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

May 1, 2012

UNITED STATES OF AMERICA, Complainant, v. RONNING LANDSCAPING, INC., Respondent.	))))))))	8 U.S.C. § 1324a Proceeding OCAHO Case No. 10A00076

ORDER GRANTING RESPONDENT'S MOTION FOR PARTIAL SUMMARY DECISION, DENYING COMPLAINANT'S MOTION FOR LEAVE TO AMEND COMPLAINT, GRANTING IN PART AND DENYING IN PART COMPLAINANT'S MOTION FOR PARTIAL SUMMARY DECISION, AND GRANTING IN PART AND DENYING IN PART RESPONDENT'S CROSS MOTION FOR PARTIAL SUMMARY DECISION

I. PROCEDURAL HISTORY

This is an action pursuant to the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a (2006), in which the Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) is the complainant and Ronning Landscaping, Inc. (Ronning or the company) is the respondent. The government filed a two count complaint, followed by a motion for leave to amend the complaint on April 1, 2011 and by a second motion for leave to amend the complaint on May 13, 2011. Leave to amend was granted both times and the complaint in this matter is now the second amended complaint in which the government alleges that Ronning engaged in a total of 94 violations of 8 U.S.C. § 1324a(b) and 8 C.F.R.§ 274a.2(b).

Count I of the second amended complaint alleges that Ronning hired 65 named individuals and either failed to ensure that each properly completed section 1 of Form I-9, or failed itself to properly complete sections 2 or 3 of the form for each. Count II of the second amended

complaint alleges that Ronning hired 29 named individuals for whom it failed to prepare and/or present an I-9 form upon request. Ronning filed an answer denying the violations and raising affirmative defenses. Prehearing procedures including discovery and preliminary motion practice ensued and are now completed; four separate motions are currently pending.[1]

The first of these is Ronning's motion for partial summary decision as to 23 of the 29 violations alleged in Count II. The government filed a timely response to this motion, and simultaneously filed its own third motion for leave to amend the complaint. Ronning filed a timely response to the motion for leave to amend.

The government then filed its own motion for partial summary decision seeking summary resolution as to all 65 of the violations alleged in Count I and for the remaining 6 violations alleged in Count II. Ronning filed a joint response and cross-motion for partial summary decision as to 35 of the 65 violations alleged in Count I and one of the violations alleged in Count II. The government's response to Ronning's cross-motion acknowledged that Ronning did in fact present an I-9 for one of the individuals named in Count II.

These motions are ripe for decision.[2] In addition to the materials submitted by the parties, I also consider the record as a whole, including pleadings, exhibits, and all other materials of record, in resolving them.

II. BACKGROUND INFORMATION

Ronning Landscaping is a family-owned landscaping company incorporated in 2006 and located in Mesa, Arizona. Michael Ronning is the president, his wife Ellen Ronning is the secretary, and their son Robert Ronning is the controller for the company. ICE served Ronning a Notice of Inspection and an Administrative Subpoena on July 1, 2009, and after conducting an investigation the government issued Ronning a Notice of Intent to Fine (NIF) on March 1, 2010. Ronning made a timely request for a hearing on March 31, 2010 and all conditions precedent to the institution of this proceeding have been satisfied.

---

[1] The parties have deferred the question of penalties and the current motions are addressed only to issues of liability.

[2] The caption to Section III of the government's memorandum in response to Ronning's cross motion indicates that ICE objects to Ronning's exhibits 1, 2, and 3 "and moves for exclusion of the evidence." A motion to exclude evidence is not properly made by means of a caption in a memorandum, and this "motion" will not be considered. Because the exhibits complained of shed no light on the issues presented they are not considered either.

III. RONNING'S MOTION FOR PARTIAL SUMMARY DECISION AND ICE'S THIRD MOTION FOR LEAVE TO AMEND THE COMPLAINT

Because ICE's third motion for leave to amend the complaint was made in conjunction with its response to Ronning's motion for partial summary decision, the two motions are considered together.

A. Ronning's Motion for Partial Summary Decision

Ronning's motion asserts that the first 23 individuals named in Count II never performed any work for Ronning, and therefore none of them satisfies the regulatory definition of an employee in 8 C.F.R. § 274a.1(f) as one "who provides services or labor for an employer for wages or other remuneration," and that therefore the company was not obliged to prepare I-9s for any of them. The motion was accompanied by exhibits A) a list of 23 individuals Ronning says were not its employees; B) Notice of Intent to Fine issued Feb. 19, 2010 (5 pp.); C) the Declaration of Robert Ronning signed April 1, 2011 (3 pp.); and D) various invoices and correspondence relating to Ronning Landscaping and the Stone Canyon Club (86 pp.).

By way of explanation, the declaration of Robert Ronning states that for several years the company participated in the H-2B program,[3] and paid an Arizona-based third party company, Corporate and Employee Services LLC (CES), to handle the logistical details regarding the H-2B process and compliance requirements because Ronning lacked the expertise to handle the process itself. The declaration states further that in early 2008 Ronning expected to need and applied for approximately 50 H-2B workers, but by the time the workers arrived in the United States the company's landscaping business had declined drastically. Ronning had already notified CES that it would not need them all, and CES proposed to handle the paperwork to transfer 23 surplus workers to another employer, the Stone Canyon Club. The declaration states that CES handled the paperwork for the transfer while the employees worked at Stone Canyon and Ronning acted as a temporary payroll administrator from October 2008 until December 2008 at CES' direction. It took some time for the paperwork to be officially approved but other than processing the payroll, Ronning had no business relationship with Stone Canyon. Ronning said it relied on CES to guide it through the transfer process.

