to being an owner of SCPS since approximately 1999 and to being responsible, in part, for the company's tax liabilities because it is an S corporation. Mr.

¹¹ October 5, 2007, represents the fourth business day after John Scherman's hire date. *See* discussion *infra* pp. 9, 14.

Cotroneo asserts that he does not perform daily operational tasks, such as payroll operations and Form I-9 preparation. Instead, he “control[s] all of the company’s internal operations,” by overseeing SCPS’s internal management operations, including the supervision of all employees. *Id.*, Cotroneo Aff. 1. Similar to Mr. Lynch, Mr. Cotroneo’s “continuation with or departure from the company is governed by an agreement among the owners,” and, therefore, he is not subject to being hired or fired. *Id.* at 2.

2. Penalty

SCPS asserts that ICE’s proposed penalty is “disproportionate and punitive.” According to Respondent, the company is a small business, made efforts to comply with its Form I-9 obligations prior to ICE’s inspection, does not employ undocumented workers, and does not have a prior history of violations. Respondent’s Response at 5-6. In addition, Respondent cited to the Regulatory Flexibility Act, 5 U.S.C. § 601 et seq. (2006), amended by § 223(a) of the Small Business Regulatory Enforcement Fairness Act (SBREFA) of 1996, Pub. L. No. 104-121, 110 Stat. 864 (1996), as support for the public policy of leniency to small entities, which should serve to mitigate the fine amount. Accordingly, the company considers the statutory minimum fine amount to be an appropriate penalty. In its Proposed Order, SCPS proffered \$300 as the fine for the one Count I violation and \$880 for the eight Count II violations, calling for a total fine amount of \$1180.

IV. DISCUSSION

A. Applicable Legal Standards

1. Summary Decision

OCAHO rule 28 C.F.R. § 68.38(c) establishes that an Administrative Law Judge “shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.” Relying on United States Supreme Court precedent, OCAHO case law has held, “An issue of material fact is genuine only if it has a real basis in the record. A genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit.” *Sepahpour v. Unisys, Inc.*, 3 OCAHO no. 500, 1012, 1014 (1993) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

“Once the moving party satisfies its initial burden of demonstrating both the absence of a material factual issue and that the party is entitled to judgment as a matter of law, the nonmoving party must come forward with contravening evidence to avoid summary resolution.” *United States v. Four Seasons Earthworks, Inc.*, 10 OCAHO no. 1150, 3 (2012) (citing *Celotex Corp. v.*

Catrett, 477 U.S. 317, 323 (1986)); *see generally* FED. R. CIV. P. 56(e). OCAHO rule 28 C.F.R. § 68.38(b) provides that the party opposing the motion for summary decision “may not rest upon the mere allegations or denials” of its pleadings, but must “set forth specific facts showing that there is a genuine issue of fact for the hearing.” Moreover, “the court must view all facts and all reasonable inferences to be drawn from them ‘in the light most favorable to the non-moving party.’” *United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1062, 3 (2000) (quoting *Matsushita*, 475 U.S. at 587).

Rule 56(c) of the Federal Rules of Civil Procedure, which may serve as guidance in OCAHO proceedings, *see* 28 C.F.R. § 68.1, permits consideration of “admissions on file” for the basis of summary decision. *WSC Plumbing*, 9 OCAHO no. 1062 at 3-4 (citing *Celotex Corp.*, 477 U.S. at 323).

2. Burdens of Proof and Production

In cases arising under 8 U.S.C. § 1324a, the government has the burden of proving by a preponderance of the evidence that the respondent is liable for committing a violation of the employment eligibility verification requirements. *See United States v. Nebeker, Inc.*, 10 OCAHO no. 1165, 4 (2013) (citing *United States v. Am. Terrazzo Corp.*, 6 OCAHO no. 877, 577, 581 (1996)). In addition to proving liability, “[t]he government has the burden of proof with respect to the penalty, *United States v. March Construction, Inc.*, 10 OCAHO no. 1158, 4 (2012), and must prove the existence of any aggravating factor by a preponderance of the evidence, *United States v. Carter*, 7 OCAHO no. 931, 121,159 (1997).” *United States v. Niche, Inc.*, 11 OCAHO no. 1250, 6 (2015).

