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

January 23, 2013

UNITED STATES OF AMERICA, Complainant, v. OCCUPATIONAL RESOURCE MANAGEMENT, INC., A.K.A. OCCUPATIONAL RESOURCE MANAGEMENT STAFFING, INC., Respondent.	)	8 U.S.C. § 1324a Proceeding OCAHO Case No. 11A00003

FINAL DECISION AND ORDER

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 United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a complaint alleging that Occupational Resource Management, Inc., a.k.a Occupational Resource Management Staffing, Inc.,[1] (ORM or the company) committed a total of 379 violations of 8 U.S.C. § 1324a(b) and 8 C.F.R.§ 274a.2(b) (2012).

Count I alleged that ORM hired Jorge Contreras-Garcia and Jorge Cruz-Rivera knowing them to

[1] The complaint identifies the respondent as Occupational Resource Management Staffing, Inc., while the Notice of Intent to Fine identifies it as Occupational Resource Management. The company said its correct legal name is Occupational Resource Management, Inc., and during a prehearing telephone conference on July 21, 2011, the government's oral motion to amend the case caption was granted. The respondent's name is accordingly now reflected as Occupational Resource Management, Inc., a.k.a. Occupational Resource Management Staffing, Inc. ORM's motion to dismiss the complaint based on the misnomer was denied.

be unauthorized for employment in the United States. Count II alleged that the company hired 108 named individuals and failed to prepare and/or present an Employment Eligibility Verification Form (Form I-9) for any of them, and Count III alleged that the company hired 269 named individuals and failed to ensure that the individual completed section 1 of the form properly, and/or failed itself to complete section 2 or 3 of the form properly. The government sought penalties in the total amount of $188,017.50.

ORM filed an answer denying the material allegations, challenging the proposed penalties, and raising various affirmative defenses. The government filed a motion to strike the affirmative defenses, to which ORM filed a response. Pursuant to an order for prehearing statements, both parties filed their respective statements and a telephonic prehearing conference was subsequently conducted. Presently pending are the government's motion for summary decision and the company's cross motion for partial summary decision. Responses were filed to both motions, and both are ripe for decision.

II. BACKGROUND INFORMATION

Occupational Resources is a Washington state corporation established in 1995 and has its principal place of business at 5700 Sixth Avenue South, Suite 200, Seattle, Washington. The company is owned by La Bern Slaughter and George Cutrell[2] and provides temporary staffing services to companies in various industries, including seafood processing, warehousing, and light manufacturing. As of November 17, 2011, ORM had offices in Seattle and Kent. For some portions of the audit period the company also had offices in Tacoma, Ballard, and Renton, but these offices were subsequently closed due to a downturn in business.

The declaration of La Bern Slaughter explains that the company tracks the labor needs of its client customers, most of which have regular full-time workforces of their own that are supplemented from time to time with temporary hires from ORM. There is accordingly a good deal of turnover among workers. Slaughter described the hiring process as being responsive to the needs of the client companies. Applicants come to the ORM office where each typically completes an application form, a W-4 form, and section 1 of an I-9 form. Section 2, the employer portion of the I-9, is completed only if and when the worker is given an actual job assignment. Slaughter indicated that according to company policy, the worker would then need to come to the office within three business days and present documentation for the completion of section 2. He acknowledged that this did not always happen.

The record reflects that the company, while operating under the trade name MOR Staffing, received a warning notice from the former U.S. Immigration and Naturalization Service (INS) in April 2001 after an inspection of its I-9 forms revealed deficiencies. The government thereafter

[2] The name appears in the 2006 tax return as "Cutrall." The discrepancy is not resolved.

served a Notice of Inspection and Subpoena on ORM on June 13, 2008, instructing the company to produce I-9s for all employees hired since June of 2005. On June 27, 2008, ORM produced six binders with approximately 1700 I-9 forms, and a payroll list with 1753 names. A Notice of Suspect Documents was served on April 8, 2009 identifying 1141 current and former employees with questionable identification or documents. ORM responded on April 28, 2009 noting that almost all had been terminated prior to the notice, and the few remaining failed after notice to present alternative documents and were also terminated. A Notice of Technical or Procedural Failures was issued on May 1, 2009 identifying forty I-9s with technical or procedural errors, and ORM responded on May 20, 2009 indicating that it made such corrections as it could. A Notice of Intent to Fine (NIF) was served on March 24, 2010, after which the company provided additional I-9s and disputed some of the facts alleged. The government subsequently served a revised NIF on July 20, 2010. ORM made a timely request for a hearing and all conditions precedent to the institution of this proceeding have been satisfied. The revised NIF constitutes the basis for the complaint in this matter.

III. STATUTORY AND REGULATORY PROVISIONS INVOLVED

A. Summary Decision

OCAHO rules[3] provide that a complete or partial summary decision may issue 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 the moving party is entitled to summary decision. 28 C.F.R. § 68.38(c). This rule is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in federal cases. Accordingly, OCAHO jurisprudence looks to federal case law interpreting that rule for guidance in determining when summary decision is appropriate. *See United States v. Candlelight Inn, Inc.*, 4 OCAHO no. 611, 212, 222 (1994).[4]

[3] 28 C.F.R. pt. 68 (2012).

[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.

A party seeking a summary disposition bears the initial burden of demonstrating the absence of a genuine issue of material fact and entitlement to judgment as a matter of law. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Once the moving party satisfies that burden, the nonmoving party must come forward with contravening evidence to avoid summary resolution. *Id*. 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). For purposes of considering each motion, the facts are to be viewed in the light most favorable to the nonmoving party. *United States v. Primera Enters., Inc*., 4 OCAHO no. 615, 259, 261 (1994).

B. The Prohibition Against Hiring Unauthorized Aliens

IRCA makes the employment of unauthorized aliens unlawful. Employers are prohibited from, inter alia, hiring an alien worker knowing that the alien is unauthorized with respect to employment in the United States. 8 U.S.C. § 1324a(a)(1)(A). *See, e. g., United States v. Valdez*, 1 OCAHO no. 91, 598, 604 (1989). Regulations define "knowing" as including both actual and constructive knowledge:

The term "knowing" includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition. Constructive knowledge may include, but is not limited to, situations where an employer:

> (i) Fails to complete or improperly completes the Employment Eligibility Verification Form, I–9;
> (ii) Has information available to it that would indicate that the alien is not authorized to work, such as Labor Certification and/or an Application for Prospective Employer; or
> (iii) Acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf.

8 C.F.R. § 274a.1(*l*)(1).

OCAHO case law respecting constructive knowledge has not been fully developed. *United States v. Associated Painters, Inc.*, 10 OCAHO no. 1151, 4 (2012). Case law reflects, however, that the government must show either that the company knew, or that it should have known, that the employee was unauthorized to work in the United States at the time of hire. *United States v. Carter*, 7 OCAHO no. 931, 121, 140-41 (1997). The basic principle as it has been articulated in OCAHO case law is that the employer is not entitled to cultivate deliberate ignorance or avoid acquiring knowledge. *See United States v. Sunshine Bldg. Maint., Inc.*, 7 OCAHO no. 997, 1122, 1151-51 (1998); *United States v. Aid Maint. Co.*, 7 OCAHO no. 951, 475, 485 (1997).

The state of mind to be shown has also been characterized as "conscious disregard," "deliberate ignorance," or by some other formulation implying a conscious avoidance of positive knowledge. That showing has been found, for example, under circumstances where an employee wrote the expiration date for his employment authorization document in section 1 of Form I-9 and the employer failed to reverify his work authorization prior to the expiration date of the document. *United States v. Great Bend Packing Co.*, 6 OCAHO no. 835, 129, 131 (1996); *United States v. Buckingham Ltd.*, 1 OCAHO no. 151, 1059, 1067 (1990).

Generally speaking, when an employer receives specific information that casts doubt on the employment authorization of an employee, and the employer continues to employ the individual without taking adequate steps to reverify the individual's employment eligibility, a finding of constructive knowledge may result. *See Candlelight Inn*, 4 OCAHO no. 611 at 223-24; *United States v. Noel Plastering & Stucco, Inc.*, 3 OCAHO no. 427, 318, 321-22 (1991), *aff'd*, 15 F.3d 1088 (9th Cir. 1993); *United States v. New El Rey Sausage Co.*, 1 OCAHO no. 66, 389, 416 (1989), *aff'd*, 925 F.2d 1153 (9th Cir. 1991). As explained in *Mester Mfg. Co. v. INS*, 879 F.2d 561, 566 (9th Cir. 1989), the statute does not require that the knowledge come to the employer in any specific way.

Courts have warned that the doctrine of constructive knowledge must be "sparingly applied" in order to preserve Congressional intent. *Aramark Facility Servs. v. SEIU Local 1877*, 530 F.3d 817, 825 (9th Cir. 2008); *Collins Food Int'l, Inc. v. INS*, 948 F.2d 549, 555 (9th Cir. 1991). The *Collins* court distinguished its prior decisions in *Mester* and *New El Rey*, noting that unlike the employer in *Collins*, both *Mester* and *New El Rey* involved employers that had been given express notice that the suspect employees were using false cards or alien registration numbers belonging to someone else, after which the company continued to employ those individuals without reverifying their authorization. *Collins* held that where the social security card proffered by the employee appeared on its face to be valid, the employer was not obligated to investigate it further.

C. The Employment Eligibility Verification System

The INA imposes an affirmative duty upon employers to prepare and retain certain forms for employees hired after November 6, 1986 and to make those forms available for inspection on three days' notice. 8 C.F.R. § 274a.2(b)(2)(ii). Regulations designate the I-9 form as the Employment Eligibility Verification Form to be used by employers. 8 C.F.R. § 274a.2(a)(2). Forms must be completed for each new employee within three business days of the hire, 8 C.F.R. § 274a.2(b)(1)(ii), and each failure to properly prepare, retain, or produce the forms upon request constitutes a separate violation, 8 C.F.R. § 274a.10(b)(2). The form has three parts; section 1 consists of an employee attestation, in which the employee provides information under penalty of perjury about his or her status in the United States, 8 C.F.R. §§ 274a.2(a)(3), (b)(1)(i)(A), and section 2 consists of an employer attestation under penalty of perjury that specific documents

were examined to establish the individual's identity and eligibility for employment. 8 C.F.R. § 274a.2(a)(3), (b)(1)(ii)(A)-(B). Section 3 must be completed only when necessary to document that an employee's eligibility has been reverified prior to the expiration date, if any, on the employee's work authorization document. 8 C.F.R. § 274a.2(b)(vii).

An employer is required to ensure that the employee properly completes section 1, 8 C.F.R. § 274a.2(b)(1)(i)(A), and to ensure that it completes section 2 properly. 8 C.F.R. § 274a.2(b)(1)(ii)(B). Employers are also required to examine either a List A document, or both a List B and a List C document for each employee. 8 C.F.R. § 274a.2(b)(1)(v). List A documents are those that establish both identity and employment eligibility, 8 C.F.R. § 274a.2(b)(1)(v)(A); List B documents establish identity only, 8 C.F.R. § 274a.2(b)(1)(v)(B); while List C documents establish only employment eligibility, 8 C.F.R. § 274a.2(b)(1)(v)(C). Employers are permitted, but not required, to copy the documents they examine. 8 C.F.R. § 274a.2(b)(3).

