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

January 13, 2015

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 14A00006
	)	
FOOTHILL PACKING, INC., Respondent.	)	

FINAL DECISION AND ORDER

For the complainant:
Amy C. Martin, Esq.

For the respondent:
Monte Lake, Esq.

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 (2012), in which the United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a four-count complaint against Foothill Packing, Inc. (Foothill or the company). The government subsequently withdrew some of its allegations and amended its complaint to allege only two counts. A second amendment was subsequently permitted to clarify the allegation in Count II. The company filed a timely answer denying the material allegations and asserting fourteen affirmative defenses.

The amended complaint asserts in Count I that Foothill hired 382 individuals for whom the company either failed to ensure each employee properly completed section 1 of Form I-9 or failed itself to properly complete section 2 or 3 of the form. Count II as amended states that Foothill hired Luis Rivas knowing him to be unauthorized for employment in the United States.

The amended complaint seeks penalties in the total amount of $168,455.

Prehearing procedures have been completed. Presently pending are the parties' cross motions for summary decision. The company filed a response to the government's motion, but ICE made no response to Foothill's motion and the time for doing so has expired.[1] Both motions are ready for resolution.

II. BACKGROUND INFORMATION

Foothill Packing, Inc. is a farming and fruit and vegetable packing company based in Salinas, California, with growing areas located in California's Central Valley and Imperial Valley, and a sub-office in Somerton, Arizona, near Yuma. The Arizona facility is the component at issue in this proceeding. ICE served Foothill's Somerton office with a Notice of Inspection (NOI) and administrative subpoena in late March 2012. During the course of its investigation, the government issued the company a Notice of Technical and Procedural Violations in July 2012, a Notice of Suspect Documents in May 2013, and a Notice of Intent to Fine (NIF) on June 25, 2013. Foothill filed a timely request for hearing on or about July 24, 2013 and all conditions precedent to the institution of this proceeding have been satisfied.

Neither party provided this office with a copy of the notice or the subpoena issued in this matter, and the parties disagree as to precisely what these documents said. The declaration of Tony Tew, Area Manager for the Somerton location, asserts in pertinent part that the NOI requested the I-9 forms for the period 2009-2011, but did not request other documents. The affidavit of auditor N. Ryan Miller says in contrast that the notice and subpoena called for I-9 forms and supporting documents as well as E-Verify screen prints, payroll and wage reports, and other documents.

Although there are forty-four additional paperwork violations and one knowing hire violation alleged, the principal issue dividing the parties in this case involves an omission on the I-9 forms for 337 Mexican workers Foothill hired through the H-2A nonimmigrant temporary agricultural visa program. Whatever documents the government requested initially, Tew said in his declaration that when ICE Agent Scott Young, the first auditor assigned to the case, saw the volume of documents the company initially generated,[2] Young told the company to present only the I-9 forms for the 526 current employees hired within the last three years and their E-Verify confirmation sheets. Tew says Foothill did not present ICE with copies of the supporting

[1] The scheduling order gave each nonmoving party thirty days from the filing of the adversary's dispositive motion to file a response.

[2] Foothill says there were twelve boxes containing 6000 I-9 forms and accompanying documents.

documents at that time because Young expressly told the company not to do so. Foothill says it offered several times to submit the supporting documents but Agent Young declined to accept them. Tew said he was therefore surprised some months later to learn that a newly assigned auditor, Agent N. Ryan Miller, said that had Foothill presented copies of the passports for these 337 H-2A workers initially, the violations involving them would have been treated as technical or procedural violations. Foothill says nearly all the seasonal workers at its Somerton location are hired through the H-2A visa program. The company describes its customary practice and procedure in hiring H-2A workers as including copying the worker's H-2A visa, Form I-94, and passport, and keeping the documents with the individual's I-9 form.

III. THE QUESTION OF LIABILITY

A. The Government's Motion

The government's motion contends that visual inspection of Foothill's I-9 forms demonstrates the existence of all the violations and the fact that all are substantive in nature.