However, after the government has introduced evidence to meet its burden of proof, “the burden of *production* shifts to the respondent to introduce evidence . . . to controvert the government’s evidence. If the respondent fails to introduce any such evidence, the un rebutted evidence introduced by the government may be sufficient to satisfy its burden” *United States v. Durable, Inc.*, 11 OCAHO no. 1231, 5 (2014) (referencing *United States v. Alvand, Inc.*, 2 OCAHO no. 352, 378, 382 (1991) (modification by the Chief Administrative Hearing Officer (CAHO)); *United States v. Kumar*, 6 OCAHO no. 833, 112, 120-21 (1996); *Breda v. Kindred Braintree Hosp., LLC*, 10 OCAHO no. 1202, 7-8 (2013)).

3. Employment Verification Requirements

Employers must prepare and retain Forms I-9 for employees hired after November 6, 1986, and are required to produce the Forms I-9 for inspection by the government upon three days’ notice. 8 C.F.R. § 274a.2(b)(2)(ii); *United States v. Keegan Variety, LLC*, 11 OCAHO no. 1238, 2

(2014). Employers must ensure that an employee complete section 1 of the Form I-9 and attest to his or her citizenship or immigration status in the United States by signing and dating the Form I-9 no later than the first day of employment. 8 C.F.R. § 274a.2(a)(3) (attestation under penalty of perjury), (b)(1)(i)(A). For employees employed for three business days or more, an employer must sign section 2 of the Form I-9 within three days of the employee's first day of employment to attest under penalty of perjury that it reviewed the appropriate documents to verify the individual's identity and employment authorization. 8 C.F.R. § 274a.2(a)(3), (b)(1)(ii).

Failures to satisfy the requirements of the employment verification system are known as "paperwork violations," which are either "substantive" or "technical or procedural." See 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 & Immigrant Responsibility Act of 1996* (Mar. 6, 1997) (Virtue Memorandum) available at 74 No. 16 Interpreter Releases 706 (Apr. 28, 1997). Substantive violations include failure to prepare or present a Form I-9 and failure to timely prepare a Form I-9. *Id.* at 3; *United States v. Dr. Robert Schaus, D.D.S.*, 11 OCAHO no. 1239, 7-8 (2014). An employer can fail to timely prepare a Form I-9 in any one of three ways: (1) the employer fails to ensure that the employee attest to his or her work authorization in section 1 on the date of hire; (2) the employer fails to attest to verifying the employee's work authorization by reviewing the appropriate documents within three days of hire; and (3) the employer fails with respect to both section 1 and section 2 of the Form I-9. *United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1071, 15 (2001) (citations omitted).

4. Statute of Limitations

Title 8 U.S.C. § 1324a does not establish a time limit for when proceedings under its provisions must be commenced. OCAHO case law has held that the five-year statute of limitations codified at 28 U.S.C. § 2462 is applicable to proceedings under 8 U.S.C. § 1324a. See *Ojeil & Ishk*, 7 OCAHO no. 984 at 988-89 (citing *United States v. Curran Eng'g Co.*, 7 OCAHO no. 975, 874, 879 (1997)). Therefore, a complaint is timely if filed within five years of the date on which a violation first accrued. *Leed Construction*, 11 OCAHO no. 1237 at 6 (citing *United States v. H & H Saguario Specialists*, 10 OCAHO no. 1144, 6 n.5 (2012)).

Generally, paperwork violations are "continuous" violations until they are corrected or until the employer is no longer required to retain the Form I-9 pursuant to IRCA's retention requirements, see 8 C.F.R. § 274a.2(b)(2)(i)(A). *Curran Eng'g*, 7 OCAHO no. 975 at 895 (collecting cases); see also *United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1061, 11 (2000). However, a paperwork violation that alleges a timeliness failure is "frozen in time" at the point when the employer "fail[s] to complete, or to ensure completion, of an I-9 form by the date that the completion is required." *WSC Plumbing*, 9 OCAHO no. 1061 at 11-12 (quoting *Curran Eng'g*, 7 OCAHO no. 975 at 897). Therefore, "depending upon which section or sections of each I-9

form Respondent failed to complete in a timely manner, the five-year statute of limitations began to run on either the first business day after hiring or the fourth business day after hiring.” *Id.* at 12; *see also Curran Eng’g*, 7 OCAHO no. 975 at 897. Unlike other kinds of paperwork violations, timeliness verification failures cannot be cured. *WSC Plumbing*, 9 OCAHO no. 1061 at 15 (“Once the requisite deadlines for completion of the I-9 form have passed, the timeliness violation is ‘perfected,’ and the employer is powerless to ‘cure’ it.”); *see also United States v. Durable, Inc.*, 11 OCAHO no. 1229, 12-13 (2014); *United States v. New China Buffet Rest.*, 10 OCAHO no. 1132, 5 (2010).