D. The Good Faith Defense and the Distinction Between Substantive and Technical or Procedural Violations

Section 1324a(b)(6), enacted in 1996,[5] significantly altered the enforcement of the employer sanctions provisions by adding a new potential affirmative defense where an employer made a good faith attempt to comply with the requirements, but nevertheless committed certain technical or procedural violations. With respect to such violations, the employer must be given a period of not less than ten business days to correct the failure voluntarily. 8 U.S.C. § 1324a(b)(6)(A)-(B). The defense has no application to substantive violations. Neither is it available to an employer that did not make a good faith attempt to comply, or one that has been or is engaging in a pattern or practice of violating INA §§ 274A(a)(1)(A) or (A)(2). 8 U.S.C. § 1324a(b)(6)(C).

The distinction between substantive violations and those that are technical and procedural in nature is elaborated in Memorandum to INS from Paul W. Virtue, INS Acting Executive Commissioner for Programs, *Interim Guidelines: Section 274A(b)(6) of the Immigration & Nationality Act Added by Section 411 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996* (Mar. 6, 1997) (the Virtue Memorandum or Interim Guidelines), *available at* 74 No. 16 Interp. Releases 706, at app. I (Apr. 28, 1997). As explained in *United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1071, 11 (2001), dissemination of the Interim Guidelines to the public may be viewed as an invitation for the public to rely upon them as representing agency policy. The Interim Guidelines define the ambiguous statutory concept of technical and procedural violations in a manner that is arguably more generous than is required by the strict statutory language. *Id.* at 10. While this office is not bound by the Virtue

[5] The Illegal Immigration Reform and Immigrant Responsibility Act of 1996, sec. 1, tit. IV, § 411, 110 Stat. 3009 (codified as amended 8 U.S.C. § 1324a(b)(6)), was signed into law on September 30, 1996.

Memorandum, the government is so bound, and failure to follow its own guidance is grounds for dismissal of those claims. *Id.* at 12.

IV. EVIDENCE CONSIDERED

A. Exhibits Accompanying the Government's Motion

Exhibits accompanying the government's motion include Exs. G-1) Complaint and Notice of Intent to Fine (26 pp.); G-2) Declaration of ICE Forensic Auditor Sandra Hollcraft dated October 3, 2011 (8 pp.); G-3) Notice of Inspection and Administrative Subpoena dated June 10, 2008 (2 pp.); G-4) Information from ORM's website, as of November 17, 2010, and Washington State Department of Revenue business records database as of January 13, 2009 (11 pp.); G-5) Respondent's employment roster (35 pp.); G-5A) Count I: ORM's Form I-9 and Proof of Employment and Hire Dates for Jorge Garcia-Contreras and Jorge Cruz-Rivera, with supporting documents (6 pp.); G-5B) Count II: Proof of dates of hire for Carlos Castro and Norma Casillas (13 pp.); G-5C) Spreadsheets of the employees listed in Count II, with supporting documents (98 pp.); G-5D) Spreadsheets of the employees listed in Count II, with supporting documents (183 pp.); G-5E) Spreadsheets for employees listed in Count III, with supporting documents (Section 1 violations) (288 pp.); G-5F) Spreadsheets for employees listed in Count III, with supporting documents (Section 2 violations) (451 pp.); G-5G) Spreadsheets for employees listed in Count III, with supporting documents (Sections 1 and 2 violations) (138 pp.); G-5H) Spreadsheets for employees listed in Count III, with supporting documents (Section 3 violations) (15 pp.); G-6) Memorandum from Paul W. Virtue, INS Acting Executive Commissioner of Programs, *Interim Guidelines: Section 274A(b)(6) of the Immigration & Nationality Act* (Mar. 6, 1997) ("Virtue Memorandum") (22 pp.); G-7) ORM's corporate income tax returns for the years 2005-2009 (60 pp.); G-8) Letter from ORM attorney Robert Gibbs dated June 27, 2008; G-9) Spreadsheets of alleged unauthorized aliens employed by ORM and listed in Counts II & III and Notice of Suspect Documents dated April 8, 2009, including list of employee names (40 pp.); G-10) Warning Notice issued to MOR Staffing dated April 3, 2001 and Attestation of Compliance from MOR Staffing executed February 16, 2001 (3 pp.); G-11) Letter from ORM attorney Robert Gibbs dated April 28, 2009 (2 pp.); G-12) Relevant portions of ORM's Responses to ICE's Revised Set of Interrogatories and ICE's Second Set of Interrogatories, dated April 22, 2011 and September 8, 2011 respectively (10 pp.).

B. Exhibits Accompanying Occupational Resource Management's Motion

Exhibits accompanying ORM's motion include Exs. R-1) Declaration of La Bern Slaughter dated November 17, 2011 (8 pp.); R-2) ORM's response to Notice of Suspect Documents dated April 28, 2009 (2 pp.); R-3) Notice of Technical and Procedural Failures dated May 1, 2009 (3 pp.); R-4) ORM's response to Notice of Technical and Procedural Failures dated May 20, 2009 (3 pp.); R-5) ICE's response to ORM's First Set of Interrogatories and Request for Production dated

February 8, 2011 (43 pp.); R-6) Declaration of Robert Gibbs dated November 17, 2011; R-7) ICE operations message released July 13, 2009 regarding technical violations; R-8) Memorandum from Paul W. Virtue, INS Acting Executive Commissioner of Programs, *Interim Guidelines: Section 274A(b)(6) of the Immigration & Nationality Act* (Mar. 6, 1997) ("Virtue Memorandum") (22 pp.); R-9) Relevant pages from U.S. Citizenship and Immigration Services Handbook for Employers (M-274 rev. 01/05/11) (8 pp.); R-10) Internal ICE memorandum regarding Revised Administrative Fine Policy Procedures dated November 25, 2008 (2 pp.); R-11) Table and I-9s for selected Count III technical violations (7 pp.); R-12) ICE's Response dated August 25, 2011 to ORM's Third Set of Requests for Discovery (18 pp.); R-13) Internal ICE memorandum regarding Superseding Guidance on Reporting and Investigating Claims to U.S. Citizenship dated November 19, 2009 (3 pp.); R-14) Table and I-9s for selected Count III technical violations (13 pp.); R-15) Table and I-9s for selected Count III technical violations (5 pp.); R-16) Table and I-9s for selected Count III technical violations (5 pp.); R-17) Table and I-9s for selected Count III technical violations (37 pp.); R-18) Table and I-9s for selected Count III technical violations (6 pp.); R-19) U.S. Social Security Administration, *Identity Theft and Your Social Security*, SSA Pub. No. 05-10064 (2009) (8 pp.); R-20) U.S. Department of Justice, Name and Social Security Number (SSN) "No-Matches" Information for Employers; R-21) U.S. Social Security Administration, Program Operations Manual System, *Identity of Claimants*, GN 00203.020 (4 pp.); R-22) U.S. Social Security Administration, Program Operations Manual System, *Enumeration-at-Entry*, RM 10205.600 (6 pp.); R-23) National Immigration Law Center, *How Errors in E-Verify Databases Impact U.S. Citizens and Lawfully Present Immigrants* (Feb. 2011) (4 pp.); R-24) Notice of Inspection dated June 10, 2008; R-25) Notice of Suspect Documents dated April 8, 2009, not including the list of allegedly unauthorized employees (2 pp.).

C. Exhibits Accompanying Occupational Resource Management's Response

Exhibits accompanying ORM's response include Exs. R-26) U.S. Department of Homeland Security, E-Verify instructions (15 pp.); R-27) U.S. Citizenship and Immigration Services, *Affirmative Asylum Procedures Manual* (relevant excerpts) (July 2010) (16 pp.); R-28) Margaret D. Stock, *Citizenship and Computers*, 15 Bender's Immigr. Bull. 1143 (Aug. 15, 2010) (2 pp.); R-29) Julia Preston, *Immigration Crackdown Also Snares Americans*, N.Y. Times (Dec. 13, 2011) (4 pp.); and R-30) Form I-9, Lists of Acceptable Documents (rev. 08/07/09).

D. Exhibits Accompanying the Government's Response

Exhibits accompanying the government's response include Exs. G-13) ORM financial statements for 2010 and 2011 (46 pp.); G-14) Washington State quarterly unemployment insurance report for ORM/MOR Staffing, Inc. for 2005 to 2008 (108 pp.); and G-15) Form I-9 (rev. 05/07/1987).

In addition to the materials submitted with these motions, I also consider the record as a whole, including the pleadings, attachments thereto, and all other materials of record.

V. ISSUES AS TO LIABILITY

The government's motion seeks summary decision as to liability for all 379 violations alleged in the complaint. ORM's cross motion for partial summary decision initially sought summary decision as to liability for both the violations alleged in Count I, for sixty of the 108 violations alleged in Count II, and for sixty-six of the 269 violations alleged in Count III. ORM's response to the government's motion challenged two additional violations in Count III of the complaint, so there are 130 violations actually in dispute.

A. Liability for Count I

Count I alleges that ORM hired Jorge Contreras-Garcia and Jorge Cruz-Rivera knowing that each was unauthorized for work in the United States at the time he was hired. The parties agree that ORM is an entity within the meaning of 8 U.S.C. § 1324a(a)(1), and that the company hired both individuals. The record reflects that Contreras-Garcia was hired in 2005 and Cruz-Rivera in 2007, and that ORM paid wages to each of them during at least some portion of the inspection period. The parties vigorously dispute, however, whether either individual has been shown to be unauthorized for employment at the time of hire.

The declaration of ICE Forensic Auditor Sandra Hollcraft said that she served ORM with a Notice of Suspect Documents on April 8, 2009 listing 1141[6] employees "who did not appear to be authorized to work," and that both Contreras-Garcia and Cruz-Rivera were on that list. According to Hollcraft, ORM did not challenge the inclusion of any of the employees named in the Notice. Hollcraft said further that out of 914 individuals claiming to be lawful permanent residents or aliens authorized to work, she found only ninety-five whose information matched U.S. Citizenship and Immigration Services (CIS)[7] databases. Eight hundred and nineteen individuals entered Alien numbers (A numbers) that were either assigned to others or were never assigned, did not have work authorization, or had only expired work authorization. Three hundred twenty-eight were using invalid social security numbers, or social security numbers that were assigned to others.

ORM's motion for partial summary judgment contends that the government has failed to provide "conclusive evidence" to show that either Jorge Contreras-Garcia and Jorge Cruz-Rivera was unauthorized for work at the time of hire because Hollcraft's spreadsheet shows only a person's status as of the time checked, and does not specifically indicate the individual's status during the

[6] ORM says the Notice listed 1142 employees. The difference is immaterial.

[7] CIS is the agency within the U.S. Department of Homeland Security that oversees lawful immigration to the United States.

actual time periods of the individual's employment. It argues that a no match result from CIS or SSA may be suggestive, but is not conclusive, and that the custodian of the databases has not identified precisely what the individual discrepancies were, so that they could be simple misspellings or typographical errors.

ORM overstates the government's burden. ICE is not required to present "conclusive evidence" of the employee's unauthorized status; the standard of proof that must be met is instead a preponderance of the evidence. *See* 8 U.S.C. § 1324a(e)(3)(C); *United States v. Haim Co.*, 7 OCAHO no. 988, 1030, 1036 (1998). When the government makes a prima facie showing that a document is false based on a computer search of its records system, and the employer fails to provide any evidence to the contrary, substantial evidence supports a finding of lack of authorization. *Mester*, 879 F.2d at 566. As articulated in *New El Rey Sausage,*

> Contrary to the argument of New El Rey that the government has the entire burden of proving or disproving that a person is unauthorized to work, IRCA clearly placed part of that burden on employers. The inclusion in the statute of section 1324a(b)'s verification system demonstrates that employers, far from being allowed to employ anyone except those whom the government had shown to be unauthorized, have an affirmative duty to determine that their employees are authorized. This verification is done through the inspection of documents. Notice that these documents are incorrect places the employer in the position it would have been if the alien had failed to produce the documents in the first place: it has failed to adequately ensure that the alien is authorized.