1. Count I - Paperwork Violations

Section 1 Violations

ICE asserts first that the I-9 forms for seven of the employees named in Count I show violations involving the company's failure to ensure that the individual properly completed section 1 of Form I-9. The forms for Jose Arreola Jamarillo and Sergio Esquival Becerra show that Foothill failed to ensure that the employee checked a box attesting to his immigration status. The form for Juventino Ramos shows that Foothill failed to ensure that the employee properly completed section 1 because Ramos marked two different and inconsistent boxes indicating that he was both a citizen and a lawful permanent resident of the United States. Finally, ICE asserts that the forms for Virginia Guererro, Ana Ramirez, Alfredo Valadez, and Maria Villa reflect that Foothill failed to ensure that the employee signed the section 1 attestation.

Section 2 Violations

The majority of the government's allegations in Count I concern 337 H-2A visa employees for whom Foothill failed to record the pertinent foreign passport information in section 2 of the I-9 form, or to present photocopies of the employees' passports. ICE submitted the I-9 forms for three individuals it said were representative of these 337 forms, and offered to provide all the rest upon request. The government alleges generally that it did not impose a fine for I-9 forms that included a copy of an unexpired foreign passport, but that the regulations make clear that copying

documents does not relieve the employer of the responsibility of fully completing the I-9 form.

As to the remaining section 2 violations, ICE first points out that Foothill left three I-9 forms virtually blank. Visual inspection of the I-9s for Jose Diaz, Roberto Morales, and Jose Perez reflect the entry of only the employees' names at the top of section 1 of the form, and no other information either in section 1 or in section 2. Similarly, ICE says no information or documents are recorded on the I-9 form for Gilberto Becerra.

ICE says in addition that on the I-9 forms for thirteen employees, Jesse Almeida, Norma Aragon, Miriam Beltran, Vincente Carlos, Jr., Jhonnanoha Garcia, Ivan Garcia Lopez, Antonio Hernandez, Ignacio Lopez, Isaura Nuno, Maria Reyes, Jonathan Rivera, Joseph Santa Blas, and Miguel Vargas, Foothill failed to record a document for List A or both Lists B and C as required. For eight employees, Cecilia Anzures, Maria Barraza, Ernesto Burke, Jesus Lopez, Roberto Lopez Valenzuela, Jaime Quinonez, Manuel Solano, and Jesus Villa, ICE says Foothill failed to list the issuing authority or title of documents. For two employees, Juan Ruiz and Gloria Padilla, the government says that Foothill failed to record the expiration dates for List B documents.

For four employees, Apolinar Lopez-Santiago, Naur Martinez, Graciela Mendivil, and Francisco Valencia, Foothill failed to record the document title, issuing authority, expiration date, or a combination of all three for List A documents. The government points out that the I-9 form for Agustin Tabares shows that the employee self-identified as a U.S. citizen in section 1, but the entry under List A in his I-9 says "Ricencia Permit" and it is improbable that a U.S. citizen would have such a permit. No documents are listed in List B or List C for this employee.

ICE says further that Foothill failed to sign the section 2 attestations for Miguel Arellano Martinez and Aureliano Beltran. Finally, ICE says that the form for Luis Rivas shows that Foothill accepted and entered an expired work authorization document under List A.

Section 3 Violations

ICE alleges that the employment authorization cards presented by Sergio Salazar Yanez and Jose Hernandez expired in September 2010 and March 2011 respectively, but that the individuals both continued to work thereafter without any updated documents being recorded. Foothill did not complete section 3 of the I-9 forms for these employees to demonstrate that they remained eligible for employment. The government says that these violations too are substantive, and are apparent from a visual inspection of the forms.

2. Count II - The Knowing Hire Violation

The government says it is more likely than not that Foothill had actual knowledge that Luis Rivas

was unauthorized to work in the United States, and hired him anyway. ICE says such knowledge is apparent from the face of Rivas' I-9 form, because the form reflects that Rivas was hired on June 12, 2010, but presented an employment authorization card that had already expired on August 5, 2003, almost seven years before his hire date. ICE says there is no question that Foothill knew it was hiring a person who was unauthorized for work in the United States.