5. Penalty Assessment

Civil money penalties are assessed when an employer fails to properly prepare, retain, or produce upon request the Forms I-9, according to the following parameters established at 8 C.F.R. § 274a.10(b)(2): the minimum penalty is \$110 and the maximum penalty is \$1100 for each individual with respect to whom a paperwork violation occurred after September 29, 1999. Pertinent regulations and OCAHO case law set forth that if a paperwork violation is proven, then a fine must be assessed. 8 C.F.R. § 274a.10(b)(2) (“A respondent determined . . . to have failed to comply with the employment verification requirements as set forth in § 274a.2(b), shall be subject to a civil penalty”); *Keegan Variety*, 11 OCAHO no. 1238 at 7 (discussing that there is no fine waiver and a penalty must be assessed).

Title 8 U.S.C. § 1324a(e)(5) requires consideration of the following factors when assessing civil money penalties for paperwork violations: (1) the size of the employer’s business; (2) the employer’s good faith; (3) the seriousness of the violations; (4) whether the employee is an unauthorized alien; and (5) the employer’s history of previous violations. “The statute does not require that equal weight necessarily be given to each factor, nor does it rule out consideration of other factors.” *United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000). Although not an exhaustive list, additional factors may be considered, including a company’s ability to pay the proposed penalty and policies of leniency established by statute. *See Niche*, 11 OCAHO no. 1250 at 6-7. ICE has broad discretion in setting the penalties; however, OCAHO is not bound by the government’s penalty methodology and the Administrative Law Judge may conduct a *de novo* review of the penalty assessment. *United States v. Holtsville 811 Inc.*, 11 OCAHO no. 1258, 10 (2015) (citing *United States v. Aid Maint. Co.*, 8 OCAHO no. 1023, 321, 343 (1999); *United States v. Ice Castles Daycare Too, Inc.*, 10 OCAHO no. 1142, 6 (2011)).

B. SCPS’s Liability

1. Count I

ICE has met its burden of proving SCPS is liable for violating 8 U.S.C. § 1324a(a)(1)(B), as charged under Count I. The record conclusively shows that SCPS admitted to failing to prepare and/or present a Form I-9 for one employee, Kenneth Schissel, after being requested to do so by

ICE. *See* Respondent's Answer at 1-2; Respondent's Response at 2. Accordingly, the government is entitled to summary decision as to liability for the one violation in Count I.

2. Count II

a. SCPS's Admissions of Liability

ICE has met its burden of proving there is no genuine issue of material fact with respect to eight of the sixteen violations charged under Count II. SCPS admitted to failing to ensure that the following employees timely completed section 1 of their Forms I-9 and failing to timely complete sections 2 or 3 of these employees' Forms I-9, in violation of 8 U.S.C. § 1324a(a)(1)(B): (1) Tim Batson, (2) Alyssa Montbriand, (3) Alba Quinones,¹² (4) Beatriz Sandoval, (5) Russel Stafne, (6) Teng Thao, (7) Melissa Yang, and (8) Senghoung Yongpao. Respondent's Answer at 2-3; Respondent's Response at 1-2. Therefore, ICE will be granted summary decision as to liability for these eight violations.¹³

b. Statute of Limitations

The remaining eight Count II violations are barred by the statute of limitations. As a preliminary matter, it is undisputed that the allegations charged in Count II relate to substantive failures in timely preparing the Form I-9, and not merely a failure to date sections 1 or 2 on an otherwise timely completed Form I-9, which is considered a technical or procedural failure. *See* Virtue Memorandum at 4-5; *Dr. Robert Schaus*, 11 OCAHO no. 1239 at 7. Furthermore, the evidence of record in fact proves that Respondent (a) failed to ensure that the following eight employees completed section 1 of their Forms I-9 no later than their respective hire dates and (b) failed to complete section 2 of these employees' Forms I-9 within three business days of their hire dates: (1) Lucia Cortez; (2) Christy Cotroneo Williams; (3) Thomas Cotroneo; (4) Leah Dale; (5) Kathryn Deloia; (6) Michael Hofmeister; (7) Cory Lynch; and (8) John Scherman. First, the hire dates and the "I-9 initiation date/completion date"¹⁴ of these employees, to which the parties

¹² The undersigned notes that the parties' pleadings indicate that Ms. Quinones's hire date was May 1, 2013, and that the initiation/completion date of her I-9 was also May 1, 2013. *See* Complainant's Motion at 3; Respondent's Proposed Order for Partial Summary Judgment. However, Respondent has repeatedly admitted to failing to ensure timely preparation of section 1 and to failing to timely prepare section 2 of this I-9; there has been no kind of challenge to the validity of this admission. As SCPS has admitted liability with respect to this Form I-9, this matter has been "conclusively established," *see* 28 C.F.R. § 68.21(d), and I will not address it further.