925 F.2d at 1158.

Whatever problems there may be with the government's spreadsheet, moreover, there is independent evidence to show as to both individuals named in Count I not only that they were unauthorized for employment, but also that well before the records check even took place ORM had knowledge of specific facts that would have put a reasonable person on notice of their status. The Hollcraft declaration says that in each case the knowing hire violations are based on information from the individual's I-9 itself, not just on the records check.

1. Jorge Cruz-Rivera

The facts respecting the hiring of this individual are for the most part undisputed. Visual examination of Cruz-Rivera's I-9 form reflects that he entered November 5, 2005 in section 1 as the date his employment authorization expired. The date of hire ORM entered in section 2 of the form was July 11, 2007 at which time there was no indication in section 1 that Cruz-Rivera's authorization had ever been renewed. The face of the I-9 form thus reflects that Cruz-Rivera's

employment authorization document had expired long before he was hired. ORM acknowledged that Cruz-Rivera's work authorization had expired at the time he was hired.

The company's motion nevertheless argued that because Cruz-Rivera presented a facially valid social security card, ORM was obligated, as in *Collins*, to accept his proffered document, and that ICE provided no credible evidence that the social security number ORM entered in section 2 of Cruz-Rivera's I-9 is not valid or not assigned to him. ICE's check of the CIS database, performed sometime between June 27, 2008 when ORM produced the I-9s, and April 8, 2009, when ICE issued the Notice of Suspect Documents, reflected that Cruz-Rivera was still unauthorized for employment.

ORM's reliance on *Collins* for the proposition that it was under no obligation to question Cruz-Rivera about his expired work authorization is misplaced, because there was no expired or facially suspicious document at issue in *Collins.* An employer is obligated to ensure that a new employee properly completes section 1 of the I-9 form. 8 C.F.R. § 274a.2(b)(1)(i)(A). That obligation is not satisfied when an employee enters an expired work authorization document in section 1 of the form and the employer chooses to make no further inquiry. When an employer is put on notice of circumstances that would cause a reasonable person to make timely and specific inquiry but fails to take any steps to investigate or inquire further, that employer acts in reckless disregard of the facts and consequences. The employer is chargeable with such knowledge as reasonable inquiry would have revealed. *United States v. Jonel, Inc.*, 8 OCAHO no. 1008, 175, 193 (1998).

Because Cruz-Rivera's expired employment authorization document was sufficient to put ORM on notice of his unauthorized status, the government has shown by a preponderance of the evidence that ORM hired Jorge Cruz-Rivera with constructive if not actual knowledge that he was unauthorized for employment in the United States.

2. Jorge Contreras-Garcia

Jorge Contreras-Garcia completed section 1 of the I-9 form and signed the attestation indicating that he was a lawful permanent resident of the United States. The ORM employee who completed section 2 of the form entered a driver's license and a social security card as the documents examined, but did not sign the section 2 attestation and wrote a note in red at the bottom of the form stating, "12-19-2005: Social Security Card did not appear valid on its face." The entry is signed with initials that appear to be "TA." Hollcraft's declaration says that the CIS database reflected that the Alien number Contreras-Garcia entered on his I-9 appeared to belong to another person.

ORM hypothesizes that the reason the I-9 section 2 attestation was unsigned was that the ORM representative would have told Contreras-Garcia he had to bring in better documentation within three days, and that Contreras-Garcia actually worked for a total of fourteen hours, which adds up

to less than three business days. ORM says that the company accordingly should not be penalized for allowing Contreras-Garcia additional time to bring in better evidence of his work authorization, and then terminating him "within the three day window" when he failed to do so.

The record reflects, however, that Contreras-Garcia was hired on December 19, 2005, and that he worked until March 3, 2006. Time is counted in business days, not business hours. 8 C.F.R. § 274a.2(b)(1)(ii)(B). Upon being presented with a social security card that ORM itself recognized as not valid on its face, ORM should have refused to accept the document altogether, and should not have allowed Jorge Contreras-Garcia to start work in the first place, even for a brief time. ORM hired Contreras-Garcia despite knowing that his social security card appeared invalid on its face, and allowed this individual to remain on the payroll for approximately three months. In *Mester*, continuing to employ an unauthorized alien for even two weeks after obtaining information that would lead a reasonable person to inquire into the eligibility of the employee, was found unreasonable. 879 F.2d at 568.

The government has accordingly shown by a preponderance of the evidence that ORM hired Jorge Contreras-Garcia with constructive if not actual knowledge that he was unauthorized for employment in the United States. ORM will be held liable for both violations alleged in Count I.

B. Liability for Count II

Count II of the complaint alleged that ORM failed to prepare and/or present the Employment Eligibility Verification Form for 108 named individuals, and the government seeks summary decision for all these violations. The company acknowledged that it was unable to locate I-9 forms for 48 of these individuals: Maria Alfaro-De Aguilera, Nabor Carrillo-Jeronimo, Sarita Carter-Reed, Noiman Castillo, James Christie, Cristobal Cortez-Castillo, Marco Damian-Perez, Inocente Diaz, Crystal Durden, Patrick Epler, Sulaiman Fulton, Romeo Gupalao-Gines, Jaime Hangi-Flores, Francemi Hernandez-Villa, Tamala Hutchinson, Michael Imberg, Leonardo Luna-Ojeda, Rafael Magana-Torres, Victoria Maiava, Modesto Martinez-Hernandez, Eduardo Meza-Torres, Zenaida Mikel, Librado Mora-Palma, Wyatt Nickerson, Consuelo Nunez-Sarrios, Herminio Ojeda-Juarez, Marcelina Olvera-Butron, Jose Orellana-Guillen, Pablo Orta-Rodriguez, Luis Ortis, Basila Pablo-Lorenzo, Henry Pristell, Eduardo Quezada-Robles, Jose Quintanilla-Cortez, Audelia Quintero-Estrada, Noemi Santamaria-Cortes, Emilio Sevilla-Mendoza, Curtis Shelton, Alejandro Soto-Sanchez, Ezequiel Tayahua, Joe Thomas, James Thompson, Thao Trvong, Enrique Valentin-Montes, Wilfredo Vallejos, Tierra Vassar, Ivan Villada-Rojas and Lynn Williamson, and the government is entitled to summary decision for each of these forty-eight violations.

The basic facts pertaining to the contested violations alleged in the remaining sixty[8] forms are for

[8] Daniel Alatorre-Hernandez, Jose Ambriz-Hipolito, Rogelio Barron-Rodriguez, Alberto Bautista-Sanchez, Dana Belin, Eric S. Berry, Alejandro Carrillo-Perez, Rafael Castellanos-

the most part not in dispute. ORM apparently did produce these I-9s at some point, but they were evidently included in Count II rather than Count III because it is clear from the face of the documents that they were not actually prepared at the time of hire. When these I-9s were prepared cannot be determined, because the section 2 attestations for all these I-9s were all backdated to make it appear as though the forms had been timely prepared. The government alleges that at least two were not completed until after the NIF.

Each of these disputed I-9s was signed on behalf of ORM by either Norma Casillas or Carlos Castro, both former employees of the company. Casillas was employed from June 26, 2007 until January 11, 2008, while Castro was employed from February 27, 2006 until September 12, 2008. Each of these individuals signed multiple I-9s that were dated prior to the start of their own employment, so it is patently not possible that these forms were actually completed on the dates that were entered in section 2, and similarly not possible that the company representatives actually reviewed the documents entered on the forms on the dates they swore they examined them. Casillas signed sixteen[9] I-9s that were dated between April 5, 2007 and June 25, 2007, before she was even hired. Castro signed forty-three[10] I-9s that were dated between March 20, 2003 and February 17, 2006, before his own hire date. Castro also signed one I-9 on June 25, 2008, during his actual period of employment, on which he made a notation that the original I-9 from 2003 had been lost, and this I-9 was "redone" for compliance purposes.

ORM does not dispute these facts and acknowledged that Casillas and Castro backdated the I-9s.

Garcia, Kevin Chaney, Jacob Chess, James Coleman, Maria Cota-Girou, Rosario Crisostomo-Salmeron, Maria Cruz-Gonzalez, Claudia Cruz-Perez, Edward Estoque, Andres Fabian-Andres, Demicol Flight, Margarita Flores-De Morales, Victoriano Gomez-Vazquez, Crisanto Gregorio-Andres, Santiago Gregorio-Andres, Rigoberto Gregorio-Gomez, Rigoberto Gregorio-Matias, Leonel Hernandez-Garcia, Josias Hernandez-Gonzalez, Martha Hernandez-Juarez, Florentino Hernandez-Lopez, Angela Herrera Arias, Michael J.Hibbitt, Steve Humphrey, Benjamin Ibarra-Alcala, Fredy Isiordia-Lizarraras, Celerino Lopez-Paredes, Raul Manzo-Nunez, Juan Martinez-Cuellar, Aldis Martinez-Trujillo, Ramiro Matias-Lorenzo, Ernestina Moreno-Herrera, Mizraim Neri-Lucio, Manuel Ordonez-Cardona, Antonio Ordonez-Escalante, Jason Patmon, Mario Pedraza-Garcia, Higinio Pena-Hernandez, Marcelo Perez-Medina, Mario Quezada-Castro, Kenneth Quinlan, Fernando Quinones-Bobadilla, Benito Rodriguez-Cruz, Maria I. Rosales-Charrez, Kao Saelaw, Michael Shores, Julie Smith, Gladis Soto-Garcia, Donald Stokes, Maria Vargas-Campos, William Velasquez-Rosales, Jason Vertheen, and Jose Zavala-Jacobo.

[9] Ex. G-5D, at 23, 41, 44, 47, 53, 62, 65, 68, 71, 74, 113, 116, 125, 128, 137, and 182.

[10] Ex. G-5D, at 5, 8, 11, 14, 17, 20, 26, 29, 32, 35, 38, 50, 56, 59, 77, 80, 83, 86, 89, 92, 95, 98, 101, 104, 107, 110, 119, 122, 131, 134, 140, 143, 146, 149, 152, 155, 158, 161, 164, 167, 170, 176, and 179.

Slaughter avers that the practice was contrary to company policy and that neither individual currently works for ORM. ORM argues that the "misdated" forms reflect only technical, not substantive violations, and that the government was accordingly obliged to give it a ten-day period in which to correct the violations.

In support of its view that the violations are technical or procedural only, the company points to an internal ICE Operations Message dated July 13, 2009, that classifies a "[f]ailure to date section 2 within 3 business days of date employment begins" as a technical violation. ORM argues that pursuant to this guidance it is immaterial when section 2 is dated, so that the entry of no date, an early date, a late date, or an incorrect date must be treated as a technical violation, and not a substantive one. ORM also argues that ICE has furnished no evidence to prove the allegation brought in the complaint, that the I-9s were not "prepared or presented," and says that failure to prepare an I-9 in a timely manner is a different violation from failure to prepare it at all, as was alleged in the complaint.

ORM ignores the principal element of the so-called "good faith" defense. The 1996 reforms did not repeal any provision of the statute or regulations, nor did they alter an employer's obligation to ensure preparation of I-9 forms in the time and manner required by the statute and regulations. The reforms simply provided employers with the potential for a defense with respect to certain technical or procedural violations "if there was a good faith attempt to comply with the requirement." 8 U.S.C. § 1324a(b)(6)(A). Good faith is the sine qua non for this defense and without it ORM has not even crossed the threshold of eligibility for the defense.

