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In the
United States Court of Appeals
For the Second Circuit

August Term, 2016
No. 15-3959-ag

BUFFALO TRANSPORTATION, INC.
Petitioner-Appellant,
v.

UNITED STATES OF AMERICA,
Respondent-Appellee.

Petition for review of order of the Office of the Chief Administrative
Hearing Officer for the Executive Office of Immigration Review

SUBMITTED: OCTOBER 6, 2016
DECIDED: DECEMBER 22, 2016

Before: NEWMAN, LYNCH, and DRONEY, *Circuit Judges.*

30 Petition for review of order of the Office of the Chief
31 Administrative Hearing Officer for the Executive Office of
32 Immigration Review that found petitioner to have committed
33 violations regarding verifications of its employees' immigration
34 status. The Administrative Law Judge found that petitioner had
35 committed numerous substantive violations. The Administrative
36 Law Judge also found that the fines imposed for the substantive
37 violations were not excessive. We **DENY** the petition for review.

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40 Stephen F. Szymoniak, Law Office of
41 Stephen F. Szymoniak, Williamsville, New
42 York, *for Petitioner-Appellant*.

43

44 Andrew N. O'Malley, Trial Attorney,
45 Benjamin C. Mizer, Principal Deputy
46 Assistant Attorney General, Bernard A.
47 Joseph, Trial Attorney, Office of
48 Immigration Litigation, United States
49 Department of Justice, Washington, D.C. *for*
50 *Respondent-Appellee*.

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53 DRONEY, *Circuit Judge*:

54

55 Buffalo Transportation, Inc. ("Buffalo Transportation")

56 petitioned pursuant to 8 U.S.C. § 1324a(e)(8) for review of a final

57 order of the Office of the Chief Administrative Hearing Officer for

58 the Executive Office of Immigration Review ("OCAHO") that found

59 it to have committed substantive violations of Section 274A(b) of the
60 Immigration and Nationality Act (“INA”) and affirmed the
61 imposition of fines by Immigration and Customs Enforcement of the
62 Department of Homeland Security (“ICE”). The Administrative Law
63 Judge (“ALJ”) found that Buffalo Transportation had not timely
64 complied with the requirements of 8 U.S.C. § 1324a(b) and related
65 regulations that require employers to verify that an employee is
66 legally authorized to work in the United States through executing a
67 Form I-9 for each employee within three business days of hire.
68 Buffalo Transportation petitioned this Court for review of the ALJ’s
69 decision on the grounds that the violations were “procedural” rather
70 than substantive, and that ICE should have issued a warning rather
71 than imposing fines. Buffalo Transportation also contends that the
72 fines imposed were unreasonably high. We agree with the ALJ’s
73 determination of liability and adjustments of ICE’s original fine
74 amounts, and therefore **DENY** the petition for review.

75 **BACKGROUND**

76 Buffalo Transportation is located in Buffalo, New York,
77 and provides transportation services to individuals for medical
78 appointments. On August 22, 2013, ICE notified Buffalo
79 Transportation of a scheduled audit of its Forms I-9 to occur on
80 August 28, 2013. At the audit, ICE found that six of the completed
81 Forms I-9 had technical or procedural errors and allowed Buffalo
82 Transportation to correct those errors. ICE also found, however, that
83 all 54 of the completed Forms I-9 were not created within three
84 business days of the employees' hiring dates, and that Buffalo
85 Transportation did not properly retain completed Forms I-9 for 84
86 former employees. On March 14, 2014, ICE served Buffalo
87 Transportation with a Notice of Intent to Fine in the amount of
88 \$794.75 per violation (for a total of \$109,675.50) which it calculated
89 using the regulatory scheme at 8 C.F.R. § 274a.10(b)(2) and its own
90 internal guidelines. These guidelines set the base and maximum

91 fines for various types of violations and adjust the fines for
92 aggravating and mitigating circumstances. *See* ICE, Fact Sheet: I-9
93 Inspection Overview, *available at* <https://www.ice.gov/factsheets/i9->
94 inspection (last visited Oct. 11, 2016).

95 After receiving the Notice of Intent to Fine, Buffalo
96 Transportation requested a hearing before an ALJ, as permitted by 5
97 U.S.C. § 554. Both Buffalo Transportation and ICE submitted
98 briefing and evidence in support of their motions for a summary
99 decision. The ALJ granted in part both Buffalo Transportation’s and
100 ICE’s motions for summary decision.¹ The ALJ found Buffalo
101 Transportation to have committed 81 violations for not retaining the
102 Forms I-9 for former employees for the proper time period (the later
103 of three years from date of hire, or if terminated, one year from

¹ Motions for summary decisions are governed by 28 C.F.R. § 68.38 (c), which provides that an ALJ “shall enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.” If a party raises a genuine question of material fact, then the ALJ shall hold an evidentiary hearing. *Id.* § 68.38 (e).