¹³ Although SCPS's failure in ensuring that its employees timely completed section 1 and the company's failure in timely completing section 2 are separate substantive violations, *see WSC Plumbing*, 9 OCAHO no. 1071 at 15, only one penalty will be assessed for each Form I-9.

stipulated, establish that SCPS did not complete these Forms I-9 until several years *after* the employees' hire dates. *See* Complainant's Motion at 2-3; Respondent's Response at 1.¹⁵ Second, copies of these eight employees' Minnesota driver's licenses, which are attached to their I-9s as proof of identity, reveal that the licenses were issued between October 2008 and September 2011. *See* Respondent's Response, Ex. 2.

ICE filed the complaint on July 30, 2015, and, therefore, any claims that occurred before July 30, 2010, fall outside the applicable limitations period. As explained above, timeliness verification failures constitute an exception to the general rule that paperwork violations can be cured; timeliness failures are "'frozen' . . . in time" at the moment the statutory deadline for completion of the Form I-9 has passed and cannot be cured. *WSC Plumbing*, 9 OCAHO no. 1061 at 15.¹⁶

Lucia Cortez's first day of employment was July 1, 2005. Accordingly, SCPS's failure in ensuring she timely complete section 1 occurred on July 5, 2005, and the company's failure in timely completing section 2 of her I-9 occurred on July 8, 2005.¹⁷ These violations occurred more than five years before ICE filed the complaint.

¹⁴ An examination of the Forms I-9 for these employees demonstrates that the "I-9 initiation date/completion date" represent the dates of completion for both section 1 and section 2 of these I-9s, with the exception of Ms. Deloia's Form I-9, which does not have a section 2 date. *See* Respondent's Answer, Ex. 2.

¹⁵ There appears to be a discrepancy in the record regarding Cory Lynch's hire date. According to ICE, Cory Lynch's hire date was May 1, 2009. *See* Complainant's Motion at 3. Respondent stipulated to this proposed fact but also claimed that Mr. Lynch's hire date was May 1, 1999. *See* Respondent's Response at 1, 4. In addition, section 2 of Mr. Lynch's Form I-9 indicates that his hire date was May 1, 1999, *see* Respondent's Answer, Ex. 2, and Mr. Lynch asserted in his 2015 affidavit that he has owned SCPS for approximately sixteen years, *see* Respondent's Response, Lynch Aff. 1. The evidence of record thus corroborates that Mr. Lynch's hire date was May 1, 1999.

¹⁶ ICE cited to *Ojeil & Ishk* as support for its claim that the eight Count II violations at issue are not time barred. In *Ojeil & Ishk*, the government alleged that the respondent untimely completed section 2 of its employees' Forms I-9 and the Administrative Law Judge observed that the "last dates" on which the respondent could have been in violation for timeliness failures occurred on the date of cure, "*i.e.*, the dates of attestation." 7 OCAHO no. 984 at 983, 991. However, subsequently in *WSC Plumbing*, the analysis of which the undersigned has followed, another Administrative Law Judge explicitly held that because timeliness paperwork failures are "inherently non-'continuing,'" these kinds of violations are "incurable." 9 OCAHO no. 1061 at 15.

Christy Cotroneo Williams's first day of employment was July 19, 1999. SCPS therefore failed to ensure that she timely complete section 1 on July 20, 1999, and Respondent failed to timely complete section 2 of her I-9 on July 23, 1999. These violations also occurred more than five years before ICE filed the complaint.

Thomas Cotroneo's first day of employment was April 1, 1999. SCPS's failure in ensuring that he timely complete section 1 occurred on April 2, 1999, and Respondent's failure in timely completing section 2 occurred on April 7, 1999.¹⁸ Both of these dates fall outside the limitations period.

Leah Dale's first day of employment was August 13, 2003. Respondent was in violation of IRCA's employment verification requirements on August 14, 2003, when it failed to ensure that Ms. Dale complete section 1 no later than her first day of employment, and on August 19, 2003, when the company failed to complete section 2 within three business days of her hire date.¹⁹ Both of these violations occurred more than five years before the complaint was filed. Kathryn Deloia's first day of employment was July 26, 1999. SCPS's failure in ensuring that Ms. Deloia timely complete section 1 occurred on July 27, 1999. This violation occurred more than five years before ICE filed the complaint.