---

[3] The colloquial term "H-2B worker" is applied to an alien who comes temporarily to the United States to perform nonagricultural labor of a temporary or seasonal nature. The term derives its name from 8 U.S.C. § 1101(a)(15)(H)(ii)(b) of the INA. Approval for the employment of a nonimmigrant alien for seasonal nonagricultural work is governed and regulated by a complex system of interrelated laws administered by the Departments of Labor (DOL), State, and Homeland Security. *See Mid-Atlantic Reg'l Org. Coal. v. Heritage Landscaping Svcs., LLC*, 10 OCAHO no. 1134, 12-13 (2010).

The Ronning declaration states finally that the first 23 individuals named in Count II, Rosendo Mendez Salazar, Santiago Valencia Hernandez, Abelardo A. Escandon, Jose F. Fernandez Hernandez, Jorge A. Gutierrez Varela, Jorge A. Valenzuela Torres, Jesus Aguirre, Ivan Perez Valencia, Hugo A. Ramirez Abril, Gustavo Barron Hernandez, Fernando Mote Andrade, Erik Fernandez Valencia, Bruno Velasquez Martinez, Bartolo A. Galaviz Paredes, Enerio Armenta, Ibarra Idalicio, Omar Munoz, Mario Rodriguez, Jorge Romo, Erick Barron, Martin Andrade, Martin Bojorquez, and Alejandro Velasquez, never performed any work for Ronning Landscaping and that the company has not needed or utilized H-2B workers since last using the services of CES in 2008.

B. ICE's Response in Opposition and Motion for Leave to Amend the Complaint

The government's response in opposition to the motion said there were three basic grounds upon which it should either be deferred or denied. First, ICE argued that the motion was premature because it was filed before discovery had been completed, second ICE said that consideration should be delayed because all necessary parties have not yet been named, and third, the government argued that there remain genuine issues of material fact as to the employment status of the 23 individuals at issue. Finally, the government argued that even if there is no genuine issue of material fact, the motion should be denied because whether or not those individuals performed any work for Ronning, the company was still their employer "for I-9 purposes."

The accompanying motion for leave to amend the complaint seeks to add CES and Stone Canyon as parties respondent on the grounds that their participation is necessary to resolve all the issues. Ronning opposed the government's motion for leave to amend on the grounds that adding additional parties at this stage of the litigation would cause undue delay, citing *McNier v. San Francisco State Univ.*, 8 OCAHO no. 1030, 425, 428-30 (1999).[4]

Exhibits accompanying ICE's response included: GX-1) Complaint and Notice of Intent to Fine (19 pp.); GX-2) Amended Complaint (4 pp.); GX-3) (reserved); GX-4) Declaration of ICE Senior Forensic Auditor Keith Campton dated May 2, 2011 (5 pp.); GX-5) Notice of Inspection and Administrative Subpoena served on July 1, 2009 (4 pp.); GX-6) Copies of Forms I-9

[4] Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet been reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database "FIM-OCAHO," or in the LexisNexis database "OCAHO," or on the website at http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders.

containing substantive violations (65 pp.); GX-7) Copies of Arizona Dept. of Economic Security Unemployment Tax and Wage Reports for Ronning Landscaping, Inc. for the calendar quarters ending December 31, 2008, December 31, 2007, September 30, 2007, June 30, 2007, March 31, 2007 and September 30, 2006 (12 pp.); GX-8) Various documents reflecting the size of Ronning's business (54 pp.); GX-9) ICE Inspection Worksheets (30 pp.); GX-10) ICE Form I-9 Inspection Overview (7 pp.); GX-11) Ronning's H-2B employee documents filed in 2006 (14 pp.); GX-12) Ronning's H-2B employee documents filed in 2007 (31 pp.); GX-13) Stone Canyon's H-2B employee documents filed in 2008 (29 pp.); GX-14) Forms I-9 prepared by Stone Canyon, LLC in December 2008 (15 pp.); GX-15) Declaration of U.S. Citizenship and Immigration Services (CIS) Adjudications Officer Frank Harton signed on April 29, 2011 (3 pp.); GX-16) U.S. CIS Handbook for Employers: Instructions for Completing the Form I-9 (Rev. 11/01/2007) (47 pp.).

C. Discussion and Analysis

The government's initial objection to the consideration of Ronning's motion for partial summary decision, that discovery was not complete, has been mooted by the passage of time. The record reflects that during a telephonic prehearing conference held on March 31, 2011 the parties agreed to work out their remaining discovery issues within the next 30 days. A subsequent telephonic conference to resolve any outstanding issues scheduled for May 5, 2011 was cancelled and neither party requested that it be rescheduled. Neither party filed a motion to compel and neither moved to extend discovery.

The government's motion for leave to amend the complaint to join CES and Stone Canyon as respondents does not assert that ICE has any cause of action against either of them, or that either bears any liability in this matter. Rather, it asserts only that CES and Stone Canyon have "relevant knowledge" and that their joinder is "necessary" for that reason. The motion thus appears to be addressed to questions that should have, but evidently were not, dealt with as part of discovery. No explanation is offered as to why the information the government wants from CES or Stone Canyon was not available from the existing parties, or why, if it wasn't, the appropriate procedures for third party discovery pursuant to 28 C.F.R. § 68.25(b)[5] were not utilized to obtain it. The fact that a person or entity has knowledge of the facts or may be a potential witness does not provide a reasonable basis for joinder of the person or entity as a party.[6]

---

[5] Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2011).

[6] Courts are exceedingly cautious in even imposing the burdens of discovery on a nonparty. *See Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 637-38 (C.D. Cal. 2005). Compelling a nonparty to participate in a lawsuit in which it has no interest of its own at stake simply to facilitate an existing party's discovery is a fortiori unjustifiable.