104 termination) and 54 violations for current employees for Forms I-9
105 not prepared within three business days of hire.² The ALJ also
106 determined that the fines assessed by ICE were excessive, and
107 adjusted the penalty to \$600 per violation for the former employees
108 and \$500 per violation for the current employees. Thus, the total fine
109 that the ALJ assessed was \$75,600. In making these adjustments to
110 ICE's fines, the ALJ considered Buffalo Transportation's financial
111 situation as well as other mitigating factors pursuant to 8 C.F.R.
112 § 274a.10 (b)(2)(i)-(v). *See* J.A. 45.

113 DISCUSSION

114 I. Standard of Review

115 We review an order of the OCAHO issued pursuant to 8
116 U.S.C. § 1324a under the arbitrary and capricious standard. 8 U.S.C.
117 § 1324a(e)(8); *see Alaska Dep't of Env'tl. Conservation v. E.P.A.*, 540 U.S.
118 461, 496–97 (2004) (applying arbitrary and capricious standard when

² A review of the Forms I-9 reflects that many of the forms were prepared immediately prior to the inspection and more than three business days from the hiring date. *See, e.g.*, Record on Appeal at 214-15.

119 the statute itself does not specify a standard for judicial review of
120 agency action). We review an agency's factual determinations under
121 the substantial evidence standard, *N.Y. & Atl. Ry. Co. v. Surface*
122 *Transp. Bd.*, 635 F.3d 66, 71 (2d Cir. 2011) (citations omitted), while
123 we review an agency's determinations on questions of law *de novo*,
124 *see Nwozuzu v. Holder*, 726 F.3d 323, 326 (2d Cir. 2013) (citations
125 omitted).

126 **II. Substantive Violations**

127 Section 274A(b) of the Immigration and Nationality Act
128 requires employers to verify that their employees are legally
129 authorized to work in the United States. 8 U.S.C. § 1324a(b).
130 Regulations designate the Employment Eligibility Verification Form
131 ("Form I-9") for this purpose, 8 C.F.R. § 274a.2(a)(2), and employers
132 must complete these forms within three business days of hire, *id.*
133 § 274a.2(b)(1)(ii). An employer must retain these forms and provide
134 them for inspection by ICE upon three business days' notice for

135 current employees, and retain forms for one year for terminated
136 employees. *Id.* § 274a.2(b)(2)(i)-(ii). If an employer does not comply
137 with these requirements, it may face civil penalties between \$110
138 and \$1,100 per individual violation. *Id.* § 274a.10(b)(2) (for violations
139 prior to November 2, 2015). An employer may be “considered to
140 have complied” with the Form I-9 requirements if there is only a
141 “technical or procedural failure” so long as the employer made a
142 “good faith attempt to comply.” 8 U.S.C. § 1324a(b)(6)(A). To avail
143 itself of the good faith defense, an employer must also correct the
144 relevant violations within ten business days of receiving notice of
145 the technical or procedural failings. *Id.* § 1324a(b)(6)(B).

146 The Immigration and Naturalization Services (the
147 predecessor agency to ICE) (“INS”) issued interim guidance about
148 what constitutes a “technical or procedural violation” as opposed to
149 a “substantive violation” for which the good faith defense would not
150 be available. Memorandum of Paul W. Virtue, INS Office of

151 Programs, Interim Guidelines: Section 274A(b)(6) of the INA (March
152 6, 1997), *available at* 74 Interpreter Releases 706, App. I (April 28,
153 1997) (“Virtue Memorandum”). ICE has continued to follow that
154 guidance. The OCAHO has consistently relied on the Virtue
155 Memorandum to determine that the failure of an employer to
156 complete a Form I-9 is a substantive violation of Section 274a.2. *See*
157 *United States v. Anodizing Indust., Inc.*, 10 OCAHO 1184 (2013); *United*
158 *States v. Platinum Builders of Cent. Fla., Inc.*, 10 OCAHO 1199 (2013).

159 Formal adjudications and agency-promulgated rules are given
160 considerable deference under the Administrative Procedure Act and
161 *Chevron*. *See Chevron, USA, Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S.
162 837, 844 (1984); *Kruse v. Wells Fargo Home Mortgage, Inc.*, 383 F.3d 49,
163 55 (2d Cir. 2004). An informal agency interpretation that is neither a
164 formal adjudication nor a promulgated rule may still receive
165 deference under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944). Such
166 informal agency guidance receives deference “according to its

167 persuasiveness,’ as evidenced by the ‘thoroughness evident in [the
168 agency’s] consideration, the validity of its reasoning, its consistency
169 with earlier and later pronouncements, and all those factors which
170 give it power to persuade.’” *Estate of Landers v. Leavitt*, 545 F.3d 98,
171 107 (2d Cir. 2008) *as amended* (Jan. 15, 2009) (quoting *United States v.*
172 *Mead Corp.*, 533 U.S. 218, 221, 228 (2001)) (internal citation omitted);
173 *see also Ketchikan Drywall Servs., Inc. v. Immigration & Customs Enf’t*,
174 725 F.3d 1103, 1112–13 (9th Cir. 2013) (applying *Skidmore* deference
175 to the Virtue Memorandum). We apply *Skidmore* deference to the
176 Virtue Memorandum because we find it well-reasoned and
177 thorough. It distinguishes between violations that effectively
178 undermine immigration requirements (such as not filling out the
179 form at all, or not including the employee’s name) and those that
180 create small but solvable problems (such as an omitted birth date).
181 Moreover, the agency has greater expertise “when it comes to
182 determining which omissions are substantive and which ought to be

183 excused.” *Ketchikan*, 725 F.3d at 1113. Thus, we agree with the
184 Virtue Memorandum, and with prior decisions of the OCAHO, *see*,
185 *e.g.*, *United States v. Dr. Robert Schaus, D.D.S.*, 11 OCAHO 1239
186 (2014), that failing to prepare Forms I-9 within three business days of
187 hire is a substantive violation of the INA and its accompanying
188 regulations.