Michael Hofmeister's first day of employment was May 13, 2002. SCPS's failure in ensuring that Mr. Hofmeister timely complete section 1 occurred on May 14, 2002, and Respondent's failure in timely completing section 2 occurred on May 17, 2002. These violations therefore fall outside the limitations period.

Corwin Lynch's first day of employment was May 1, 1999. SCPS failed to ensure that Mr. Lynch timely complete section 1 on May 3, 1999, and failed itself to timely complete section 2 on May 6, 1999.²⁰ These dates also fall outside the limitations period.²¹

¹⁷ July 1, 2005, fell on a Friday and the following Monday fell on July 4. Therefore, the first business day after hiring was July 5 and the third business day after hiring was July 7. *See WSC Plumbing*, 9 OCAHO no. 1061 at 12.

¹⁸ April 1, 1999, fell on a Thursday and, therefore, the third business day after hiring was Tuesday, April 6, 1999. *See Curran Eng'g*, 7 OCAHO no. 975 at 898 (noting that "business days" in that matter was presumed to exclude Saturday and Sunday, as the term is not defined by the regulations).

¹⁹ August 13, 2003, fell on a Wednesday. The third business day after hiring was therefore Monday, August 18, 2003.

²⁰ May 1, 1999, fell on a Saturday. The first business day after hiring was Monday, May 3 and the third business day after hiring was Wednesday, May 5.

John Scherman's first day of employment was October 1, 2007. SCPS was in violation of IRCA's statutory requirements on October 2, 2007, when the company failed to ensure that Mr. Scherman complete section 1 no later than his first day of employment, and on October 5, 2007, when Respondent failed to complete section 2 within three days of his hire date. As these violations occurred more than five years before the complaint was filed, they are also time barred.

Pursuant to the five-year statute of limitations, the claims relating to these eight Forms I-9 must be dismissed because the timeliness failures on each form occurred more than five years before the complaint was filed. I therefore deny Complainant's Motion for Summary Decision with respect to these eight violations.

The government's motion is granted in part as to the one Count I violation and the eight Count II violations to which SCPS admitted liability. Accordingly, Respondent is liable for a total of nine substantive violations.

C. Penalty Assessment

As stated above, the parties did not wish to supplement the record or provide additional briefing on the penalty issue and requested that the undersigned resolve the liability and penalty issues in a single decision.

According to ICE's internal agency guidelines, the baseline penalty amount for a first-time offense of IRCA's employment verification requirements for an employer who has a fifty percent or more violation rate, which is based on the number of substantive violations out of the number of Forms I-9 required, is \$935. *See ICE, Form I-9 Inspection Overview: Fact Sheet (I-9 Fact Sheet)*, 3 (Jun. 26, 2013), <http://www.ice.gov/news/library/factsheets/i9-inspection.htm>. The government may only enhance or mitigate the baseline fine amount by five percent each in consideration of the five factors mandated by 8 U.S.C. § 1324a(e)(5). In the instant matter, ICE set a penalty amount of \$981.75 for each of the seventeen violations alleged in the complaint, which represents a \$935 baseline amount enhanced by five percent (\$46.75). ICE did not disclose on account of which statutory factor it aggravated the fine amount and chose not to when presented with the opportunity to do so. The burden rests with the government to show by a preponderance of the evidence that an aggravating factor is present, *see Holtsville 811*, 11 OCAHO no. 1258 at 10. Here, ICE failed to satisfy its burden of proof.

²¹ As the claims with respect to Thomas Cotroneo and Cory Lynch are time barred, the undersigned will not address Respondent's arguments concerning these individuals' status as owners of the business for whom SCPS was not required to prepare Forms I-9.

ICE established SCPS's liability for nine substantive violations of 8 U.S.C. § 1324a(a)(1)(B). The permissible fine amount for these violations ranges from the statutory minimum of \$990 to the maximum of \$9900. ICE's proposed civil penalty represents a fine in the upper range of penalty assessments for first-time offenses. Penalties near the maximum should be reserved for the most egregious violations. *United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013). The government's penalty guidelines are not binding in this forum, and Administrative Law Judges may review penalty assessments *de novo*. See *Niche*, 11 OCAHO no. 1250 at 9.

As stated above, due consideration must be given to the following factors in setting an appropriate penalty amount: (1) the size of the employer's business; (2) the employer's good faith; (3) the seriousness of the violations; (4) whether the employee is an unauthorized alien; and (5) the employer's history of previous violations. 8 U.S.C. § 1324a(e)(5).