Fed. R. Civ. P. 20(a), upon which the government purports to rely, expressly states that persons who may be joined as defendants are those against whom a right to relief is asserted. Fed. R. Civ. P. 20(a)(2)(A). *See also* 7 C. Wright, A. Miller and M.K. Kane, *Federal Practice and Procedure* § 1657 (3d ed. 2001) (Permissive Joinder of Parties under Rule 20(a) – Joinder of Defendants). Absent some right of relief asserted against a proposed defendant, permissive joinder is not available under the provision cited by the government. *Id.* No right of relief against either CES or Stone Canyon is apparent here and the government's purported reliance on *United States v. Mr. Z. Enterprises, Inc*., 1 OCAHO no. 288, 1869, 1872-73 (1991) is similarly misplaced because that case does not support joinder of a respondent against whom no liability is asserted either. The administrative law judge in that case permitted joinder of the President of Mr. Z. Enterprises, Edward Zimmerman, as a party respondent in his individual capacity precisely because the evidence established that while the original corporate respondent was liable on only one of the counts in the complaint, Zimmerman himself was personally liable for the remaining counts alleged. *Id*. at 1873 n.2. Nothing in *Mr. Z. Enterprises* supports the proposition that a person or entity may be joined as a party respondent absent some colorable claim for relief against that person or entity.[7]

Notwithstanding the liberality with which leave to amend is freely granted under 28 C.F.R. § 68.9(e) moreover, *United States v. Sunshine Building Maintenance, Inc*., 6 OCAHO no. 913, 1067, 1071-72 (1997) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)), this liberality does not extend to permit a proposed amendment that clearly would not survive a motion to dismiss. This is the usual test for determining whether or not a proposed amendment is futile. *See Santiglia v. Sun Microsystems, Inc*., 9 OCAHO no. 1097, 7 (2003) (*Santiglia I*) (citing *Jones v. Cmty. Redev. Agency of L.A.*, 733 F.2d 646, 650 (9th Cir. 1984)). When a newly proposed defendant could not properly be joined under the permissive joinder standard, a motion to amend should be denied as futile. *United States v. WSC Plumbing, Inc.*, 8 OCAHO no. 1045, 696, 705-06 (2000) (citing *League to Save Lake Tahoe v. Tahoe Reg'l Planning Agency*, 558 F.2d 914 (9th Cir. 1977); *Coughlin v. Rogers*, 130 F.3d 1348, 1351 (9th Cir. 1997)).

ICE's motion for leave to amend will accordingly be denied on the grounds of futility because it fails to meet one of the basic requirements for permissive joinder. As Ronning points out, needless delay and wasted resources would be the only practical result of allowing the amendment proposed here. There is accordingly no obstacle to consideration of Ronning's motion for partial summary decision.

Ronning's motion is supported by an unrebutted declaration and by exhibits. Absent

---

[7] In order to state a claim for relief pursuant to 8 U.S.C. § 1324a moreover, the government has to satisfy certain conditions precedent, including service of a NIF on the proposed respondent. 28 C.F.R. § 68.7(c). There is no assertion that this ever occurred with respect to either CES or Stone Canyon.

countervailing evidence that creates a factual issue, I am obliged to, and do, credit the factual allegations made in the Ronning declaration, including the statement that the first 23 individuals named in Count II never actually performed any work for Ronning Landscaping, and that from October 2008 to December 2008 the company's only relationship with these 23 individuals was that of payroll processor during which time Stone Canyon would invoice Ronning for paychecks to issue to Stone Canyon's employees,[8] but Ronning had no other role.

The government argues in opposition to the motion that Ronning has not explained why it put the 23 individuals on its payroll if they were working for Stone Canyon, that Ronning does not indicate whether it discussed with Stone Canyon which company would complete I-9s for the 23 individuals, that there is contradictory evidence on the question of whether Ronning charged Stone Canyon a fee for processing the payroll, and that the names listed on the CIS[9] Form I-129 approving Ronning's application for H-2B visas do not match the 23 names listed in Count II. For these reasons the government argues that genuine issues of material fact preclude summary decision.

ICE nevertheless acknowledged that beneficiaries may be substituted after an initial approval, and it appears undisputed that all the names on the Approval Notice CIS eventually issued to Stone Canyon for the transfer of the 23 H-2B workers match the names in Count II, as do the names on the petition CES prepared for Stone Canyon. The government's own exhibits show that the 23 individuals were authorized to work under H-2B visas issued to Ronning, that the visas were transferred from Ronning to Stone Canyon, and that CES processed the relevant paperwork for both Ronning and Stone Canyon.

An issue of fact is material only if it might affect the outcome of the case, *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986), and only if it must inevitably be decided, William W. Schwartzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 480 (1983, 1984). Factual disputes the resolution of which is unnecessary to the decision are therefore insufficient to avert a summary decision. *See Heritage Landscaping*, 10 OCAHO no. 1134 at 13-14. I am not persuaded that a conflict in the evidence as to whether Ronning charged Stone Canyon a fee is sufficient to preclude summary decision and it is simply not correct that Ronning did not explain why it put the 23 individuals on the payroll. ICE's assertion that Ronning did not indicate whether it discussed I-9s with Stone Canyon is true, but has no bearing on the question of whose employees the 23 individuals actually were.

---

[8] This is the language of the declaration. From the context and other exhibits, it appears that the reverse was true; Ronning issued the paychecks and was then reimbursed by Stone Canyon.

[9] U.S. Citizenship and Immigration Services

The government points out in addition that Ronning did not inform either CIS or the DOL that it was not using all 50 of the visas so from the perspective of those agencies Ronning was the employer of all of them, that Ronning paid wages to the 23 disputed individuals and made unemployment tax payments to the state of Arizona during the fourth quarter of 2008 for them, and that Stone Canyon did not even prepare their I-9s until December 2008. While these facts are true, they do not controvert or negate the basic facts alleged in the Ronning Declaration.