Documents accompanying ICE's motion are Attachments A) three I-9 forms alleged to be representative of those with missing foreign passport information (3 pp.); B) I-9 forms and payroll list dated April 2, 2012 (70 pp.); C) I-9 Form for Luis Rivas and query of alien registration number (4 pp.); and D) the affidavit of ICE Auditor N. Ryan Miller (6 pp.).

B. Foothill's Motion and its Response to ICE

Foothill's response to the government's motion contends that the missing passport issue for the H-2A workers was generated entirely by ICE because the first auditor, Agent Young, instructed the company not to produce the supporting documentation, but the government then "sprung its trap" and whipsawed the company by bringing in a new auditor many months later, and claiming that the company should have provided copies of the H-2A workers' Mexican passports at the outset of the investigation.

Foothill argues that it made repeated offers to provide copies of the passports for the H-2A workers, but those offers were rebuffed. Foothill said that when Agent Young was still working on the case, he sent a letter to the company notifying Foothill of certain technical or procedural failures, but the notice letter did not include the omissions in the I-9s for the H-2A employees whose forms were missing the foreign passport information. All the technical and procedural violations identified in the notice were corrected, but Foothill was given no opportunity to correct the violations on these 337 forms although it could readily have done so. Foothill points out that according to the Virtue Memorandum, a failure to enter the foreign passport information is a technical or procedural violation if a copy of the document is presented at the time of inspection, and that but for Agent Young's instructions to provide only the I-9 forms the document copies would have been presented initially, as ICE belatedly faults the company for not doing. Without an opportunity to correct the technical and procedural errors on the forms, the company argues, it should not be held liable for those violations.

Foothill's motion says in addition that the lion's share of the employees at Somerton is hired through the H-2A program. The declarations of Nashira Sharky, Gabriela Lopez, Sandra Ruiz, Alma Esparza, and Erika Chavez describe each individual's involvement in company's hiring processes, the preparation of I-9 forms, the reverification process, and the processing of guest workers. The declarations assert that as a first step for the H-2A workers, the visa applicants

visit the U.S. Consulate in Tijuana to obtain their visas. Once the visas are approved, they are printed directly on a page of the workers' Mexican passports. The workers are then transported to San Luis Rio Colorado Sonora for travel to Yuma.

At the port of entry in San Luis, each worker obtains an I-94 form that is stapled to the passport page where the H-2A visa was stamped. The workers are then transported to the Somerton office, where each completes an employment application and an I-9 form. Office personnel examine the visas, the I-94 documents, and the passports to verify that the person presenting the passport is the same person as in the passport photo. All the information, including expiration dates, is reviewed and the I-9 is filled out. Section 1 is signed by the employee in the presence of office personnel, and copies are made of the H-2A visa and passport. The I-9 itself is then completed and the required information on the form is submitted to E-Verify. Confirmation and non-confirmation notices produced by the E-Verify system are attached to the I-9 form for the employee.

Foothill describes itself as an outlier in an industry where the majority of the agricultural workforce consists of unauthorized workers, and says that the company spends significant resources and efforts to employ a workforce that is 100% authorized. The company asserts a defense of good faith and says also that it substantially complied with the employment eligibility verification requirements within the meaning of *United States v. Northern Michigan Fruit Co.*, 4 OCAHO no. 667, 697 (1994).[3] The company asserts in addition that the August 7, 2009 version of the I-9 form was so ambiguous that USCIS introduced a revised form on March 8, 2013 that was designed to address what Foothill characterized as the "widespread confusion" about the prior version. The new form has specific, clearly labelled areas to be completed, a revised layout, and improved instructions to employers on how to include the foreign passport information when completing forms for employees presenting form I-94.

Foothill does not specifically address its liability for the remaining forty-four alleged paperwork violations other than to characterize the violations as minor. The company argues that its use of E-Verify and the H-2A program demonstrate its good faith compliance efforts. The company

[3] 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.

says that the affidavits of its human resources staff demonstrate substantial compliance with I-9 requirements, supporting a finding that the company should not be held liable.

Finally, Foothill disputes ICE's allegation that it hired Luis Rivas knowing him to be unauthorized for work. The company says that ICE fails to meet its burden of proof because no evidence supports this claim, and because Rivas was not identified in ICE's Notice of Suspect Documents (NSD) as an unauthorized individual.