Deliberate falsification of I-9 forms, moreover, unlike an inadvertent error, is not a technical or procedural violation, and ORM's overbroad construction of the Operations Message must be firmly rejected. The company seeks to blur the distinction between the inadvertent omission of a date or a delay in entering a date on an existing form that was actually prepared at the appropriate time, and a failure to prepare the form at all when required. A total failure to prepare an I-9 at all at the time of hire is still a substantive violation. That an inadvertent failure to complete certain specific entries on the form in a timely manner may be technical or procedural does not operate to extinguish the duty to prepare the I-9 in the first instance. According to ORM's view, no penalty could attach to a subsequently prepared and deliberately perjured I-9 form, so that an employer would be free to wait until service of a Notice of Inspection, then prepare and backdate I-9s for all its employees many years after the forms should have been prepared.

There is nothing in the Virtue Memorandum or in the Operations Message that suggests either provision was intended to provide such an opportunity or to give employers a free pass to deliberately backdate multiple I-9 forms. The omission of a particular date, or the completion of section 2 on a particular I-9 after the third day may be a technical violation where there was a good faith effort to comply with the requirements, but the wholesale backdating of or otherwise falsifying multiple I-9s is not. As explained in *United States v. LFW Dairy Corp.*, 10 OCAHO no. 1129, 5 (2009), "the rule relieves employers from liability for minor unintentional violations

of the verification requirements; it does not provide a shield to avoid the basic requirements of the Act." Nothing in the rule alters or affects the necessity of completing I-9s for new employees at the time they are hired, or of retaining the forms thereafter. Waiting for months or years after these employees' hire dates to prepare their I-9s and then backdating them is not a technical or procedural violation nor does it reflect a good faith attempt to comply with the requirements.

As to James Coleman, however, no violation will be found and no penalty assessed because it does not appear that ORM was required on June 13, 2008 to retain an I-9 form for him. An employer is obligated to retain an I-9 for three years after an individual's hire date or one year after the employee's termination, whichever is later. The record reflects that James Coleman was hired on March 8, 2005 and terminated on January 26, 2007. The latest date upon which ORM was required to retain an I-9 form for this employee thus was March 8, 2008, three months prior to the issuance of the Notice of Inspection. ORM will accordingly be held liable for fifty-nine of the sixty alleged violations that involve the backdated forms, and liability for a total of 107 violations will be found for Count II. The allegation with respect to James Coleman will be dismissed.

C. Liability for Count III

The government's motion seeks summary decision as to the allegations in Count III that ORM hired 269 named individuals[11] and failed to ensure that the individual completed section 1 of the form properly, and/or failed itself to complete section 2 or 3 of the form properly. The company's cross motion initially sought summary resolution in its favor as to sixty-six of the violations alleged in Count III, and subsequently challenged two additional violations in its response to the government's motion. ORM did not dispute the remaining 201 alleged violations and liability will be found for these violations.[12] Sixty-eight of the violations alleged in Count III thus remain in dispute.

With respect to all the violations occurring in section 1 of the form, ORM's motion initially asserts that because the statute itself does not require an employer to oversee completion of the employee attestation, an employer cannot be penalized for errors made by the employee. While a regulation provides otherwise, 8 C.F.R. § 274a.2(b)(1)(i), ORM simply asserts that the regulation is ultra vires. No authority is cited for this proposition and no coherent argument is made in its

[11] There are minor discrepancies between some of the names as they appear in the complaint and as they appear on the I-9 form. The respondent has raised no issues with respect to the identity of the particular employees, and the version of the names used will be as they appear in the complaint.

[12] A list of the 269 employees named in Count III is included as an appendix to this decision. The 201 conceded violations are those with the designation, "Violation admitted."

support. The short answer to ORM's attack on this regulation is that Congress expressly granted the Attorney General the power to implement regulations and procedures, and the Attorney General did so. *See United States v. Arnold*, 1 OCAHO no. 119, 781,784-86 (1989); *see also Steiben v. INS*, 932 F.2d 1225, 1227 (9th Cir. 1991). When Congress delegates authority to an agency to fill in gaps in a statute, the agency's permissible regulation is not ultra vires. *United States v. Dang*, 488 F.3d 1135, 1140-41 (9th Cir. 2007).

As to the specific categories of violations, ORM challenges these as well. It contends that the Virtue Memorandum is entitled to respect only to the extent it is actually persuasive, and that at least some of the disputed violations should be characterized as technical or procedural in nature.

1. Lawful Permanent Resident Box Checked, But No Alien Number Entered

ICE asserts that thirty-nine employees each checked a box in section 1 reflecting status as a lawful permanent resident, but did not enter an Alien number on the line provided. ORM conceded violations involving the I-9 forms for Nefertiti Lopez-Barbosa (no. 134), Francisco Mendez (no. 158), and Jose Mercado-Rojas (no. 166), but challenged thirty-six[13] of these alleged violations. The government relies on the Virtue Memorandum and on *United States v. Ketchikan Drywall Servs., Inc*., 10 OCAHO no. 1139, 16 (2011) to support its view that it is a substantive violation when the employee checks a box in section 1 but fails to write an Alien number on the form.

ORM's motion argues in contrast that failure to check a box is merely a technical violation

[13] Michael Abay (no. 1), Luis Amates-Sanchez (no. 8), Greg Anthony Asuncion (no.16), Evelio Bernal-Leyva (no. 31), Jose Castro-Lino (no. 45), Marieno Charles-Calmo (no. 47), Libia Chavez-De La Rosa (no. 48), Williams Contreras-Rivas (no. 53), Denis Fiallos-Archaga (no. 74), Enrique Galvan-Becera (no. 81), Arnulfo Gomez-Vazquez (no. 91), Jose Gonzalez-Beltran (no. 93), Raymundo Gonzalez-De Nova (no. 94), Abel Gonzalez-Garcia (no. 95), Martha Guity-De Miranda (no. 103), Rene Lujan-Torres (no. 140), Jema Marquez-Garcia (no. 148), Felipe Martinez-Velasco (no. 153), Enrique Martin-Jeronimo (no. 154), Catarina Matias-Calmo (no. 156), Roberto Mazariegos-Mencia (no. 157), Rigoberto Mendoza-Pablo (no. 161), Armando Herrera Morales (no. 170), Raul Peralta-Rojas (no. 185), Candelaria Perez-Mendoza (no. 190), Jose Ramirez-Gonzalez (no. 199), Mariano Ramos (no. 203), Rafaela Ramos-De Los Santos (no. 205), Maria Rodriguez-Valencia (no. 218), Fernando Rojas-Gonzalez (no. 219), Bartolo Romero-Hidalgo (no. 221), Hector Serafin-Rodriguez (no. 234), Ban Shin (no. 237), Jose Torres-Hernandez (no. 253), Hilarino Valdovinos (no. 260) and Marie Zavala-Perez (no. 268).
For Abel Gonzalez-Garcia (no. 95), the government makes the additional allegation that the employee listed different social security numbers in sections 1 and 2. Gov't motion, p. 22. As one substantive violation has been found for section 1, there is no need to consider the additional alleged violation.

because 8 U.S.C. § 1324a(b)(2) only requires the employee to attest generally to being a U.S. citizen, a lawful permanent resident, or an alien authorized for employment, and that the statute is "silent about the level of details" required. ORM argues that it is accordingly entitled to judgment as a matter of law. But OCAHO case law squarely holds that the failure to ensure that an employee enters his or her Alien number on the form prevents the government from verifying the employee's work authorization status, thus defeating the purpose of the I-9. *Ketchikan*, 10 OCAHO no. 1139 at 16.

Visual inspection of the government's exhibits reflects that for one of the thirty-six disputed individuals, Evilio Bernal-Leyva (no. 31), there are actually two I-9 forms for him in the record, the earlier of which is dated in July of 2006, and the later of which is dated September 4, 2007. The former appears as Exhibit G-5E, page 28 (and part of R-18) and the latter as G-5G, page 21 (and part of R-17). It is the later form that is missing an A number. The earlier form contains a different substantive violation and is addressed subsequently. For purposes of the September 4, 2007 I-9 form, Bernal-Leyva is identified as employee no. 31, while for purposes of the July 2006 I-9 form he is identified as employee no. 30. While a given I-9 is penalized only once regardless of the number of violations, these two I-9s are different and each is subject to a separate penalty.

While there is a number appearing on the form for Arnulfo Gomez-Vasquez (no. 91), the number simply duplicates the social security number this individual entered in section 1, and is not an A number. There is a six-digit number entered on the form for Raul Peralta-Rojas (no. 185) that ICE suggests is "probably a date." Whatever the number represents, however, it is patently not an A number. No A number is reflected in section 1 for the remainder of the individuals named, and there is no A number in section 2 or 3 of the I-9 form for these individuals either.

These are substantive violations and the government is entitled to summary decision as to liability for the thirty-six violations alleged.

2. No Section 1 Box Checked, but Alien Number Entered on the Appropriate Line

The government's motion also sought summary decision as to its allegation that sixteen employees failed to check any box in section 1 to attest to a particular immigration status, that is, to indicate whether the individual is a U.S. citizen, a lawful permanent resident, or an alien authorized for employment. ORM conceded violations for twelve[14] of these I-9s, but sought

[14] Maria Arciniega-Gama (no. 12), Jose Ayala-Molina (no. 20), Jose Barrios (no. 23), Jose Bustos (no. 38), Your Cortes-Martinez (no. 55), Jonathan Cortes-Valdivia (no. 57), Staline Delbirt (no. 66), Victor Gonzalez-Alfonsin (no. 92), Rubiel Hernandez-Perez (no. 111), Maricela Leon-Pena (no. 128), Jorge Salazar-Ramos (no. 226), and Brien Shiprit (no. 239).

summary decision for the I-9s for four others, Antonio Beristain-Maceda (no. 29), Salvador Marin-Hernandez (no. 147), Maria Mendoza-Ceja (no. 160), and Isabel Paredes-Rivera (no. 184). ORM argues that while these four employees did not check a box in section 1, each did write an Alien number on the line provided next to the box for lawful permanent resident, and did properly sign the attestation in section 1, thus substantially complying with the statute, citing *Ketchikan*, 10 OCAHO no. 1139 at 15-16 (finding substantial compliance when the employee wrote an Alien number on the line next to the words, "A Lawful Permanent Resident," and signed the section 1 attestation, despite failing to check a box).

Visual examination of the I-9 forms shows that the section 1 attestation section on each I-9 is signed by the employee, and an A number is entered on the line provided next to the lawful permanent resident box, but there is no check mark in any box. The government asserts this is a substantive violation under the Virtue Memorandum and that *Ketchikan* was wrongly decided. Because I am not so persuaded, I find that, as in *Ketchikan*, where the employee entered an Alien number on the line next to the phrase "Lawful Permanent Resident," and signed the attestation in section 1, the employer substantially complied with the requirements of the employment eligibility verification process. Summary decision will accordingly issue in favor of ORM finding no liability for the alleged violations in the I-9 forms of Antonio Beristain-Maceda, Salvador Marin-Hernandez, Maria Mendoza-Ceja, and Isabel Paredes-Rivera, and the allegations as to these four will be dismissed.

3. Multiple, Incompatible Work Authorization Statuses Indicated

The government alleged that two employees, Andres Herrera-Lozano (no. 112) and Jesus Martinez-Mendoza (no. 152), each checked a box in section 1 indicating status as a United States Citizen, but each nevertheless entered an Alien number in section 1. Visual examination of their I-9 forms confirms that the box for U.S. citizen is checked, and in addition, the employee has written an A number on the line below, next to the lawful permanent resident box. The permanent resident box itself is not checked.

ORM's motion seeks summary decision as to both alleged violations, saying that where the employer established the employee's identity and work authorization by examining specified documents for purposes of section 2, it has substantially complied with the requirements of the employment eligibility verification system and that any section 1 violation is technical or procedural in nature.