When a motion for summary decision is made and supported as provided in the rules, the opposing party may not rest upon mere allegations or denials, but must "set forth specific facts showing that there is a genuine issue of fact for the hearing." *United States v. New China Buffet Rest.*, 10 OCAHO no. 1132, 2 (2010) (citing 28 C.F.R. § 68.38(b)). While ICE makes a number of arguments, it presents no evidence creating a material factual issue. It remains undisputed that the 23 workers actually provided their services to Stone Canyon and provided no services or labor to Ronning.

The government's final position is that even if there is no genuine issue of material fact, the 23 individuals were Ronning's employees "on paper" and Ronning benefitted financially from their labor through the collection of a payroll processing fee from Stone Canyon, and that this is sufficient to establish its liability for failure to prepare I-9 forms for them. No authority is cited in support of this proposition.

Employers are required to complete I-9 forms for all employees they hire and to make those forms available for inspection. 8 U.S.C. § 1324a(b)(3); 8 C.F.R. § 274a.2(b)(2). Regulatory definitions provide in pertinent part, with bewildering circularity, that "hire" means the actual commencement of employment of an employee for wages or other remuneration, 8 C.F.R. § 274a.1(c), that "employment" constitutes service or labor performed by an employee for an employer, 8 C.F.R. § 274a.1(h), that an "employee" is one who provides services or labor for an employer for remuneration, 8 C.F.R. § 274a.1(f), and that an "employer" is one who engages the services of an employee for wages or other remuneration, 8 C.F.R. § 274a.1(g). While the "remuneration" referred to is not necessarily limited to a regular hourly wage, there still must be some kind of payment or exchange given in return for some kind of work done. *See, e.g., United States v. Dittman*, 1 OCAHO no. 195, 1289, 1291-92 (1990). ICE provided no explanation of how its view can be reconciled with these definitions.

Neither did the government supply any citation of authority to support the proposition that providing temporary payroll services to another company is sufficient to trigger I-9 responsibilities. As our case law explains, a company's mere provision of payroll or other administrative services to another employer is usually not sufficient to create a joint employment relationship between the companies where the provider of such services has no right to discharge, direct, or control the employees, to set their work schedules, to assign work to them, or to control their working conditions. *See United States v. Gen. Dynamics Corp.*, 3 OCAHO no. 517, 1121, 1149-51 (1993). Case law in the circuit is in accord that no one factor can be controlling as to

when an employment relationship is created, and that the totality of the circumstances must be examined in order to make that determination. *Moreau v. Air France*, 356 F.3d 942, 946-48 (9th Cir. 2004) (identifying principal factors as power to hire and fire, supervision and control of work schedules and conditions, determining rate and method of payment, and maintaining records); *Torres-Lopez v. May*, 111 F.3d 633, 639-40 (9th Cir. 1997) (same). *See also Goldberg v. Whitaker House Coop., Inc.*, 366 U.S. 28, 33 (1961) (noting "economic reality" rather than "technical concepts" provides the appropriate test of who is an employer). It is undisputed that Ronning did not have the power to fire these 23 individuals from Stone Canyon, to set their work schedules or working conditions, to assign them work, to supervise them, or to determine their rate of pay.

Assuming for purposes of this motion that Stone Canyon paid Ronning a payroll processing fee and construing the facts, as I must, in the light most favorable to the government, *United States v. Primera Enters., Inc.*, 4 OCAHO no. 615, 259, 261 (1994), it is still impossible to conclude that these 23 H-2B workers were Ronning's employees when they were never actually hired by Ronning, and they provided their services or labor only to Stone Canyon. Absent any of the principal indicia of an employment relationship and absent any interrelation between Ronning and Stone Canyon such as common management or ownership, the inescapable conclusion is that the exclusive employer of these 23 individuals was Stone Canyon, and not Ronning. *Cf. United States v. David Jenkins*, 4 OCAHO no. 649, 511, 517-18 (1994) (noting that respondent would have a defense to a charge of failure to prepare an I-9 if it never hired the individual named).

Ronning is accordingly entitled to summary decision as to the 23 H-2B workers identified in its motion.

IV. ICE'S MOTION FOR PARTIAL SUMMARY DECISION AND RONNING'S CROSS-MOTION FOR PARTIAL SUMMARY DECISION

The filing of cross motions does not necessarily mean that summary decision should issue in favor of either party; each motion must be considered on its own merits. *Santiglia v. Sun Microsystems, Inc.*, 9 OCAHO no. 1110, 8 (2004) (*Santiglia II*) (citing William W. Schwarzer, Alan Hirsch & David J. Barrans, *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441, 499 (1992)).

A. ICE's Motion for Partial Summary Decision

An employer is responsible for ensuring that the employee properly completed section 1 of Form I-9, 8 C.F.R. § 274a.2(b)(1)(i)(A), as well as for properly completing section 2 itself. 8 C.F.R. § 274a.2(b)(1)(i)(B). The government's motion seeks summary decision as to all 65 of the violations alleged in Count I on the grounds that visual inspection of the I-9 forms for these individuals demonstrates that Ronning either failed to ensure that the employee properly

completed section 1 or failed itself to complete section 2, or both.

The government's motion also says that there are genuine issues of material fact respecting the status of the first 23 employees named in Count II,[10] but that it is entitled to summary decision as to the remaining 6 violations alleged in that count, that Ronning failed to prepare or present form I-9 for these individuals upon request.