Accompanying Foothill's motion are exhibits A) the declaration of Nashira Sharly (2 pp.); B) the declaration of Gabriela Lopez (2 pp.); C) the declaration of Sandra Ruiz (2 pp.); D) the declaration of Dennis Diaz (2 pp.); E) the declaration of Alma Esparza (2 pp.); F) the declaration of Erika Chavez (2 pp.), and; G) the declaration of Tony Tew (2 pp.).

C. The Statutory and Regulatory Provisions Involved

1. Summary Decision

Summary decision is appropriate where the pleadings, affidavits, or material obtained by discovery or otherwise show that there is no genuine issue as to any material fact, and that a party is entitled to summary decision. 28 C.F.R. § 68.38(c). An issue of fact is genuine only if it has a real basis in the record. *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 586-87 (1986). A genuine issue of fact is material if, under governing law, it might affect the outcome of the suit. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *United States v. Primera Enters., Inc.*, 4 OCAHO no. 615, 259, 260-61 (1994).

A party seeking a summary disposition bears the initial burden of demonstrating the absence of a genuine issue of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party satisfies its initial burden of demonstrating both the absence of a material factual issue and that the party is entitled to judgment as a matter of law, the nonmoving party must come forward with contravening evidence to avoid summary resolution. *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. *United States v. DJ Drywall, Inc.*, 10 OCAHO no. 1136, 3 (2010).

2. Employer Obligations

The law requires employers to prepare and retain I-9 forms for any employees hired after November 6, 1986 and to make those forms available to the government for inspection upon request. 8 U.S.C. § 1324a(b). The forms include section 1, where the employee attests to his or her work eligibility; section 2, where the employer certifies to the review of documents

establishing the employee's identity and work authorization, and; section 3, where the employer certifies to the re-verification of eligibility for employees who are re-hired or whose documents expired during the period of employment.

3. The Good Faith Defense under 8 U.S.C. 1324a(b)(6) and the Distinction between Substantive and Technical or Procedural Violations

Section 1324a(b)(6) provides an 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. The difference between technical or procedural violations and substantive violations is explained in a memorandum authored by Paul W. Virtue, *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 Interpreter Releases 706 (Apr. 28, 1997).

The Virtue Memorandum makes clear that the omission of a document number or expiration date in section 2 may be a technical or procedural violation if a legible copy of the document is retained with the I-9 form and presented at the I-9 inspection. Virtue Memorandum at 5.

4. The Knowing Hire of Unauthorized Aliens

It is unlawful for an employer to hire an alien knowing that the alien is unauthorized to work 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).

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 underlying the doctrine of constructive knowledge 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, 1151-52 (1998); *United States v. Aid Maint. Co.*, 7 OCAHO no. 951, 475, 485 (1997). The state of mind that needs to be shown to establish constructive knowledge has been characterized as "conscious disregard" or "deliberate ignorance," or by other terms 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 the individual's work authorization prior to the expiration date of the document. *See United States v. Great Bend Packing Co.*, 6 OCAHO no. 835, 129, 132-33 (1996) (where an employer recorded the expiration date of the individuals' work authorization document on his I-9 form, but continued thereafter to employ the individual without reverifying the individual's employment authorization, the employer was on notice that the individual had become unauthorized for employment and was held liable for knowingly continuing to employ an unauthorized alien); *United States v. Buckingham Ltd.*, 1 OCAHO no. 151, 1059, 1067 (1990) (same).

It is long and well established in OCAHO jurisprudence that 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*, 4 OCAHO no. 611, 212, 223-27 (1994); *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., Inc.*, 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.

D. Discussion and Analysis

1. The Missing Mexican Passport Information

Although the affidavit of Agent Miller says Foothill was not penalized for I-9s that had supporting documents, Miller did not directly address Tew's account of what transpired during the early stages of the investigation nor did he acknowledge or challenge Tew's explanation of why Foothill did not present copies of the H-2A workers' Mexican passports at the time of inspection. ICE offered no affidavits or other evidence to controvert Tew's assertions that Agent Scott Young "told us to send only the I-9 forms and E-Verify confirmation sheets and not copies of the documents provided by employees." ICE did not, in fact, respond to Foothill's motion for summary decision at all.