But when an employee provides conflicting employment authorization information in section 1, it is impossible to determine the status to which the employee is attesting when signing the form, thus defeating the purpose of the employee attestation. *Id.* at 17. The employer's completion of section 2 does not relieve the employer from responsibility for ensuring that the employee properly attests to his employment authorization status in section 1, and liability will accordingly be found for the forms for Andres Herrera-Lozano and Jesus Martinez-Mendoza.

4. Multiple, Incompatible Section 1 Boxes Checked

The government's motion alleged that twelve[15] employees each checked the box in section 1 indicating that they were citizens of the United States, but each also checked another box reflecting status either as a lawful permanent resident, or as an alien authorized for employment. Visual examination of the I-9 forms shows that eight employees checked boxes reflecting status as both a U.S. citizen and a lawful permanent resident, three employees checked boxes indicating status as both a U.S. citizen and an alien authorized for employment, and one employee checked all three boxes, claiming status as a U.S. citizen, a lawful permanent resident, and an alien authorized for employment. The government cites to both the Virtue Memorandum and OCAHO case law in support of its view that these are substantive violations.

ORM's motion seeks summary decision as to all twelve of these alleged violations and contends that the statute does not require the employee to attest to only one status, so that checking an "extra box" is only a technical violation. As observed in *Ketchikan*, however, it is impossible for an individual to be both a U.S. citizen and a lawful permanent resident at the same time, and attestation to multiple conflicting statuses renders the attestation itself meaningless. 10 OCAHO no. 1139 at 17. These are all substantive violations for which ORM will be held liable.

5. Employee Attests to Being U.S. Citizen in Section 1, But Presents Lawful Permanent Resident Card for Section 2 Identification

The government's motion alleged that eight[16] employees each checked the box in section 1 indicating status as a citizen of the United States but each presented a lawful permanent resident card as a List B document in section 2. Visual examination of the I-9s for Julieta Bazan-De Suarez (no. 25), Andres Chontal-Cruz (no. 49), Eliberto Flores-Perez (no. 78), German Garcia-Calleja (no. 85), Guillermo Lara (no. 126), Rosalva Lopez-Bautista (no. 135), Griselda Ramirez-Cortez (no. 198), and Elvis Saldana-Tellez (no. 227) confirms the facts alleged.

ORM makes a number of points in support of its assertion that this is a technical violation only. First, ORM asserts it has met its section 2 obligation because it examined a document that verified the employee's identity. Second, ORM asserts that a lawful permanent resident may

[15] Froilan Castillejos (no. 44), Rosa Cruz-Gonzalez (no. 62), Beatris Guaillas (no. 101), Rito Hernandez-Hernandez (no. 108), David Antonio Lucas (no. 139), Fausto Narcizo (no.175), Maria Olvera (no. 177), Domingo Osorio-Lobos (no. 179), Gliselda Padilla-Buezo (no. 182), Marcos Perez-Zuniga (no. 191), Melbin Ramirez-Sanchez (no. 202), and Emma Tapia (no. 246).

[16] Julieta Bazan-De Suarez (no. 25), Andres Chontal-Cruz (no. 49), Eliberto Flores-Perez (no. 78), German Garcia-Calleja (no. 85), Guillermo Lara (no. 126), Rosalva Lopez-Bautista (no. 135), Griselda Ramirez-Cortez (no. 198), and Elvis Saldana-Tellez (no. 227).

acquire citizenship through derivation, and there is nothing that requires the individual to surrender his or her permanent resident card in such a case. Third, ORM points out that employers are not expected to become immigration law experts, that employees have the right to choose which documents to present, and that pressing an employer to question an employee's documents would encourage discrimination that is impermissible under 8 U.S.C. § 1324b. The government's response cites *United States v. DJ Drywall, Inc.*, 10 OCAHO no. 1136, 6 (2010), in support of its assertion that a substantive violation occurs when an employee checks the U.S. citizen box in section 1 and the employer accepts a lawful permanent resident card for purposes of section 2. The government notes further that a U.S. citizen is prohibited by statute from possessing a permanent resident card, citing 8 C.F.R. § 338.3 (2012):

> No Certificate of Naturalization will be delivered in any case in which the naturalized person has not surrendered his or her Permanent Resident Card to [USCIS]. Upon a finding that the card is destroyed or otherwise unavailable, the district director may waive the surrender of the card and the Certificate of Naturalization shall then be delivered to the naturalized person.

Regulations provide that an employer must ensure that the employee properly completes section 1 of the form, 8 C.F.R. § 274a.2(b)(1)(i)(A), as well as properly complete section 2 itself, *id*. at (ii)(B). Part of the employer's responsibility in completing section 2 is to be sure that the documents the employee presents to verify identity and work authorization "appear to relate to the individual presenting the document." 8 C.F.R. § 274a.2(b)(1)(v)(A). While a permanent resident card is acceptable evidence of both identity and employment eligibility, permanent resident status is fundamentally inconsistent with simultaneous status as a citizen of the United States and calls into question whether the document "appears to relate to the individual." ORM will accordingly be held liable for failure to properly complete the I-9s of these eight employees.

6. Two Different Social Security Numbers are Entered in Sections 1 and 2.

The government alleges that for four individuals, Miguel Barrios (no. 24), Evelio Bernal-Leyva (no. 30),[17] Jose Gonzalez-Melendez (no. 96), and Porfirio Montano-Crisanto (no. 168), the employee wrote one social security number in section 1 of the I-9 form and the employer wrote a different social security number in section 2. The government asserts that when more than one social security number is entered on the I-9, the whole purpose of the statute is undermined because the identity of an employee providing multiple social security numbers is inherently questionable. Visual examination of the I-9s shows that the facts alleged are correct, and that the error in each instance is not a simple transposition of a few digits or some other copying error;

[17] The I-9 for this violation is the one dated in July 2006 and appearing in the record as Exhibit G-5E, page 28 (and as part of R-18).

the two social security numbers on each form are wholly different and bear no resemblance whatsoever to each other.

ORM's motion asserts that multiple social security numbers will not defeat the statutory purpose of section 2 because the company attested to the identity and employment authorization documents it reviewed, and the statute does not require the employer to resolve a conflict in details that the employer could have simply failed to notice. In addition, ORM asserts that possessing multiple social security numbers does not necessarily bring into question either the employee's identity or employment eligibility because there are legitimate reasons why an employee could have more than one social security number, including administrative error, receiving a new social security number after having been the victim of identity theft, and receiving a new social security number in a new name after being the victim of harassment or life endangerment.

No evidence or authority was cited to support ORM's theory that the Social Security Administration so readily issues an individual a second social security number. That number is a unique numerical identifier, *Bower v. Roy*, 476 U.S. 693, 711 (1986), and a wage earner or other individual is entitled to only one number to serve as his or her individual taxpayer identification. 26 C.F.R. §§ 301.6109-1(a)(1)(ii),(b). ORM's speculations as to "legitimate" reasons why one might have more than one social security number are unavailing. Presentation of a second, different social security number to an employer after five years of employment has been found in a different context to be adequate cause for the employer to question the validity of the document and ultimately terminate the employee for dishonesty. *Simon v. Ingram, Inc.*, 9 OCAHO no. 1088, 16-17 (1997). *Cf. Contreras v. Cascade Fruit Co.*, 9 OCAHO no. 1090, 22 (2003) (same result based on presentation of a new resident alien card with a different A number from the one presented at time of hire six years earlier).

Because more than one social security number does not reasonably appear to relate to one single individual, ORM failed to properly prepare the I-9s for these four individuals.

7. Foreign Identification Document Entered in Section 2 for Purported U.S. Citizen

The government's motion alleges that two employees each checked a box in section 1 of the I-9 form indicating status as a citizen of the United States, but in each case a foreign identification document was entered in section 2. Visual examination of the I-9s shows that Luis Jimenez-Hernandez (no. 119) presented a "Mexico ID Issue WA" as a List B document, and Julio Lomely-Carrasco (no. 132) presented a "Consular ID card" as a List A document.

ORM says that nothing in the statute precludes a U.S. citizen from possessing dual citizenship, and that it is up to the employee to choose what document he will present to the employer for verification purposes. ORM further asserts that an identification card issued by the "federal

government of Mexico" is a valid List B document because the requirement is for an identity document "issued by federal, state or local government agencies or entities," and nothing in the I-9 instructions tells the employer that only U.S. federal government identification will satisfy the regulatory requirements. 8 C.F.R. § 274a.2(b)(1)(v)(B)(1)(v). ORM further states that there are cases in which the regulations specify a U.S. document, so the absence of such specification should indicate that the regulations do not limit acceptable identification to U.S. documents. 8 C.F.R. § 274a.2(b)(1)(v)(B)(1)(vi), (viii) (U.S. military card or U.S. Coast Guard Merchant Mariner Card). ORM's position is basically that absent specification to the contrary, any identification card from the "federal, state or local government agencies or entities" of any country would be valid in the United States to prove identity for I-9 completion purposes.

But ORM is mistaken in its contention that a "Mexico ID Issue WA" is a valid List B document, or that a "Consular ID card" is a valid List A document. Neither document is acceptable to evidence identity for purposes of the employment eligibility verification system. In the few instances where regulations allow a non-United States document to be used for purposes of the employment eligibility verification system, those documents are specifically identified in the regulation. *See, e.g.*, 8 C.F.R. § 274a.2(b)(1)(v)(B)(1)(ix) (List B documents may include a driver's license issued by a Canadian government authority); *see also Ketchikan*, 10 OCAHO no. 1139 at 19-20 (finding that a document issued by a federal agency of Mexico was not a valid List B identification document).

The government will be granted summary decision as to liability for the violations involving Luis Jimenez-Hernandez (no. 119) and Julio Lomely-Carrasco (no. 132).

D. Conclusion

For the reasons previously stated, ORM is entitled to summary decision with respect to liability for the allegations in Count II regarding the I-9 of James Coleman, and with respect to the allegations in Count III regarding the I-9s of Antonio Beristain-Maceda (no. 29), Salvador Marin-Hernandez (no. 147), Maria Mendoza-Ceja (no. 160), and Isabel Paredes-Rivera (no. 184). These allegations should be dismissed.

The government is entitled to summary decision with respect to liability for the two knowing hire violations alleged in Count I, for 107 of the 108 paperwork violations alleged in Count II, and for 265 of the 269 paperwork violations alleged in Count III.

VI. PENALTIES

ICE's motion seeks summary decision as to penalties in the amount of $577.50 for Count I, $53,746.00 for Count II, and $133,694.00 for Count III, for a total civil money penalty of $188,017.50. ORM asserts that the government failed to carry its burden of proof with respect to

the penalties, and that the penalties proposed are grossly excessive.

A. Standards to be Applied

Remedies are imposed for knowing hire violations in accordance with the parameters set out at 8 C.F.R. §274a.10(b). The issuance of a cease and desist order is mandatory for such violations. 8 C.F.R. §274a.10(b)(1)(i). For violations occurring prior to March 27, 2008, the minimum civil money penalty is $275 and the maximum is $2200. 8 C.F.R. § 274a.10(b)(1). For knowing hire violations occurring after March 27, 2008, the range of monetary penalties is from a minimum of $375 to a maximum of $3200.

Cease and desist orders are not ordinarily issued for paperwork violations. *See United States v. Torres*, 4 OCAHO no. 596, 88, 89 (1994). Civil money penalties are imposed in accordance with 8 C.F.R. § 274a.10(b)(2): the minimum penalty for each individual with respect to whom the violation occurred after September 29, 1999, is $110, and the maximum penalty is $1100. Penalties available for the 372 paperwork violations in Counts II and III thus range from $40,920 to $409,200.