189 The regulation clearly states that employers must have
190 employees fill out the Form I-9, verify the employee’s
191 documentation, and have both employee and employer sign the
192 form within three business days of hire. Failure to prepare a Form I-
193 9 constitutes a substantive violation, Virtue Memorandum at 3, and
194 necessarily includes the failure to prepare a Form I-9 within the time
195 allotted by the regulations—here, three business days. The ALJ
196 correctly determined that the 54 Forms I-9 presented to ICE at the
197 audit contained substantive violations, as there is no genuine
198 dispute that any of the 54 forms had been completed within three

199 business days of the employees' hiring dates. Indeed, it appears that
200 Buffalo Transportation only prepared the 54 Forms I-9 for its current
201 employees in response to ICE's notice of inspection.

202 Buffalo Transportation contends that it should have been
203 given a Warning Notice pursuant to 8 C.F.R. § 274a.9(c) before
204 receiving the ICE Notice of Intent to Fine. The government contends
205 that this argument is unexhausted. Even assuming that Buffalo
206 Transportation properly raised the warning notice claim, it is
207 without merit. The regulation permits ICE or the Department of
208 Labor "in their discretion" to give a warning of violations. *Id.* It
209 does not require ICE to do so.

210 Buffalo Transportation also argues that it substantially
211 complied with the employee verification requirements by keeping
212 each employee's identifying documents on file. That argument is
213 unavailing, however, because the relevant regulations explicitly
214 reject that approach: "[C]opying . . . of [underlying documents] and

215 retention of the copy or electronic image does not relieve the
216 employer from the requirement to fully complete section 2 of the
217 Form I-9.” 8 C.F.R. § 274a.2(b)(3); *see Ketchikan*, 725 F.3d at 1111
218 (rejecting the same argument).

219 III. Fines

220 Buffalo Transportation also challenges the amount of the fines
221 imposed by the ALJ as arbitrary. ICE imposed a fine of \$794.75 per
222 violation, which it calculated using the regulatory scheme at 8 C.F.R.
223 § 274a.10(b)(2) and its own internal guidelines, which ICE uses to set
224 the base penalty and adjust the fine for aggravating and mitigating
225 circumstances.³ *See* ICE, Fact Sheet: I-9 Inspection Overview, *available*
226 *at* <https://www.ice.gov/factsheets/i9-inspection> (last visited Oct. 11,
227 2016). The ALJ considered that Buffalo Transportation was a small
228 business, did not act in bad faith, lacked a history of violations, and

³ Both the relevant statute and regulations include the following factors: (i) size of the business of the employer being charged, (ii) the good faith of the employer, (iii) the seriousness of the violation, (iv) whether or not the individual was an unauthorized alien, and (v) the history of previous violations of the employer. 8 U.S.C. § 1324a(e)(5); 8 C.F.R. § 274a.10(b)(2).

229 that there was no evidence that Buffalo Transportation had hired
230 unauthorized workers as mitigating factors. The ALJ also considered
231 Buffalo Transportation’s financial situation. In light of this evidence,
232 Buffalo Transportation’s arguments, and the statutory and non-
233 statutory factors—including Buffalo Transportation’s ability to
234 pay—the ALJ reduced the fines to \$600 per violation for past
235 employees and \$500 per violation for current employees.

236 When reviewing agency fines our inquiry is limited to
237 whether the agency made “an allowable judgment in [its] choice of
238 the remedy.” *United States v. Int’l Bhd. of Teamsters*, 170 F.3d 136, 143
239 (2d Cir. 1999) (internal quotation marks omitted). We conclude that
240 the ALJ made such an allowable judgment here in determining the
241 amount of the fines after properly assessing the various factors,
242 including the seriousness and number of the violations.

243 Buffalo Transportation next argues that because the regulation
244 provides for a broad range of allowable fines (from \$110 to \$1,100)

245 and the Virtue Memorandum includes no specific guidance, the ALJ
246 impermissibly made an arbitrary determination as to the amounts of
247 the fines. Buffalo Transportation also contends that other similarly-
248 situated employers received larger reductions from ICE-imposed
249 fines than it did. We do not find these arguments convincing. The
250 ALJ provided well-reasoned bases for the fine amounts based on
251 Buffalo Transportation's specific circumstances.

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* * *

253 For the foregoing reasons, we hold that the ALJ's
254 determinations regarding liability were not arbitrary and capricious
255 and were supported by substantial evidence, and that the fines were
256 within the ALJ's allowable discretion. Accordingly, we **DENY** the
257 petition for review.