I credit, as I must, the unrebutted factual allegations made in the declaration of Tony Tew. *See United States v. Century Hotels Corp*., 11 OCAHO no. 1218, 8 (2014), *United States v. Ronning Landscaping Inc*., 10 OCAHO no. 1149, 6-7 (2012). I am not at liberty to simply disregard the facts asserted, as ICE evidently would have me do. Absent countervailing evidence, I therefore find that Foothill made diligent efforts at the outset of the investigation to provide copies it made of the Mexican passports for these H-2A employees, but that those efforts were thwarted. I decline to find the company liable for failure to present documents the government refused to accept when proffered. Under the peculiar circumstances of this case, I find Foothill's attempts were sufficient to constitute a constructive presentation of the documents. Because no opportunity was afforded for Foothill to correct what would otherwise have been treated as technical or procedural errors in the I-9s for these H-2A workers, the allegations respecting these 337 violations will be dismissed.

2. Other Paperwork Violations

Visual inspection of the I-9 forms for Jose Arreola Jamarillo, Sergio Esquivel Becerra, Juventino Ramos, Virginia Guererro, Ana Ramirez, Alfredo Valadez, and Maria Villa reflect the substantive violations ICE identified in section 1 of the forms. Similarly, an inspection of the forms confirms the section 2 violations alleged involving the I-9s for Jose Diaz, Roberto Morales, Jose Perez, Gilberto Becerra, Jesse Almeida, Norma Aragon, Miriam Beltran, Vincente Carolos, Jr., Jhonnanoha Garcia, Ivan Garcia Lopez, Antonio Hernandez, Ignacio Lopez, Isaura Nuno, Maria Reyes, Jonathan Rivera, Joseph Santos Blas, Miguel Vargas, Cecilia Anzures, Maria Barraza, Ernesto Burke, Jesus Lopez, Roberto Lopez Valenzuela, Jaime Quinonez, Manuel Solano, Jesus Villa, Gloria Padilla, Juan Ruiz, Apolinar Lopez-Santiago, Naur Martinez, Graciela Mendivil, Francisco Valencia, Agustin Tabares, Miguel Arellano Martinez, Aureliano Beltran, and Luis Rivas. Section 3 violations are similarly apparent as alleged on the forms for Sergio Salazar Yanez and Jose Hernandez.

Foothill is accordingly liable for forty-four paperwork violations.

3. The Knowing Hire of Luis Rivas

The government's evidence indicates that a query of the alien registration number Luis Rivas entered in section 1 showed that Rivas was not a lawful permanent resident as he claimed at the time of his hire on June 12, 2010, and that Rivas was not authorized for employment at any time between August 26, 2005 and September 12, 2012. ICE argues that because the document used to show his work authorization had already expired seven years prior to his date of hire, the company had actual knowledge that Luis Rivas was unauthorized to work.

The factual scenario in this case is on all fours with that in *United States v. Occupational Resources Management Co.*, 10 OCAHO no. 1166, 10-11 (2013), where the individual's I-9 form showed the employee was hired on July 11, 2007, but the expiration date he entered in section 1 for his EAD was November 5, 2005. Because the work authorization document the employee proffered had already expired almost two years before the date of hire, the employer's obligation to ensure that the employee properly completes section 1 was not satisfied. Because the employer chose to accept an expired document without making further inquiry, the company was held liable for the knowing hire of the unauthorized employee. The administrative law judge observed that,

> [w]hen 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.

10 OCAHO no 1166 at 11, citing *United States v. Jonel, Inc*., 8 OCAHO no. 1008, 175, 193 (1998).

The expired authorization document in *Occupational Resources* was deemed sufficient in itself to put the company on notice of the individual's unauthorized status, and the preponderance of the evidence therefore showed that the company hired the individual with constructive if not actual knowledge that he was unauthorized for employment in the United States. So it is in this case. Foothill was put on clear notice of a fact that would cause a reasonable employer to inquire further. The company's failure to do so renders Foothill chargeable with such knowledge as reasonable inquiry would have revealed. The company therefore knew, or should have known, that Rivas was unauthorized for employment at the time he was hired.