Failure to prepare or present a Form I-9 is among the most serious of violations because "it completely subverts the purpose of the employment verification requirements." *United States v. Speedy Gonzalez Constr., Inc.*, 11 OCAHO no. 1243, 5-6 (2015) (citing *United States v. Clean Sweep Janitor Serv.*, 11 OCAHO no. 1226, 4 (2014)). Failure to prepare a Form I-9 in a timely fashion is a serious violation as well because "an employee could potentially be unauthorized for employment during the entire time his or her eligibility remains unverified." *United States v. Anodizing Indus., Inc.*, 10 OCAHO no. 1184, 4 (2013) (citing *United States v. Sunshine Bldg. Maint., Inc.*, 7 OCAHO no. 997, 1122, 1182 (1998)). Accordingly, I will treat the seriousness of the violations as an aggravating factor and the fine amount will represent the varying, albeit minor, degrees of seriousness. See *United States v. Frio Cnty. Partners, Inc.*, 12 OCAHO no. 1276, 20 (2016).

The primary focus of a good faith analysis is on the company's compliance before the investigation. See *United States v. New China Buffet Rest.*, 10 OCAHO no. 1133, 5 (2010) (citing *United States v. Great Bend Packing Co.*, 6 OCAHO no. 835, 129, 136 (1996); *United States v. Chef Rayko, Inc.*, 5 OCAHO no. 794, 582, 592 (1995) (modification by the CAHO)). However, a poor rate of compliance is alone insufficient to support a finding of bad faith. *Id.* at 6. Although Respondent was derelict in its employment verification obligations, the record does not warrant a finding of a lack of good faith. In addition, the fact that the company completed the Forms I-9 prior to the Notice of Inspection, albeit in an untimely fashion, weighs slightly in the company's favor. See, e.g., *WSC Plumbing*, 9 OCAHO no. 1061 at 15; Complainant's Motion at 2-3; Respondent's Response at 1. For all these reasons, good faith will neither enhance nor mitigate the fine amount.

The record also indicates that SCPS does not have a history of previous violations. ICE set its baseline penalty amount in the fifty percent or more violation rate for first time offenses. "[N]ever having violated the law before does not necessarily warrant additional leniency," and I will thus treat the lack of a history of previous violations as neutral. *New China Buffet*, 10 OCAHO no. 1133 at 6. SCPS also claims that the violations to which it admitted liability did not

involve unauthorized aliens and there is no evidence to the contrary. This factor will thus be considered neutral.

Finally, the record supports a finding that SCPS is a small business. OCAHO case law has considered businesses with 100 employees or less as small businesses. *United States v. Cawoods Produce, Inc.*, 12 OCAHO no. 1280, 18 (2016) (citing *Niche*, 11 OCAHO no. 1250 at 10). Here, seventeen violations, as charged under Counts I and II of the complaint, represented ICE's assessment of a fifty percent or more violation rate, evidencing a workforce of 100 employees or less. The company's small size will therefore be considered a mitigating factor. Relatedly, SCPS requests reduction of the penalty in consideration of the public policy of leniency to small entities. Leniency toward small businesses is a non-statutory factor appropriate for consideration in the penalty assessment. See *Keegan Variety*, 11 OCAHO no. 1238 at 6 (citing § 223(a) of the SBREFA).

Therefore, based on the evidence of record and consideration of all the statutory factors and the non-statutory factor of leniency to small businesses, the undersigned will adjust SCPS's fine amount to the mid-range of permissible penalty amounts. The penalty for the one Count I failure to prepare or present a Form I-9 is adjusted to \$650, as it is the most serious of the violations. The penalty assessed for failing to timely prepare a Form I-9, as charged under Count II, is \$600 per violation, resulting in a penalty of \$4800 for eight violations. Accordingly, the total civil money penalty assessed for all nine violations is adjusted to \$5450.

V. CONCLUSION

Complainant's Motion for Summary Decision is granted in part, pursuant to 28 C.F.R. § 68.38. Through Respondent's admissions of liability, ICE established it is entitled to summary decision with respect to nine of the violations of 8 U.S.C. § 1324a(a)(1)(B) charged in the complaint, for failing to prepare or present one Form I-9 and for failing to timely prepare eight Forms I-9. Complainant's Motion for Summary Decision is denied in part because the applicable statute of limitations bars the remaining eight allegations charged in Count II of the complaint.