There is no single approved method of calculating penalties for paperwork violations, *see United States v. Felipe, Inc.*, 1 OCAHO no. 108, 726, 732 (1989) (affirmation by CAHO), and our case law has utilized both a mathematical approach, *see United States v. Davis Nursery*, 4 OCAHO no. 694, 924, 938-40 (1994), and a judgmental approach, *see United States v. Catalano*, 7 OCAHO no. 974, 860, 869 (1997). The following factors must be considered in assessing the appropriate penalties for paperwork violations: 1) the size of the business of the employer, 2) the good faith of the employer, 3) the seriousness of the violation(s), 4) whether or not the individuals involved were unauthorized aliens, and 5) any history of previous violations by the employer. 8 U.S.C. § 1324a(e)(5).

The statute does not require that equal weight be given to each factor, nor does it rule out consideration of additional factors. *United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000). The weight to be given to each factor depends upon the facts and circumstances of the particular case. *United States v. Raygoza*, 5 OCAHO no. 729, 48, 51 (1995). The government bears the burden of proof with respect to the penalty as well as to liability. *See United States v. Am. Terrazzo Corp.*, 6 OCAHO no. 877, 577, 581 (1996); *United States v. Skydive Acad. of Haw. Corp.*, 6 OCAHO no. 848, 235, 239-40 (1996).

B. The Government's Position

The Hollcraft declaration says that she calculated the penalty in accordance with "applicable guidance," referring to guidance in ICE's *Guide to Administrative Form I-9 Inspections and*

Civil Monetary Penalties, dated November 25, 2008 (Guide).[18] For Count I, Hollcraft set the penalty at $275.00 for each violation, then aggravated it by $13.75 each for a lack of good faith.

Hollcraft says for Counts II and III she first took the number of I-9 forms with substantive violations (379) and divided it by the total number of employees for whom an I-9 should have been presented (1746). Because the resulting percentage fell between 20-29%, the base fine for the paperwork violations was set at $440 per violation in accordance with the grid set out in the Guide. ICE acknowledged that the company had no history of previous violations of 8 U.S.C. § 1324a, and treated both this factor and the size of the business as neutral. Hollcraft concluded, however, that all the base penalties for paperwork violations should be aggravated by 10%-15%, 5% for lack of good faith and 5% for the seriousness of the violations, and, for 225 violations, another 5% for the involvement of unauthorized aliens.

ICE said it aggravated all the penalties for lack of good faith for several reasons, including the fact that ORM employees backdated the section 2 attestation on the I-9s for sixty of the individuals named in Count II. ICE says in addition that it questions whether the ORM employee representative actually examined the employees' original documents at the time of hire, because of what it characterizes as a "large number" of I-9s in which the document presented was either a faxed photocopy, or section 1 was a faxed photocopy while section 2 was an original document. Hollcraft says that she aggravated the penalty for the seriousness of the violations because many of the violations were due to a lack of document information and a lack of employer attestation in section 2. She says that the violations "most likely" led to the hiring of unauthorized aliens since a large number of the I-9s with violations are related to employees the government states "appear to be unauthorized."

The government says that records checks it conducted revealed that 225 individuals were not authorized to work in the United States, and that they had provided ORM with documents that did not match immigration or social security records. In support the government cited to its list of the employees and to the Notice of Suspect Documents served on April 8, 2009, which includes a spreadsheet showing more than 1700 employee names in alphabetical order, together with notations as to the result of the records check of each particular employee's social security number, alien number, and/or other identification. Among the numerous discrepancies noted are an invalid social security number or alien number, an employee name and/or date of birth that does not match Social Security records or a name that does not match immigration records, an expired or missing work authorization, or an invalid state ID or driver's license number.

[18] The relevant portions of the document are available on ICE's website. *See Fact Sheet: Form I-9 Inspection Overview* 5-6 (Dec. 1, 2009), U.S. Immigration and Customs Enforcement, *available at* http://www.ice.gov/news/library/factsheets/i9-inspection.htm. Agency guidelines are not binding in this forum. *See Sunshine*, 7 OCAHO no. 997 at 1175; *United States v. Fortune E. Fashion, Inc.*, 7 OCAHO no. 992, 1075, 1078 (1998).

Finally, the government asserts that ORM is in a position to pay the assessed penalty, and that ORM's two owners, Bernie Slaughter and George Cutrell, have each taken significant salaries in recent years, leaving the company with little or no profit. The company's tax returns for the years 2006 - 2009[19] show modest taxable income, but the combined salaries paid to Slaughter and Cutrell range from $198,796 to $627,596:

Year	**Gross Receipts**	**Taxable Income**	**Owner Salaries (Schedule E)**
2009	$1,377,518	($42,847)	$198,796
2008	$5,993,618	$111,702	$558,565
2007	$7,521,124	$71,812	$627,596
2006	$3,821,935	$43,131	$243,808

The government also says that ORM has over $100,000 in cash at its disposal, which it characterizes as a "sizeable amount." The source for this information is not identified.

C. The Company's Position

ORM argues that it should be fined for only 258 of the 379 violations alleged, which would drop the percentage of violations and lower the base penalty. The company characterizes the amount of the penalty ICE proposed as grossly unjust and punitive, and not designed to encourage voluntary compliance. ORM contends that ICE cannot establish facts to support its aggravation of the penalty, and cites to a legacy INS memorandum, *Guidelines for Determination of Employer Sanctions Civil Money Penalties* (Aug. 30, 1991), that advises leniency for first-time violators by setting the penalty at the statutory minimum. The company also asserts that its business is substantially diminished since the collapse of the economy in 2008, and that it is now an unprofitable small business.

The company urges that the greatest weight in setting the penalty should be given to its small size and inability to pay, and that the penalty should be set in the lower range in order to allow ORM to remain in business. The declaration of La Bern Slaughter says ORM now averages fifty

[19] Tax returns for 2010 and 2011 are not in the record.

employees per month, in contrast to its high of more than 240 per month, and that since 2007, its office support staff has shrunk from seven to two employees. While the company previously operated offices in as many as five different cities, ORM had offices only in Seattle and Kent as of November 2011.

In support of its claim of good faith, ORM points to a 1998 proposed rule that never became effective and has no application to setting a penalty, s*ee Ketchikan*, 10 OCAHO no. at 27 (discussing 63 Fed. Reg. 16909), and to portions of H.R. Rep. No. 99-682(I), at 10-11 (1986), *reprinted in* 1986 U.S.C.C.A.N 5649, 5660-61, that deal with an affirmative defense to a knowing hire allegation that also has no application to penalty issues. *See United States v. N. Mich. Fruit Co*., 4 OCAHO no. 667, 680, 690 (1994).

ORM also says that ICE has failed to carry its burden to show that any of the employees were unauthorized because the databases used are inaccurate, citing to a news media report that the Social Security Administration wrongly declares 14,000 people dead every year. The company notes that when ICE checks an employee's A number, it takes the number from section 1 in which the employee, not the employer, wrote the number. Because DHS forbids employers from asking an employee to present a document to verify information written in section 1, the employer cannot check the employee's self-reported information and DHS is punishing an employer for a mistake made by the employee that it is not permitted to check on.

Finally, Slaughter says that the company would be unable to continue to operate due to the penalty ICE assessed. Slaughter reports that the receipts for the first nine months of 2011 were $1.1 million, and there was an operating loss of $69,000. Slaughter also attributes the company's profitability in 2010 to a refund of $58,307 received from workers' compensation and the fact that "management took a partial salary with the complete elimination or (sic) medical and other benefits such as normal business expense reimbursements such as auto and mobile phone allowances." No specific information is provided, however, as to the compensation of officers for that period. Slaughter says no workers' compensation refund was anticipated for 2012.

D. Discussion and Analysis

The legacy INS Guidelines cited by ORM were promulgated in 1991 and have been superseded by subsequent ICE guidance. They no longer represent agency policy and are not considered here.

The parties are in agreement that ORM has no history of previous violations, a factor generally viewed as inclining favorably toward the company, but their views differ as to how the remaining factors should be assessed or weighed. First, it must be noted that a business does not have to be a "mom and pop" operation in order to qualify as a small business, and companies with significantly more than forty-five employees have consistently been found in our jurisprudence to be small employers. *See United States v.Pegasus Rest., Inc*., 10 OCAHO no. 1143, 4, 7 (2012)

(53-55 employees); *United States v. Vogue Pleating, Stitching & Embroidery Corp.*, 5 OCAHO no. 782, 468, 471 (1995) (approximately 100 employees). According to U.S. Small Business Administration (SBA) classifications[20] a temporary help services business with annual receipts up to $13.5 million per year qualifies as a small business. 13 C.F.R. § 121.201 (2011) (code 561320). ORM is significantly smaller. Whatever the size of ORM during its heyday, it must in any event be considered to be a small employer now, a factor which normally weighs in favor of the employer.

Analysis of an employer's good faith will generally focus first on whether or not the employer reasonably attempted to comply with its obligations under § 1324a prior to issuance of the Notice of Inspection. *See 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). As is often emphasized in OCAHO jurisprudence, however, the mere fact of having a dismal record of I-9 compliance is not sufficient, standing alone, to support a finding of bad faith. *United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 477, 483 (1995) (modification by the CAHO). Evidence does not support a generalized finding of bad faith here, but neither does it support a generalized finding of good faith.

With respect to the backdated I-9 forms in Count II, however, the forms themselves constitute clear evidence of culpable conduct beyond the mere failure of compliance and there is no basis upon which it could reasonably be concluded that these I-9s were completed in good faith. The only support for ORM's claim of good faith with respect to these violations is that it had a policy of completing I-9s, even if particular employees did not always fully comply with the policy. While the government's expressions of doubt surrounding the faxed photocopies are insufficient to support a finding that ORM did not ever examine the employee documents, it is still impossible to find that ORM acted in good faith with respect to these particular violations and the evidence supports enhancement of the penalty for these violations. An employer does not act in good faith when its agents enter false information in its I-9 forms in order to make the records look correct. *Sunshine,* 7 OCAHO no. 997 at 1168.

While the government aggravated the penalties for all the violations for seriousness, all violations are not necessarily equally serious. *See United States v. Snack Attack Deli, Inc*., 10 OCAHO no. 1137, 8 (2010) (citing *Carter*, 7 OCAHO no. 931 at 169). Failure to prepare an I-9 at all is certainly among the most serious of paperwork violations. *Reyes*, 4 OCAHO no. 592, 1, 10 (1994) ("[F]ailure to prepare I-9s [is] serious because that failure frustrates the national policy . . . intended to assure that unauthorized aliens are excluded from the workplace."). Forty-eight of the violations in Count II involved the failure to prepare an I-9 at all, and fifty-nine of the

[20] Previous OCAHO cases have looked to the SBA classifications in determining the size of a particular business. *See Pegasus Rest.,*10 OCAHO no. 1143 at 6; *Ketchikan Drywall*, 10 OCAHO no. 1139 at 26; *Carter*, 7 OCAHO no. 931 at 160-61.

forms were backdated, also a very serious violation. The violations in Count III, while still serious, are of a somewhat different character and do not necessarily warrant enhancement on this basis.

While the government says there were sixty-six unauthorized workers named in Count II, and 159 in Count III, I decline, if only as a concession to the shortness of life, to undertake the exercise of locating the names of these 225 individuals on Hollcraft's spreadsheet setting out the evidence respecting the documents presented by more than 1700 individuals, in order to ascertain precisely what evidence supports the government's assertion as to the unauthorized status of each of the specific individuals named.

Evidence of the employer's ability to pay a penalty is both ambiguous and incomplete.