IV. PENALTIES

Civil money penalties are assessed for paperwork violations according to the parameters set forth at 8 C.F.R. § 274a.10(b)(2): the minimum penalty for each individual with respect to whom a violation occurred after September 29, 1999, is $110, and the maximum is $1100. Because the government has the burden of proof with respect to the penalty, *United States v. March Construction, Inc.*, 10 OCAHO no. 1158, 4 (2012), ICE must prove the existence of any aggravating factor by a preponderance of the evidence, *Carter*, 7 OCAHO no. 931 at 159.

The following factors must be considered when assessing civil money penalties for paperwork violations: 1) the size of the employer's business, 2) the employer's good faith, 3) the seriousness of the violations, 4) whether or not the individual was an unauthorized alien, and 5) the employer's history of previous violations. 8 U.S.C. § 1324a(e)(5). The statute neither requires that equal weight must be given to each factor, nor rules out consideration of additional factors as may be appropriate in a specific case. *See United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000).

Penalties assessed for the knowing hire of unauthorized aliens range from a minimum of $375 to a maximum of $3200 for the first offense. 8 C.F.R. 274a.10(b)(1)(ii)(A). The statute does not set out any specific factors that must be considered in setting penalties for a knowing hire violation. 8 U.S.C. § 1324a(e)(4).

A. ICE'S Penalty Calculation

ICE says it set the base fine for the 382[4] paperwork violations in Count I in accordance with internal agency guidance at the rate of $440 per violation, and that it assessed the single knowing hire violation in Count II at the low base rate of $375. ICE then aggravated the base penalty by five percent based on the size of Foothill's business, and an additional five percent based on the high number of violations found and their seriousness. The government applied an across the board mitigation of five percent for the good faith of the company, and an additional five percent because the company has no history of previous violations. The absence of unauthorized aliens, apart from Luis Rivas, was treated as a neutral factor. The net result left the penalties for the paperwork violations to be calculated at the base rate of $440 each.

The government provided no explanation or rationale for setting the penalty for the knowing hire violation at the lowest permissible rate.

[4] Although the amended complaint alleges 382 paperwork violations, ICE did not pursue the allegation involving the I-9 form for Ezequiel Uriarte, so only 381 paperwork violations are at issue.

B. Foothill's Contentions

Foothill contends that no penalties are warranted for the alleged violations involving the H-2A workers. The company contends further that notwithstanding ICE's improper references to details about the failed settlement negotiations,[5] the fines proposed are unwarranted because ICE misapplied the penalty factors. The company argues that the penalties sought are excessive and should be mitigated because it acted in good faith, the violations were technical, all the workers except Rivas were authorized, and it has no history of previous violations. Foothill says its size, while large, should operate as a neutral factor given its level of sophistication and the resources the company allocated toward good faith compliance. The company characterizes itself as a poster child for employment eligibility compliance, and says that a six-figure penalty is not warranted in this case.

C. Discussion and Analysis

ICE provided no explanation as to why the penalty proposed for a paperwork violation should exceed that proposed for a knowing hire violation, and I am at a loss to understand what rationale could support such a result. The whole point of the employment eligibility verification system is to prevent the hiring of unauthorized aliens. For an employer to knowingly hire an unauthorized worker is exponentially more serious than any run-of-the-mill paperwork violation and the relative gravity of the violations should be reflected in the penalties imposed.

Such an intent is clearly reflected in the regulations setting out the permissible penalties for each type of violation: penalties available for the knowing hire of Luis Rivas range from $375 to $3200, while the range of penalties for a paperwork violation is substantially lower, from $110 to $1100. The statute mandates in addition to higher penalties, that a cease and desist order is required when a violation of subsection (a)(2) is detected, 8 U.S.C. § 1324a(e)(4), while monetary penalties alone are considered to be a sufficient deterrent for paperwork violations, 8 U.S.C. § 1324a(e)(5). While many civil penalty statutes require a showing of the likelihood of future violations before injunctive relief may be had, *see, e.g.*, *Commodity Exchange Act*, 7 U.S.C. § 13a-1, every violation of subsection (a)(2) requires the issuance of a cease and desist order. These provisions are reflective of a Congressional judgment about the gravity of knowing hire violations, and that judgment is entitled to deference.