Exhibits accompanying ICE's motion for partial summary decision include: Attachment A) Table of Form I-9 Substantive Violations for Count I (4 pp.); GX-17) Form I-9 with instructions, 05/31/05 rev. (11 pp.).

1. Count I

Specifically with respect to the section 1 violations in Count I, ICE says that Ronning failed to ensure that 10 employees checked a box in section 1 to indicate their immigration status. Also in section 1, the government asserts that Ronning failed to ensure that 3 employees signed the attestation in section one, and also failed to ensure that 3 employees properly completed section 1 because each attested to multiple statuses. In addition ICE says that Ronning failed to complete section 2 properly for 17 other employees by entering either a List B or a List C document on the form, but not both as is required. The I-9 forms for the remaining individuals have missing information, have different numbers in section 1 and section 2, have the wrong information, reflect information for expired documents, or have no signature on the attestation.

As to the other section 2 violations alleged in Count I, the government points out that the company recorded the words "visa," "visa/H2B," or "H2B visa" as a List A document for each of 27 individuals, and that a visa is not a proper List A document.[11] The government notes that regulations designate an unexpired foreign passport with an Arrival-Departure Record (Form I-94), as the required documentation for a nonimmigrant alien authorized to work for a specific employer incident to status, 8 C.F.R. § 274a.2(b)(1)(v)(A)(5) (2006), and provide further that proper completion of the I-9 form requires the employer to record the document number and expiration date from both the passport and the Form I-94. Ronning did not do this for Fernando Alvarez, Jesus Alvarez, Gabriel Carillo Lopez, Mauricio Castillo Martinez, Lazaro Flores, Luis Gomez Vargas, Francisco Gonzalez, German Gonzalez, Miguel Gonzalez, Hugo Guerrero Rodgriguez, Sergio Guerrero Rodriguez, Alvaro Lopez Briones, Martin Lopez Perez, Efren Lopez Saucedo, Ernesto Lozano, Emanuel Martinez, Jenaro Martinez, Victor Martinez, Jose

[10] These are the 23 H-2B workers whose employment status is addressed in Ronning's motion for partial summary decision.

[11] A visa is not a valid List B document either. *United States v. Ketchikan Drywall Servs., Inc.*, 10 OCAHO no. 1139, 20 (2011).

Martinez Castillo, Juan Martinez Diaz, Alejandro Meraz (aka Alejandro Meraz Orduno), Jorge Ponce, Ramiro Ponce (aka Ramero Ponce Escalera), Juan Rodriguez Navarro, Victor Sanchez Ponce, Aristeo Sandoval Regaldo and Eric Urbina.

2. Count II

ICE's motion initially sought summary decision as to the allegations in Count II that Ronning failed to prepare or present an I-9 form for Mario C. Jimenez, Brian Carra, Juan L. Perez, Rosario Lopez V, Abraham Duran, and Keith Holmes. The government subsequently acknowledged that the company did present an I-9 for Juan L. Perez.

B. Ronning's Cross Motion

Ronning's cross motion stood silent as to 30 of the violations alleged in Count I and 5 of the violations alleged in Count II. The motion seeks summary decision in the company's favor as to the remaining 35 violations alleged in Count I, and for the violation in Count II involving Juan L. Perez. Based on the government's acknowledgment, summary decision will be entered in Ronning's favor with respect to the alleged violation involving Perez.

Ronning asserts by way of defense to the remaining 35 violations alleged in Count I that it substantially complied with the I-9 requirements for two specific groups of employees. First, for the group of 27 H-2B workers for whom the company entered some variation of the word "visa" as a List A document, Ronning asserts that it substantially complied with all the essential requirements of the verification process. Ronning argues that it knew that each of these workers was authorized for employment in the United States because they were all obtained through the H-2B program, and the information the company entered under List A came straight from its review of their documents. The motion asserts further that information about the proper completion of the form for an H-2B worker is buried in the Handbook for Employers and is not widely known among employers, and that the company made all reasonable efforts to comply with the "spirit" of the regulations. Ronning acknowledged error in completing only four of the six lines under List A, but says that the substantial compliance doctrine should apply because the company actually "reviewed the employee's foreign passport with H-2B visa (i.e. Form I-94)" even though it did not complete all the lines on the form.

Second, Ronning also raised as an affirmative defense that it substantially complied with the essential elements of the verification system with respect to 8 employees, Amador Diaz Lopez, Juan Gomez Favela, Juan Solis, Gabriel Melo Pastor, Cervando Gonzalez, Leavardo Vasques Alfaro, Manuel Beltran, and Fernando Solis, who, although they didn't check the box in section 1 of the form to indicate permanent resident status, nevertheless wrote their alien registration numbers on the appropriate line and presented their permanent resident cards for section 2 verification.

Exhibits accompanying Ronning's Response to ICE's Motion for Partial Summary Decision and Cross-Motion for Partial Summary Decision include: 1) a letter to ICE dated September 2, 2010 (8 pp.); 2) a letter to respondent's counsel dated October 22, 2010 (7 pp.); 3) a duplicate of exhibit 1 with an I-9 attached (10 pp.); 4) 47 I-9 forms (47 pp.); and 5) 8 I-9 forms (8 pp.).

C. ICE's Response to Ronning's Cross Motion

ICE's response to Ronning's cross motion challenges Ronning's assertions of substantial compliance with respect to both groups of employees. With respect to those who failed to check a box in section 1, the government argues that substantial compliance does not insulate Ronning from liability for these violations. First, the government says it is factually incorrect that Amador Diaz Lopez failed to check a box but entered his alien registration number; visual inspection of the I-9 for this individual reflects that in fact he did check the box attesting to being a lawful permanent resident, but that he did not enter his alien registration number on the line provided. In section 2 of his I-9, moreover, the company entered a ten digit number the last four of which match the last four digits of the social security number entered in section 1. An alien registration number should have nine digits, not ten.