E. Conclusion

1. The Knowing Hire Violations

In addition to civil money penalties, a cease and desist order will be issued with respect to the knowing hire violations. The penalty factors applicable to paperwork violations have limited relevance to assessing monetary penalties for knowing hire violations because such violations are by definition not committed in good faith and are never less than extremely serious. *Sunshine*, 7 OCAHO no. 997 at 1187-88. It is thus unclear why ICE elected to treat the knowing hire violations in this case more leniently than it did the paperwork violations. An administrative law judge has the authority to increase a civil penalty when the amount initially sought is inadequate, *Id.* at 1175. Because the knowing hire of an unauthorized alien is the most serious of all the violations established, the penalties for the two knowing hire violations in Count I will be assessed at the rate of $800 for each of the two violations in Count I.

2. The Paperwork Violations

Penalties for paperwork violations should be sufficiently meaningful to accomplish the purpose of deterring future violations, *Jonel, Inc.*, 8 OCAHO no. 1008 at 201, without being "unduly punitive" in light of the respondent's resources. *United States v. Minaco Fashions, Inc.*, 3 OCAHO no. 587, 1900, 1909 (1993). Considering the record as a whole and the statutory factors in particular, the penalties for the 107 violations found in Count II will be assessed at $500 each, and for the 265 violations in Count III the penalities will be assessed at $200 each. The total for all counts is $108,100.

VII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Occupational Resource Management, Inc. is a Washington state corporation established in 1995 that has its principal place of business at 5700 Sixth Avenue South, Suite 200, Seattle, Washington.

2. Occupational Resource Management, Inc. is engaged in the business of providing temporary staffing services to companies in various industries, including seafood processing, warehousing, and light manufacturing.

3. As of November 17, 2011, Occupational Resource Management, Inc. had offices in Seattle and Kent, Washington, and was a small employer.

4. For some portions of the audit period Occupational Resource Management, Inc. had offices in Tacoma, Ballard, and Renton, as well as Seattle and Kent, but the former offices were subsequently closed due to a downturn in business.

5. While operating under the trade name MOR Staffing, Occupational Resource Management, Inc. received a warning notice from the U.S. Immigration and Naturalization Service (INS) in April 2001 after an inspection of its I-9 forms revealed deficiencies.

6. The United States Department of Homeland Security, Immigration and Customs Enforcement served a Notice of Inspection and Subpoena on Occupational Resource Management, Inc. on June 13, 2008, instructing the company to produce I-9s for all employees hired since June of 2005.

7. On June 27, 2008, Occupational Resource Management, Inc. produced six binders with approximately 1700 I-9 forms, and a payroll list with 1753 names.

8. A Notice of Suspect Documents was served on Occupational Resource Management, Inc. on April 8, 2009 identifying 1141 current and former employees with questionable identification or other documents.

9. Occupational Resource Management, Inc. responded to the Notice of Suspect Documents on April 28, 2009 noting that almost all had been terminated prior to the notice, and the few remaining failed after notice to present alternative documents and were also terminated.

10. A Notice of Technical or Procedural Failures was issued to Occupational Resource Management, Inc. on May 1, 2009 identifying forty I-9s with technical or procedural errors.

11. ORM responded to the Notice of Technical or Procedural Violations on May 20, 2009 indicating that it made such corrections as it could.

12. A Notice of Intent to Fine (NIF) was served on Occupational Resource Management, Inc. on March 24, 2010, after which the company provided additional I-9s and disputed some of the facts alleged.

13. The government subsequently served a revised Notice of Intent to Fine (NIF) on July 20, 2010.

14. The revised Notice of Intent to Fine (NIF) constitutes the basis for the complaint in this matter.

15. Occupational Resource Management, Inc. filed a request for hearing after receipt of the Notice of Intent to Fine (NIF).

B. Conclusions of Law

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

2. After service of the Notice of Intent to Fine, Occupational Resource Management, Inc. made a timely request for a hearing and all conditions precedent to the institution of this proceeding have been satisfied.

3. The term "knowing" includes not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition. 8 C.F.R. § 274a(1)(*l*)(1) (2012).

4. When an employer receives specific information that casts doubt on the employment authorization of an employee, and the employer continues to employ the individual without taking adequate steps to reverify the individual's employment eligibility, a finding of constructive knowledge may result. *See United States v. Candlelight Inn, Inc.,* 4 OCAHO no. 611, 212, 223-24 (1994).

5. When an employer is put on notice of circumstances that would cause a reasonable person to make timely and specific inquiry but fails to take any steps to investigate or inquire further, that employer acts in reckless disregard of the facts and consequences and is chargeable with such knowledge as reasonable inquiry would have revealed. *United States v. Jonel, Inc.,* 8 OCAHO no. 1008, 175, 193 (1998).

6. Occupational Resource Management, Inc. hired Jorge Contreras-Garcia and Jorge Cruz-Rivera knowing them to be unauthorized for employment in the United States.

7. The INA imposes an affirmative duty upon employers to prepare and retain certain forms for employees hired after November 6, 1986 and to make those forms available for inspection on three days' notice. 8 C.F.R. §§ 274a.2(b)(2)(i)-(ii) (2012).

8. Regulations provide that the Employment Eligibility Verification Form (Form I-9) must be completed for each new employee within three business days of his or her hire, 8 C.F.R. § 274a.2(b)(1)(ii) (2012), and each failure to properly prepare, retain, or produce the forms upon request constitutes a separate violation, 8 C.F.R. § 274a.10(b)(2).

9. Occupational Resource Management, Inc. hired 107 individuals for whom it either failed to present an Employment Eligibility Verification Form (Form I-9) upon request, or failed to prepare the Form within three days of the employee's hire and backdated the form to make it appear timely.

10. Section 1 of Form I-9 consists of an employee attestation, in which the employee provides information under penalty of perjury about his or her status in the United States, 8 C.F.R. § 274a.2(a)(3) (2012), and an employer is required to ensure that the employee properly completes the attestation in section 1. 8 C.F.R. § 274a.2(b)(1)(i)(A).

11. Section 2 of Form I-9 consists of an employer attestation under penalty of perjury that specific documents were examined to establish the individual's identity and eligibility for employment, and an attestation as to the date when that examination took place. 8 C.F.R. §§ 274a.2(a)(3), (b)(1)(ii) (2012).

12. Section 3 of Form I-9 consists of an employer attestation under penalty of perjury that the employer has reverified the continuing eligibility of an individual prior to the expiration of the individual's work authorization document. 8 C.F.R. § 274a.2(b)(vii) (2012).

13. Occupational Resource Management, Inc. hired 265 named employees and either failed to ensure that the employee properly completed section 1 of the Employment Eligibility Verification Form (Form I-9), or failed itself to properly complete section 2 or 3.

14. ICE's motion for summary decision is granted in part and denied in part. Summary decision is granted as to liability for Count I in its entirety, as to 107 of the 108 allegations in Count II, and as to 265 of the 269 allegations in Count III.

To the extent that any finding of fact is deemed to be a conclusion of law, or any conclusion of law is deemed to be a finding of fact, the same is so denominated as if set forth as such.

ORDER

For the reasons more fully set forth herein, the allegations in Count II relating to James Coleman, and the allegations in Count III relating to Antonio Beristain-Maceda, Salvador Marin-Hernandez, Maria Mendoza-Ceja, and Isabel Parades-Rivera are dismissed.

ORM shall henceforth cease and desist from further violating the provisions of 8 U.S.C. § 1324a(a)(1)(A) and shall pay a total civil money penalty of $108,100. All other pending motions are denied.

SO ORDERED.

Dated and entered this 23rd day of January, 2013.

_____

Ellen K. Thomas
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.

APPENDIX TO COUNT III			
No.	**Employee Name**	*Judgment for ICE*	*Judgment for ORM*
1	Abay, Michael	Violation as charged	
2	Abundis-Rea, Jose	Violation admitted	
3	Acevedo-Reyes, Revel	Violation admitted	
4	Aguiluz, A Z Daniell	Violation admitted	
5	Ahumada-Lizarraras, Francisco	Violation admitted	
6	Alderman, Alpenyo	Violation admitted	
7	Alvarez-Hernandez, Gloria	Violation admitted	
8	Amates-Sanchez, Luis	Violation as charged	
9	Anzures-Corona, Rene	Violation admitted	
10	Aparicio-Santiago, Javiar	Violation admitted	
11	Arce, Isaias	Violation admitted	
12	Arciniega-Gama, Maria	Violation admitted	
13	Arevalo-Contreras, Laura	Violation admitted	
14	Arevalo-Contreras, Maria	Violation admitted	
15	Arocha-Milan, Patricia	Violation admitted	
16	Asuncion, Greg Anthony	Violation as charged	
17	Atler, Gabriel	Violation admitted	
18	Avelar-Ocampo, Ruben	Violation admitted	
19	Avila, Carlos	Violation admitted	
20	Ayala-Molina, Jose	Violation admitted	
21	Balderrama, Carlos	Violation admitted	
22	Barfield, Bryan	Violation admitted	
23	Barrios, Jose	Violation admitted	
24	Barrios, Miguel	Violation as charged	
25	Bazan-De Suarez, Julieta	Violation as charged	
26	Beltran, Elmer	Violation admitted	
27	Beltran-Contreras, Floriberto	Violation admitted	
28	Beltran-Rivera, Carlos	Violation admitted	
29	Beristain-Maceda, Antonio		No violation
30	Bernal-Leyva, Evelio	Violation as charged	
31	Bernal-Leyva, Evelio	Violation as charged	
32	Blanco, Hector	Violation admitted	
33	Boyce, Shawn	Violation admitted	
34	Brent, James	Violation admitted	
35	Briggs, Derry	Violation admitted	
36	Brockley, Angelina	Violation admitted	
37	Brooks, Steve	Violation admitted	
38	Bustos, Jose	Violation admitted	
39	Calmo-Pablo, Miguel	Violation admitted	
40	Camacho-Martinez, Jaime	Violation admitted	
41	Carretero, Felix	Violation admitted	

APPENDIX TO COUNT III			
No.	**Employee Name**	*Judgment for ICE*	*Judgment for ORM*
42	Carrillo, Louis	Violation admitted	
43	Carter, David	Violation admitted	
44	Castillejos, Froilan	Violation as charged	
45	Castro-Lino, Jose	Violation as charged	
46	Chamberlin, Adam	Violation admitted	
47	Charles-Calmo, Marieno	Violation as charged	
48	Chavez-De La Rosa, Libia	Violation as charged	
49	Chontal-Cruz, Andres	Violation as charged	
50	Chontal-Cruz, Jorge	Violation admitted	
51	Collier, Jerome	Violation admitted	
52	Contreras, Margarita	Violation admitted	
53	Contreras-Rivas, Williams	Violation as charged	
54	Corona, Carlos	Violation admitted	
55	Cortes-Martinez, Your	Violation admitted	
56	Cortes-Valdivia, Jonathan	Violation admitted	
57	Cortes-Valdivia, Jonathan	Violation admitted	
58	Cortez-Garcia, Yessenia	Violation admitted	
59	Coulson, Robert	Violation admitted	
60	Cranford, Theodore	Violation admitted	
61	Crittenden, Scott	Violation admitted	
62	Cruz-Gonzalez, Rosa	Violation as charged	
63	Dacanay, Benjamin	Violation admitted	
64	Dalton, Reginald	Violation admitted	
65	De La Parte, Steven	Violation admitted	
66	Delbirt, Staline	Violation admitted	
67	Dixon, Eddie	Violation admitted	
68	Doud, Steven	Violation admitted	
69	Dread, Glenn	Violation admitted	
70	Dugger, Dillon	Violation admitted	
71	Dunomes, Larry	Violation admitted	
72	Ensastegui-Gonzalez, Arcadio	Violation admitted	
73	Fernen, Gary	Violation admitted	
74	Fiallos-Archaga, Denis	Violation as charged	
75	Flores-Hernandez, Luis	Violation admitted	
76	Flores-Hernandez, Manuel	Violation admitted	
77	Flores-Magana, Leovardo	Violation admitted	
78	Flores-Perez, Eliberto	Violation as charged	
79	Foster, Brandon	Violation admitted	
80	Fragoso-Vasquez, Luis	Violation admitted	
81	Galvan-Becera, Enrique	Violation as charged	
82	Garcia, Flavio	Violation admitted	
83	Garcia, Jorge	Violation admitted	
84	Garcia-Bautista, Jesus	Violation admitted	