Apart from the size of the company, the remaining statutory paperwork factors are favorable to Foothill, and none of the violations involved a failure to prepare or present I-9s. While some of

[5] The details ICE provided about the settlement negotiations have been disregarded and are not considered in assessing the penalties in this case.

the violations are less serious than others, assessment at the rate of $440 is within the midrange of permissible penalties and is not unreasonable. The penalty proposed for the knowing hire violation, however, is woefully inadequate and will be increased. Foothill will be directed to pay penalties of $19,360 for the forty-four paperwork violations, and $2200 for the knowing hire of Luis Rivas.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Foothill Packing, Inc. is a farming and fruit and vegetable packing company based in Salinas, California, with growing areas located in California's Central Valley and Imperial Valley, and a sub-office in Somerton, Arizona, near Yuma.

2. The Department of Homeland Security, Immigration and Customs Enforcement served Foothill's Somerton Arizona facility with a Notice of Inspection (NOI) and administrative subpoena in late March 2012.

3. The Department of Homeland Security, Immigration and Customs Enforcement served Foothill Packing, Inc.'s Somerton Arizona facility with a Notice of Suspect Documents and a Notice of Technical and Procedural Violations in July 2012.

4. The Department of Homeland Security, Immigration and Customs Enforcement served Foothill Packing, Inc.'s Somerton Arizona facility with a Notice of Intent to Fine on or about June 25, 2013.

5. Foothill Packing, Inc. filed a request for hearing on or about July 24, 2013.

6. Foothill Packing, Inc. failed to ensure that Jose Arreola Jamarillo and Sergio Esquival Becerra checked any box in section 1 of Form I-9 to attest to their respective immigration statuses.

7. Foothill Packing, Inc. failed to ensure that Juventino Ramos properly completed section 1 of Form I-9 because Ramos marked two different and inconsistent boxes indicating that he was both a citizen and a lawful permanent resident of the United States.

8. Foothill Packing, Inc. failed to ensure that Virginia Guererro, Ana Ramirez, Alfredo Valadez, and Maria Villa signed the attestation in section 1 of Form I-9.

9. Tony Tew, the area manager for Foothill Packing, Inc.'s Somerton Arizona facility, said in a

declaration that the company proffered copies of the supporting documents kept with the I-9 forms but that the first auditor assigned to the case, Agent Scott Young, expressly told the company not to present these documents.

10. Most of the seasonal workers at Foothill Packing, Inc.'s Somerton Arizona facility are Mexican nationals hired through the H-2A nonimmigrant temporary agricultural visa program.

11. Visual inspection of the I-9s for Jose Diaz, Roberto Morales, and Jose Perez reflect the entry of only the employees' names at the top of section 1 of the form, and no other information either in section 1 or in section 2.

12. Visual inspection of the I-9 form for Gilberto Becerra reflects that no information or documents are recorded on the form for Gilberto Becerra.

13. The I-9 forms for Jesse Almeida, Norma Aragon, Miriam Beltran, Vincente Carlos, Jr., Jhonnanoha Garcia, Ivan Garcia Lopez, Antonio Hernandez, Ignacio Lopez, Isaura Nuno, Maria Reyes, Jonathan Rivera, Joseph Santa Blas, and Miguel Vargas, reflect that Foothill Packing, Inc. failed to record a document for List A or both Lists B and C as required.

14. Foothill Packing, Inc. failed to list the issuing authority or title of documents presented by Cecilia Anzures, Maria Barraza, Ernesto Burke, Jesus Lopez, Roberto Lopez Valenzuela, Jaime Quinonez, Manuel Solano, and Jesus Villa in section 2 of their I-9 forms.