ICE argues further that attestation is fundamental to the verification process and here the errors led to the hiring of unauthorized aliens because each of the individuals in this group was unauthorized to be employed in the United States and each provided either a false alien number or an alien number that actually belonged to another individual. Under these circumstances the government argues that their failure to check a box may have been intentional in order to avoid liability for perjury, and that omission of the information undermines the entire purpose of the verification system.

With respect to the 27 section 2 violations the government contends that the defense of substantial compliance is not available to Ronning because the company failed altogether to examine or enter acceptable List A documents for the individuals named. The entry made on the form in each case is "visa," "visa/H2B," or "H2B visa," and the issuing authority is shown as "USA" or the Department of Homeland Security. The government points out that a Form I-94 is not the same thing as a visa, that the two documents are issued at different stages by different federal authorities, and that DHS does not issue visas. ICE also challenges the statement in Ronning's memorandum that the company reviewed the employee's foreign passports, noting that the statement is unsubstantiated and is therefore argument, not evidence. The government says that contrary to Ronning's assertions, visual inspection of the I-9 forms shows that the company did not review foreign passports or I-94 forms for these 27 employees. The I-9s for 4 of these individuals, Fernando Alvarez, Jesus Alvarez, Francisco Gonzalez, and Ramiro Ponce aka Ramiro Ponce Escalera, show a fourteen digit number for the visa, and the other forms show an eight digit number. An I-94 form would have an eleven digit number, not an eight or fourteen digit number as was entered on the I-9 forms for these employees.

Exhibits accompanying ICE's response to cross-motion for summary judgment include: GX-18) U.S. Customs and Border Protection I-94 Arrival/Departure Record - Instructions with hand written annotations; GX-19) a redacted copy of a visa; and GX-20) the Declaration of U.S. Customs and Border Protection employee William N. Johnston dated June 9, 2011 (2 pp.).

The Johnston Declaration describes the process for admitting H-2B workers at the point of entry. It explains that a visa may be issued only by a United States Embassy or Consulate abroad, and that a visa standing alone does not either determine an alien's admissibility or reflect the alien's admission to the United States. The declaration also explains the passport control process in detail, including the requirements that must be satisfied before Customs and Border Patrol can stamp an I-94 form to reflect an alien's admission, after which the agency will staple the I-94 departure page into the alien's passport to be surrendered upon departure.

D. Discussion and Analysis

The government is entitled to summary decision for the 30 uncontested violations in Count I, and judgment will be entered finding that Ronning either failed to ensure that the employee properly completed section 1 of form I-9 or failed itself to properly complete section 2 for Jose Arellano, Luis Arriaga, Jeffrey Carra, Ramon Contreras, Cesar Corona, Jose Corona, Oscar Corona, Gabriel Corona, Mario Duran, Carlos Garcia, Gilberto Garcia Andrade, Carlos Garcia Sanchez, Ismael Miranda, Jerome Pablo, Anthony Poindexter, Jaime Ramirez, Oscar Robles Murillo, Roberto Rodrigez, Roberto Rojas Quinones, Edwin Roldan Lucas, Rachel Ronning, Cesar Valverde, Dennis Villela, Jimmy Harrison, Antonio Gonzalez, Nestor Parra Cruz, Jody Flores, Efren Solano Diaz, Ruben Lopez Ambrocio and Oscar Garcia. The government is also entitled to summary decision as to 5 uncontested allegations in Count II, and judgment will be entered finding that Ronning hired 5 individuals for employment in the United States and failed to prepare or present form I-9 for each of them upon request.

OCAHO case law has recognized an affirmative defense of substantial compliance in narrowly limited circumstances, *United States v. N. Mich. Fruit Co.*, 4 OCAHO no. 667, 680, 697 (1994), and has expressly held that when an employee fails to check a box in section 1, but nevertheless writes an alien number on the line next to the words "A Lawful Permanent Resident" and signs the section 1 attestation, the employee is attesting to being a Lawful Permanent Resident and the employer has substantially complied with the requirements for section 1. *Ketchikan Drywall*, 10 OCAHO no. 1139 at 15-16. *See also United States v. Candlelight Inn*, 4 OCAHO no. 611, 212, 232-33 (1994).

Applying this standard to the I-9s in issue, the government is nevertheless still entitled to summary decision with respect to Amador Diaz Lopez because visual examination of his I-9 shows that while this individual did check the box reflecting status as a lawful permanent resident, he did not enter an alien number on the line provided and the number the employer entered in section 2 is invalid on its face because it has ten digits, not nine as an alien registration

number should have.

For the remaining 7 individuals in this group however, visual examination of the I-9 form for Juan Gomez Favela, Juan Solis, Gabriel Melo Pastor, Cervando Gonzalez, Leavardo Vasques Alfaro, Manuel Beltran, and Fernando Solis reflects that although the employee did fail as alleged to check any Section 1 box attesting to status as a U.S. citizen, lawful permanent resident, or alien authorized for work, the employee nevertheless did write an alien registration number on the line next to the words "A Lawful Permanent Resident," and did sign the attestation. In each instance, the employee presented a permanent resident card and the employer entered the same alien number in section 2 of the form as is shown in section 1.

That these employees subsequently turned out to be unauthorized for employment is regrettable, but whether or not a violation occurred in the completion of an I-9 form must be determined based on the facial sufficiency of the form when it was completed, not based on subsequent events. An employer complies with its obligation to review documents if the document (or combination of documents) examined reasonably appears on its face to be genuine, 8 U.S.C. § 1324a(b)(1)(A); that a document later proves to be counterfeit or fraudulent, or to belong to someone else, cannot operate retroactively to invalidate a facially sufficient I-9 form. Ronning is entitled to summary decision as to the allegations respecting the seven employees named in Count I of the complaint who failed to check the box but entered their alien numbers on the appropriate line provided for a lawful permanent resident and signed the attestation.