APPENDIX TO COUNT III			
No.	**Employee Name**	*Judgment for ICE*	*Judgment for ORM*
85	Garcia-Calleja, German	Violation as charged	
86	Garcia-De Cortez, Jeanette	Violation admitted	
87	Garcia-Escarzaga, Jehu	Violation admitted	
88	Garcia-Sarmiento, Felipe	Violation admitted	
89	Gauna, Sun	Violation admitted	
90	Gomez-Gonzalez, Valentin	Violation admitted	
91	Gomez-Vazquez, Arnulfo	Violation as charged	
92	Gonzalez-Alfonsin, Victor	Violation admitted	
93	Gonzalez-Beltran, Jose	Violation as charged	
94	Gonzalez-De Nova, Raymundo	Violation as charged	
95	Gonzalez-Garcia, Abel	Violation as charged	
96	Gonzalez-Melendez, Jose	Violation as charged	
97	Gonzalez-Ramirez, Victor	Violation admitted	
98	Green, Barry	Violation admitted	
99	Green, Lonnie	Violation admitted	
100	Green, Rodney	Violation admitted	
101	Guaillas, Beatris	Violation as charged	
102	Guardado-Molina, Marvin	Violation admitted	
103	Guity-De Miranda, Martha	Violation as charged	
104	Hartfield, Sadegh	Violation admitted	
105	Haynes, Denette	Violation admitted	
106	Henderson, Jerome	Violation admitted	
107	Hernandez, Marcos	Violation admitted	
108	Hernandez-Hernandez, Rito	Violation as charged	
109	Hernandez-Juarez, Javier	Violation admitted	
110	Hernandez-Lopez, Claudio	Violation admitted	
111	Hernandez-Perez, Rubiel	Violation admitted	
112	Herrera-Lozano, Andres	Violation as charged	
113	Hill, Ricky	Violation admitted	
114	Hudson, Pervis	Violation admitted	
115	Hunter, Diago	Violation admitted	
116	Irahcta, Edwin	Violation admitted	
117	Jaimes-Rodriguez, Felipe	Violation admitted	
118	Jennings, Felton	Violation admitted	
119	Jimenez-Hernandez, Luis	Violation as charged	
120	Johnson, Lavelle	Violation admitted	
121	Jones, Phillip	Violation admitted	
122	Jones, Ulysses	Violation admitted	
123	Kamgang-Otia, Alain	Violation admitted	
124	Klein, Adrian	Violation admitted	
125	Landa-Hernandez, Jovanny	Violation admitted	
126	Lara, Guillermo	Violation as charged	

APPENDIX TO COUNT III			
No.	**Employee Name**	*Judgment for ICE*	*Judgment for ORM*
127	Lee, Rodrick	Violation admitted	
128	Leon-Pena, Maricela	Violation admitted	
129	Lewis, Cotrell	Violation admitted	
130	Libby, Conrad	Violation admitted	
131	Llaverias, Latasha	Violation admitted	
132	Lomely-Carrasco, Julio	Violation as charged	
133	Lopez, Jairo	Violation admitted	
134	Lopez-Barbosa, Nefertiti	Violation admitted	
135	Lopez-Bautista, Rosalva	Violation as charged	
136	Lopez-Garcia, Feliciano	Violation admitted	
137	Lopez-Sanchez, Aaron	Violation admitted	
138	Lopez-Vega, Raul	Violation admitted	
139	Lucas, David Antonio	Violation as charged	
140	Lujan-Torres, Rene	Violation as charged	
141	Lule, Victor	Violation admitted	
142	Lule-Flores, Ramiro	Violation admitted	
143	Luna, Vicente	Violation admitted	
144	Maldonado-Martinez, Sergio	Violation admitted	
145	Manuel, James	Violation admitted	
146	Manzo-Vazquez, Gabriel	Violation admitted	
147	Marin-Hernandez, Salvador		No violation
148	Marquez-Garcia, Jema	Violation as charged	
149	Martinez, Edilberto	Violation admitted	
150	Martinez-Becerril, Victorino	Violation admitted	
151	Martinez-Martinez, Giovanni	Violation admitted	
152	Martinez-Mendoza, Jesus	Violation as charged	
153	Martinez-Velasco, Felipe	Violation as charged	
154	Martin-Jeronimo, Enrique	Violation as charged	
155	Martin-Lopez, Basillio	Violation admitted	
156	Matias-Calmo, Catarina	Violation as charged	
157	Mazariegos-Mencia, Roberto	Violation as charged	
158	Mendez, Francisco	Violation admitted	
159	Mendez, Jaime	Violation admitted	
160	Mendoza-Ceja, Maria		No violation
161	Mendoza-Pablo, Rigoberto	Violation as charged	
162	Mendoza-Ramirez, Marcelino	Violation admitted	
163	Mendoza-Ramirez, Martina	Violation admitted	
164	Mendoza-Ruiz, Carlos	Violation admitted	
165	Mendoza-Tirzo, Mateo	Violation admitted	
166	Mercado-Rojas, Jose	Violation admitted	
167	Miranda, Julio	Violation admitted	
168	Montano-Crisanto, Porfirio	Violation as charged	

APPENDIX TO COUNT III			
No.	**Employee Name**	*Judgment for ICE*	*Judgment for ORM*
169	Montero, Miguel	Violation admitted	
170	Morales, Armando Herrera	Violation as charged	
171	Morales, Jose	Violation admitted	
172	Morales-Mora, Jesus	Violation admitted	
173	Moses, Alan	Violation admitted	
174	Muse, Ahmed Fayah	Violation admitted	
175	Narcizo, Fausto	Violation as charged	
176	Oliva, Miguel	Violation admitted	
177	Olvera, Maria	Violation as charged	
178	Orellana-Guillen, Juan	Violation admitted	
179	Osorio-Lobos, Domingo	Violation as charged	
180	Pablo-Matias, Francisca	Violation admitted	
181	Pablo-Perez, Lucas	Violation admitted	
182	Padilla-Buezo, Gliselda	Violation as charged	
183	Palacios-Damian, Seferino	Violation admitted	
184	Paredes-Rivera, Isabel		No violation
185	Peralta-Rojas, Raul	Violation as charged	
186	Perez-Abrego, Jose	Violation admitted	
187	Perez-Casas, Jose	Violation admitted	
188	Perez-Figueroa, Manuel	Violation admitted	
189	Perez-Gonzalez, Monica	Violation admitted	
190	Perez-Mendoza, Candelaria	Violation as charged	
191	Perez-Zuniga, Marcos	Violation as charged	
192	Peterson, Kasia	Violation admitted	
193	Peyrebrune, Adam	Violation admitted	
194	Pruneda, Karina	Violation admitted	
195	Pulley, Paris	Violation admitted	
196	Ramirez-Carrillo, Justo	Violation admitted	
197	Ramirez-Cecena, Mario	Violation admitted	
198	Ramirez-Cortez, Griselda	Violation as charged	
199	Ramirez-Gonzalez, Jose	Violation as charged	
200	Ramirez-Lopez, Marcelino	Violation admitted	
201	Ramirez-Perez, Gabriel	Violation admitted	
202	Ramirez-Sanchez, Melbin	Violation as charged	
203	Ramos, Mariano	Violation as charged	
204	Ramos-Cruz, Nicolasa	Violation admitted	
205	Ramos-De Los Santos, Rafaela	Violation as charged	
206	Rattanavong, Somsanith	Violation admitted	
207	Ray, Michael	Violation admitted	
208	Rebsom, Donna	Violation admitted	
209	Reyes-Hernandez, Roberto	Violation admitted	
210	Reynolds, Matt	Violation admitted	

APPENDIX TO COUNT III			
No.	**Employee Name**	*Judgment for ICE*	*Judgment for ORM*
211	Richmond, Margaret	Violation admitted	
212	Rocha-Cervantes, Patricio	Violation admitted	
213	Rodriguez, Edgardo	Violation admitted	
214	Rodriguez, Rodolfo	Violation admitted	
215	Rodriguez-Diaz, Rafael	Violation admitted	
216	Rodriguez-Musquiz, Isaias	Violation admitted	
217	Rodriguez-Perez, Gabriel	Violation admitted	
218	Rodriguez-Valencia, Maria	Violation as charged	
219	Rojas-Gonzalez, Fernando	Violation as charged	
220	Romero, Scott	Violation admitted	
221	Romero-Hidalgo, Bartolo	Violation as charged	
222	Rosario-Roman, Orlando E.	Violation admitted	
223	Saeteurn, Ann	Violation admitted	
224	Saeteurn, Cho C.	Violation admitted	
225	Sahlman, Jon	Violation admitted	
226	Salazar-Ramos, Jorge	Violation admitted	
227	Saldana-Tellez, Elvis	Violation as charged	
228	Sales-Andres, Irma	Violation admitted	
229	Sanchez-Camilo, Mariana	Violation admitted	
230	Sandoval, Jose	Violation admitted	
231	Sandoval-Valdez, Jaime	Violation admitted	
232	Santos-Ramirez, Gerardo	Violation admitted	
233	Saravia, Fermina	Violation admitted	
234	Serafin-Rodriguez, Hector	Violation as charged	
235	Sheaffer, Kenneth	Violation admitted	
236	Sherard, Michael	Violation admitted	
237	Shin, Ban	Violation as charged	
238	Shipp, Ian	Violation admitted	
239	Shiprit, Brien	Violation admitted	
240	Smith, Clemon	Violation admitted	
241	Smith, David	Violation admitted	
242	Steider Robert	Violation admitted	
243	Stokes, Ronald	Violation admitted	
244	Stuttley, Guy	Violation admitted	
245	Surber, Jacqueline	Violation admitted	
246	Tapia, Emma	Violation as charged	
247	Terry, Sir Osvaldo	Violation admitted	
248	Ticeson, Dewayne	Violation admitted	
249	Tigner, Anthony	Violation admitted	
250	Tillotson, Wayne	Violation admitted	
251	Todd, David J.	Violation admitted	
252	Topete-Jimenez, Jose	Violation admitted	

APPENDIX TO COUNT III			
No.	**Employee Name**	*Judgment for ICE*	*Judgment for ORM*
253	Torres-Hernandez, Jose	Violation as charged	
254	Townsend, Michael	Violation admitted	
255	Tran, Khanh	Violation admitted	
256	Turcios, Gerald	Violation admitted	
257	Turner, Carleta	Violation admitted	
258	Turner, Hermione	Violation admitted	
259	Turner, William	Violation admitted	
260	Valdovinos, Hilarino	Violation as charged	
261	Vallejos-Salazar, Artemio	Violation admitted	
262	Villalobos, Denis	Violation admitted	
263	Walker, Skylar	Violation admitted	
264	Washington, Crosby	Violation admitted	
265	Williams, Lynwood	Violation admitted	
266	Wright, Demetries	Violation admitted	
267	Wyatt, Damien	Violation admitted	
268	Zavala-Perez, Marie	Violation as charged	
269	Zotter, Gerard	Violation admitted	