15. Foothill Packing, Inc. failed to record the expiration dates for the List B documents presented by Juan Ruiz and Gloria Padilla in section 2 of their I-9 forms.

16. Foothill Packing, Inc. failed to record the document title, issuing authority, expiration date, or a combination of all three for a List A document presented by Apolinar Lopez-Santiago, Naur Martinez, Graciela Mendivil, and Francisco Valencia in section 2 of their I-9 forms.

17. Agustin Tabares self-identified as a U.S. citizen in section 1 of his I-9 form, but the entry made by Foothill Packing, Inc. under List A in section 2 says "Ricencia Permit;" such a document is not on the List of Acceptable documents, and no other documents are entered under List B or List C for this employee.

18. Foothill Packing, Inc. failed to sign the section 2 attestations on the I-9 forms for Miguel Arellano Martinez and Aureliano Beltran.

19. Foothill Packing, Inc. accepted and entered an expired work authorization document in section 2 of the I-9 form for Luis Rivas.

20. The employment authorization cards presented by Sergio Salazar Yanez and Jose Hernandez expired in September 2010 and March 2011 respectively, but the individuals both continued to work for Foothill Packing, Inc. thereafter without any updated documents being recorded and without completion of section 3 of their I-9 forms.

21. Foothill Packing, Inc. hired Luis Rivas for employment on June 12, 2010, and accepted and entered an employment authorization document that had expired on August 5, 2003 in section 2 of his I-9 form.

B. Conclusions of Law

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

2. All conditions precedent to the institution of this proceeding have been satisfied.

3. An employer's obligation to prepare I-9 forms for new employees pursuant to 8 U.S.C. § 1324a(b) includes the obligation to ensure that the employee properly completes section 1, and to itself properly complete section 2 and/or section 3 as appropriate. 8 C.F.R. § 274A(2)(b).

4. The governing statute provides an affirmative defense where an employer makes a good faith attempt to comply with the requirements but nevertheless commits certain technical or procedural violations; in such a case, 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).

5. The difference between technical or procedural violations and substantive violations is explained in a memorandum authored by Paul W. Virtue, *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 Interpreter Releases 706 (Apr. 28, 1997).

6. The Virtue Memorandum provides that the omission of a document number or expiration date in section 2 may be a technical or procedural violation if a legible copy of the document is retained with the I-9 form and presented at the I-9 inspection. Virtue Memorandum at 5.

7. It is unlawful for an employer to hire an alien knowing that the alien is unauthorized to work 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).

8. Regulations provide that constructive knowledge includes situations where an employer has

information available to it that would indicate the alien is not authorized to work. 8 C.F.R. § 274A1(*l*)(1).

9. The basic principle underlying the doctrine of constructive knowledge 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, 1151-52 (1998); *United States v. Aid Maint. Co.,* 7 OCAHO no. 951, 475, 485 (1997).

10. Civil money penalties are assessed for paperwork violations according to the parameters set forth at 8 C.F.R. § 274a.10(b)(2): the minimum penalty for each individual with respect to whom a violation occurred after September 29, 1999, is $110, and the maximum is $1100.

11. The following factors must be considered when assessing civil money penalties for paperwork violations: 1) the size of the employer's business, 2) the employer's good faith, 3) the seriousness of the violations, 4) whether or not the individual was an unauthorized alien, and 5) the employer's history of previous violations. 8 U.S.C. § 1324a(e)(5).

12. Penalties assessed for the knowing hire of unauthorized aliens range from a minimum of $375 to a maximum of $3200 for the first offense. 8 C.F.R. 274a.10(b)(1)(ii)(A).

13. The governing statute, 8 U.S.C. § 1324a(e)(4), does not set out any specific factors that must be considered in setting penalties for a knowing hire violation.

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

ORDER

Foothill Packing, Inc. is liable for forty-four paperwork violations and for hiring Luis Rivas with actual or constructive knowledge that he was unauthorized for employment in the United States. Foothill is directed to pay civil money penalties totaling $21,560. The government's allegations involving violations in the I-9 forms for the remaining 337 workers named in Count I are dismissed.

SO ORDERED.

Dated and entered this 13th day of January, 2015.

_____

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.