For the 27 H-2B employees for whom Ronning recorded the words "visa," "visa/H-2B," or "H-2B visa" on the I-9 form as a List A document however, no defense can be established. Ronning's assertion that an H-2B visa is the same thing as an Arrival-Departure Record (Form I-94) is patently incorrect; the two are entirely different documents issued at different times by different authorities and one may not be substituted for the other. The I-9 form and instructions, as well as the CIS Handbook for Employers, both available to Ronning during the relevant period, expressly provide that acceptable documents for an H-2B worker include either an:

> "[u]nexpired foreign passport, with I-551 stamp or attached Form I-94 indicating unexpired employment authorization" (Form I-9, May 31, 2005 version) or "[a]n unexpired foreign passport with an unexpired Arrival-Departure Record, Form I-94, bearing the same name as the passport and containing an endorsement of the alien's nonimmigrant status, if that status authorizes the alien to work for the employer (Form I-9, June 5, 2007 or June 16, 2008 versions).

A visa does not in any way correspond to this description and is not a valid List A document.

Ronning's assertion that the company actually reviewed passports and I-94 forms for these 27 employees is wholly unsupported. It is well established that unsworn factual allegations made

in a brief or memorandum are not evidence and are insufficient to preclude summary decision absent evidence in the record supporting them. *See, e.g., United States v. Hotel Martha Washington Corp.*, 6 OCAHO no. 846, 216, 225 n.5 (1996); *Coverdell v. Dep't of Social and Health Servs.*, 834 F.2d 758, 762 (9th Cir. 1987). I find no such evidence in the record and do not consider this allegation further.

Ronning failed to properly complete section 2 of the Form I-9 for these individuals in that it recorded information from an improper List A document and the government is entitled to summary decision for these 27 violations.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings

1. Ronning Landscaping, Inc. is a family-owned landscaping company incorporated in 2006 and located in Mesa, Arizona.

2. The Department of Homeland Security, Immigration and Customs Enforcement served Ronning Landscaping, Inc. a Notice of Inspection and an Administrative Subpoena on July 1, 2009.

3. After conducting an investigation the Department of Homeland Security, Immigration and Customs Enforcement issued Ronning Landscaping, Inc. a Notice of Intent to Fine (NIF) on March 1, 2010.

4. Ronning Landscaping, Inc. made a request for hearing on March 31, 2010.

5. The Department of Homeland Security, Immigration and Customs Enforcement filed a two count complaint that was amended twice; the second amended complaint alleged that Ronning engaged in a total of 94 violations of 8 U.S.C. § 1324a(b) and 8 C.F.R.§ 274a.2(b).

6. Ronning Landscaping, Inc. filed an answer to the complaint on November 12, 2010.

7. For several years, including 2008, Ronning Landscaping, Inc. participated in the H-2B program in order to obtain the services of seasonal workers.

8. For several years, Ronning Landscaping, Inc. hired Corporate and Employee Services LLC, an Arizona-based third party company, to handle the logistical details regarding the H-2B process and compliance requirements because it lacked the expertise to do so itself.

9. Ronning Landscaping, Inc. applied for approximately 50 H-2B workers in early 2008 but by

the time these workers arrived in the United States it did not need them all because its business declined drastically.

10. Corporate and Employee Services LLC proposed to transfer 23 surplus H-2B workers to another employer, the Stone Canyon Club, and this was done, but took some time to accomplish.

11. Corporate and Employee Services LLC handled the paperwork for the transfer and Ronning Landscaping, Inc. processed the payroll for a period of approximately three months for the 23 surplus H-2B workers who were actually working at the Stone Canyon Club.

12. Rosendo Mendez Salazar, Santiago Valencia Hernandez, Abelardo A. Escandon, Jose F. Fernandez Hernandez, Jorge A. Gutierrez Varela, Jorge A. Valenzuela Torres, Jesus Aguirre, Ivan Perez Valencia, Hugo A. Ramirez Abril, Gustavo Barron Hernandez, Fernando Mote Andrade, Erik Fernandez Valencia, Bruno Velasquez Martinez, Bartolo A. Galaviz Paredes, Enerio Armenta, Ibarra Idalicio, Omar Munoz, Mario Rodriguez, Jorge Romo, Erick Barron, Martin Andrade, Martin Bojorquez, and Alejandro Velasquez, never performed any work for Ronning Landscaping, Inc., but Ronning Landscaping, Inc. issued paychecks to them and paid unemployment tax payments to the state of Arizona for them during the fourth quarter of 2008.

13. During the fourth quarter of 2008, the Stone Canyon Club reimbursed Ronning Landscaping, Inc. for paychecks Ronning issued for 23 H-2B workers who were actually employed by Stone Canyon, but Ronning had no other role with respect to those individuals.

14. The Department of Homeland Security, Immigration and Customs Enforcement sought leave to amend the complaint to join Corporate and Employee Services LLC and the Stone Canyon Club as parties respondent.