When presented with the opportunity to do so, neither party sought to supplement the record regarding the penalty issue and instead requested that I issue a single decision disposing of both liability and the appropriate penalty based on the current record. After reviewing the evidence of record and in consideration of the mandated factors at 8 U.S.C. § 1324a(e)(5), the undersigned will reduce ICE's proposed fine amount toward the statutory mid-range due to the small size of SCPS's business and the public policy of leniency to small businesses. Although Respondent is liable for serious violations, the adjusted penalty shall mirror the differing degrees of seriousness between failing to prepare or present a Form I-9 and failing to timely prepare a Form I-9. SCPS is ordered to pay a total civil money penalty amount of \$5450.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. St. Croix Personnel Services, Inc. is an entity authorized to do business in the State of Minnesota.
2. On September 6, 2013, the Department of Homeland Security, Immigration and Customs Enforcement served St. Croix Personnel Services, Inc. with a Notice of Inspection.
3. The Department of Homeland Security, Immigration and Customs Enforcement served St. Croix Personnel Services, Inc. with a Notice of Intent to Fine on April 7, 2014.
4. In a letter dated April 7, 2014, St. Croix Personnel Services, Inc. requested a hearing before an Administrative Law Judge.
5. The Department of Homeland Security, Immigration and Customs Enforcement filed a complaint consisting of two Counts with the Office of the Chief Administrative Hearing Officer on July 30, 2015.
6. St. Croix Personnel Services, Inc. hired and employed the seventeen individuals identified in the complaint after November 6, 1986.
7. St. Croix Personnel Services, Inc. failed to prepare and/or present a Form I-9 for Kenneth Schissel.
8. St. Croix Personnel Services, Inc. failed to ensure that the following employees timely complete section 1 of their Forms I-9 and the company failed to timely complete sections 2 or 3 of their Forms I-9: (1) Tim Batson; (2) Alyssa Montbriand; (3) Alba Quinones; (4) Beatriz Sandoval; (5) Russell Stafne; (6) Teng Thao; (7) Melissa Yang; and (8) Senghoung Yongpao.
9. Lucia Cortez's first day of employment was July 1, 2005.
10. Christy Cotroneo Williams's first day of employment was July 19, 1999.
11. Thomas Cotroneo's first day of employment was April 1, 1999.
12. Leah Dale's first day of employment was August 13, 2003.
13. Kathryn Deloia's first day of employment was July 26, 1999.

14. Michael Hofmeister's first day of employment was May 13, 2002.
15. Corwin Lynch's first day of employment was May 1, 1999.
16. John Scherman's first day of employment was October 1, 2007.
17. The company failed to ensure that (1) Lucia Cortez, (2) Christy Cotroneo Williams, (3) Thomas Cotroneo, (4) Leah Dale, (5) Kathryn Deloia, (6) Michael Hofmeister, (7) Cory Lynch, and (8) John Scherman completed section 1 of their Forms I-9 on their hire dates and the company failed to complete section 2 within three business days of their hire dates.
18. The company's timeliness verifications failures with respect to the Forms I-9 of (1) Lucia Cortez, (2) Christy Cotroneo Williams, (3) Thomas Cotroneo, (4) Leah Dale, (5) Kathryn Deloia, (6) Michael Hofmeister, (7) Cory Lynch, and (8) John Scherman occurred more than five years before the complaint was filed on July 30, 2015.
19. St. Croix Personnel Services, Inc. is a small business with no history of previous Form I-9 violations.
20. St. Croix Personnel Services, Inc. was not shown to have acted in bad faith.
21. No specific individual employed by St. Croix Personnel Services, Inc. was shown to be an alien not authorized for employment in the United States.

B. Conclusions of Law

1. St. Croix Personnel Services, Inc. is an entity within the meaning of 8 U.S.C. § 1324a(a)(1) (2012).
2. All conditions precedent to the institution of this proceeding have been satisfied.
3. OCAHO rule 28 C.F.R. § 68.38(c) establishes that an Administrative Law Judge "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision."
4. "An issue of material fact is genuine only if it has a real basis in the record. A genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit." *Sepahpour v. Unisys, Inc.*, 3 OCAHO no. 500, 1012, 1014 (1993) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