15. It was uncontested that Ronning Landscaping, Inc. hired 30 employees for employment in the United States for whom it either failed to ensure that the employee properly completed section 1 of form I-9 or failed itself to properly complete section 2, including Jose Arellano, Luis Arriaga, Jeffrey Carra, Ramon Contreras, Cesar Corona, Jose Corona, Oscar Corona, Gabriel Corona, Mario Duran, Carlos Garcia, Gilberto Garcia Andrade, Carlos Garcia Sanchez, Ismael Miranda, Jerome Pablo, Anthony Poindexter, Jaime Ramirez, Oscar Robles Murillo, Roberto Rodrigez, Roberto Rojas Quinones, Edwin Roldan Lucas, Rachel Ronning, Cesar Valverde, Dennis Villela, Jimmy Harrison, Antonio Gonzalez, Nestor Parra Cruz, Jody Flores, Efren Solano Diaz, Ruben Lopez Ambrocio, and Oscar Garcia.

16. It was uncontested that Ronning Landscaping, Inc. hired 5 employees, Mario C. Jimenez, Brian Carra, Rosario Lopez V, Abraham Duran, and Keith Holmes, for employment in the United States and failed to prepare or present form I-9 for each of them upon request.

17. Ronning Landscaping, Inc. hired 27 employees for employment in the United States,

including Fernando Alvarez, Jesus Alvarez, Gabriel Carillo Lopez, Mauricio Castillo Martinez, Lazaro Flores, Luis Gomez Vargas, Francisco Gonzalez, German Gonzalez, Miguel Gonzalez, Hugo Guerrero Rodgriguez, Sergio Guerrero Rodriguez, Alvaro Lopez Briones, Martin Lopez Perez, Efren Lopez Saucedo, Ernesto Lozano, Emanuel Martinez, Jenaro Martinez, Victor Martinez, Jose Martinez Castillo, Juan Martinez Diaz, Alejandro Meraz (aka Alejandro Meraz Orduno), Jorge Ponce, Ramiro Ponce (aka Ramero Ponce Escalera), Juan Rodriguez Navarro, Victor Sanchez Ponce, Aristeo Sandoval Regaldo, and Eric Urbina, and recorded the words "visa," "visa/H2B," or "H2B visa" in the area for entering a List A document on each of their I-9 forms.

18. Ronning Landscaping, Inc. hired 7 employees for employment in the United States, including Juan Gomez Favela, Juan Solis, Gabriel Melo Pastor, Cervando Gonzalez, Leavardo Vasques Alfaro, Manuel Beltran, and Fernando Solis, each of whom failed to check the box in section 1 of the I-9 form to indicate an immigration status, but each of whom nevertheless wrote an alien registration number on the line next to the words, "A Lawful Permanent Resident," signed the attestation, and presented a permanent resident card for section 2 verification.

19. Ronning Landscaping, Inc. hired Amador Diaz Lopez for employment in the United States and failed to ensure that he entered an alien registration number on the line next to the words, "A Lawful Permanent Resident" in section 1 of his I-9 form.

20. The Department of Homeland Security, Immigration and Customs Enforcement acknowledged that Ronning Landscaping, Inc. did present an I-9 form for Juan L. Perez, one of the employees named in Count II of its complaint.

B. Conclusions of Law

1. Ronning Landscaping, Inc. is an entity within the meaning of 8 U.S.C. § 1324a(a)(1) (2006).

2. All jurisdictional prerequisites to this action have been satisfied.

3. *United States v. Mr. Z. Enterprises, Inc.*, 1 OCAHO no. 288, 1869, 1873 n.2 (1991) does not support the proposition that a person or entity may be joined as a party respondent when there is no claim for relief against that person or entity.

4. When a newly proposed respondent could not properly be joined under the permissive joinder standard, a motion to amend to join that respondent should be denied as futile. *United States v. WSC Plumbing, Inc.*, 8 OCAHO no. 1045, 696, 705-06 (2000).

5. A company's mere provision of payroll or other administrative services to another company is not sufficient to create an employment relationship. *United States v. General Dynamics Corp.*, 3 OCAHO no. 517, 1121, 1149-51 (1993).

6. When an employee fails to check a box in section 1 of Form I-9, but writes an alien registration number on the line next to the words "A Lawful Permanent Resident," and signs the attestation, the alien is attesting to being a lawful permanent resident of the United States. *United States v. Ketchikan Drywall Servs., Inc.*, 10 OCAHO no. 1129, 15-16 (2011).

7. Acceptable documents to verify the employment eligibility of an H-2B worker include an unexpired foreign passport with an I-551 stamp or attached Form I-94 indicating unexpired employment authorization, or an unexpired foreign passport with an unexpired Form I-94 showing an endorsement of the alien's nonimmigrant status if that status authorizes the alien to work for the employer.

8. A "visa," "visa/H-2B," or "H-2B visa" is not a valid List A document.

9. Unsworn factual allegations in a brief or memorandum are not evidence and will not preclude summary decision. *United States v. Hotel Martha Washington Corp.*, 6 OCAHO no. 846, 216, 225 n.5 (1996).

10. The government is entitled to summary decision finding that Ronning Landscaping, Inc. failed to ensure that Amador Diaz Lopez properly completed section 1 of Form I-9.

11. Ronning Landscaping, Inc. engaged in a total of 63 violations of 8 U.S.C. § 1324a(b) and 8 C.F.R. § 274a.2(b).

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

Ronning's motion for partial summary decision is granted as to the employment status of the 23 H-2B workers named in Count II who actually worked for Stone Canyon. The government's motion for leave to amend the complaint is denied. The government's motion for partial summary decision is granted as to liability for 58 of the violations alleged in Count I and 5 of the remaining violations alleged in Count II. The motion is otherwise denied. Ronning's cross motion for partial summary decision is granted with respect to 7 violations alleged in Count I and 1 of the remaining violations alleged in Count II.

The government may make filings to support its penalty request on or before May 31, 2012. Ronning may make responsive filings on or before June 29, 2012.

SO ORDERED.

Dated and entered this 1st day of May, 2012.

_____
Ellen K. Thomas
Administrative Law Judge