5. In cases arising under 8 U.S.C. § 1324a, the government has the burden of proving by a preponderance of the evidence that the respondent is liable for committing a violation of the employment eligibility verification requirements. *See United States v. Nebeker, Inc.*, 10 OCAHO no. 1165, 4 (2013) (citing *United States v. Am. Terrazzo Corp.*, 6 OCAHO no. 877, 577, 581 (1996)).
6. In addition to proving liability, “[t]he government has the burden of proof with respect to the penalty, *United States v. March Construction, Inc.*, 10 OCAHO no. 1158, 4 (2012), and must prove the existence of any aggravating factor by a preponderance of the evidence, *United States v. Carter*, 7 OCAHO no. 931, 121,159 (1997).” *United States v. Niche, Inc.*, 11 OCAHO no. 1250, 6 (2015).
7. After the government has introduced evidence to meet its burden of proof, “the burden of *production* shifts to the respondent to introduce evidence . . . to controvert the government’s evidence. If the respondent fails to introduce any such evidence, the un rebutted evidence introduced by the government may be sufficient to satisfy its burden” *United States v. Durable, Inc.*, 11 OCAHO no. 1231, 5 (2014) (referencing *United States v. Alvand, Inc.*, 2 OCAHO no. 352, 378, 382 (1991) (modification by the Chief Administrative Hearing Officer); *United States v. Kumar*, 6 OCAHO no. 833, 112, 120-21 (1996); *Breda v. Kindred Braintree Hosp., LLC*, 10 OCAHO no. 1202, 7-8 (2013)).
8. Employers must ensure that an employee complete section 1 of the Form I-9 and attest to his or her citizenship or immigration status in the United States by signing and dating the Form I-9 no later than the first day of employment. 8 C.F.R. § 274a.2(a)(3) (attestation under penalty of perjury), (b)(1)(i)(A).
9. For employees employed for three business days or more, an employer must sign section 2 of the Form I-9 within three days of the employee’s first day of employment to attest under penalty of perjury that it reviewed the appropriate documents to verify the individual’s identity and employment authorization. 8 C.F.R. § 274a.2(a)(3), (b)(1)(ii).
10. The five-year statute of limitations codified at 28 U.S.C. § 2462 is applicable to proceedings under 8 U.S.C. § 1324a. *See United States v. Ojeil & Ishk*, 7 OCAHO no. 984, 982, 988-89 (1998) (citing *United States v. Curran Eng’g Co.*, 7 OCAHO no. 975, 874, 879 (1997)). Therefore, a complaint is timely if filed within five years of the date on which a violation first accrued. *United States v. Leed Construction*, 11 OCAHO no. 1237, 6 (2014) (citing *United States v. H & H Saguario Specialists*, 10 OCAHO no. 1144, 6 n.5 (2012)).
11. Unlike other kinds of paperwork violations, timeliness verification failures cannot be cured. *United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1061, 15 (2000) (“Once the requisite deadlines for completion of the I-9 form have passed, the timeliness violation is ‘perfected,’ and

the employer is powerless to ‘cure’ it.”); *see also United States v. Durable, Inc.*, 11 OCAHO no. 1229, 12-13 (2014); *United States v. New China Buffet Rest.*, 10 OCAHO no. 1132, 5 (2010).

12. “[D]epending upon which section or sections of each I-9 form Respondent failed to complete in a timely manner, the five-year statute of limitations began to run on either the first business day after hiring or the fourth business day after hiring.” *United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1061, 12 (2000); *see also United States v. Curran Eng’g Co.*, 7 OCAHO no. 975, 874, 897 (1997).

13. St. Croix Personnel Services, Inc. is liable for nine violations of 8 U.S.C. § 1324a(a)(1)(B), for failing to prepare and/or present one Form I-9 and for failing to timely complete eight Forms I-9.

14. Eight of the timeliness paperwork violations charged in the complaint are barred by the five-year statute of limitations.

15. In assessing the appropriate penalty, an Administrative Law Judge must consider the following factors: 1) the size of the employer’s business; 2) the employer’s good faith; 3) the seriousness of the violations; 4) whether the individual was an unauthorized alien; and 5) the employer’s history of previous violations. 8 U.S.C. § 1324a(e)(5).

16. St. Croix Personnel Services, Inc. is a small business warranting penalty mitigation.

17. St. Croix Personnel Services, Inc. warrants penalty mitigation pursuant to the Small Business Act’s policy of leniency toward small businesses.

ORDER

Complainant’s Motion for Partial Summary Decision is granted in part. ICE proved by a preponderance of the evidence that St. Croix Personnel Services, Inc. is liable for nine violations of 8 U.S.C. § 1324a(a)(1)(B). St. Croix Personnel Services, Inc. is directed to pay civil money penalties in the total amount of \$5450. The parties are free to establish a payment schedule in order to minimize the impact of the penalty on the operations of the company.

SO ORDERED.

Dated and entered on September 30, 2016.

Robert J. Lesnick
United States 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.