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

May 20, 2015

UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 12A00059
	)	
SPLIT RAIL FENCE COMPANY, INC.,	)	
Respondent.	)	
	)	

FINAL DECISION AND ORDER

Appearances:

Nathan Herbert and Ivan Gardzelewski
For complainant

Kristin Knudson and Ann Allott
For respondent

I. PROCEDURAL HISTORY

The Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a complaint in two counts against Split Rail Fence Company, Inc. (Split Rail, SRF, or the company), alleging that the company violated the employer sanctions provisions of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a (2012). After some preliminary motion practice, ICE filed an amended complaint. As amended, the complaint asserts in Count I that Split Rail hired Jaime Lopez Ramirez and continued to employ him after the expiration of his employment authorization document without updating and reverifying his eligibility for employment. Count II alleges that Split Rail hired Aaron Apodaca, Isidro Ameca Aguilera, Ivan Dominguez, Fernando Morales Arroyo, Jesus Nunez, Juan Perez, Angel Quinones, Esteban Rodriguez Campos, and Juan Sanchez, all of whom were or were about to become unauthorized for employment, and continued to employ them after knowing that they were or had become unauthorized. Split Rail

filed an answer to the amended complaint, and prehearing procedures were undertaken.

A previous order in this matter denied Split Rail's motion to dismiss Count II and found that a settlement agreement reached in another dispute involving the same parties did not operate as a bar to the second count of the government's complaint. *See United States v. Split Rail Fence Co.*, 11 OCAHO no. 1216, 6 (2014).[1] Still pending is the government's motion for summary decision as to both counts. Split Rail responded to the government's motion, and it is ripe for adjudication.

II. BACKGROUND INFORMATION

Split Rail Fence is a Colorado-based retailer, wholesaler, and contractor specializing in fence installation, fence repair, and fencing materials, and is located at 8065 Brandon Drive in Littleton, Colorado. The company's president is Tom Barenberg, who has operated Split Rail ever since it was founded in 1985.

ICE served its first Notice of Inspection (NOI) on SRF in July 2009. In the course of the ensuing investigation, ICE issued the company a Notice of Suspect Documents (NSD) on September 11, 2009, advising the company that eighty-three of its current and former employees appeared to be unauthorized to work in the United States. The NSD informed the company that the documents these employees presented did not satisfy the eligibility verification requirements, and that unless the employees presented valid documents other than the ones they previously produced, ICE would consider them to be unauthorized to work in the United States. The notice also advised that if the company or the employees believed the determination was not correct, they should contact forensic auditor Melissa Shanahan immediately so that ICE could reverify the information already provided or verify any new information from the company or the employees.

No such contact was ever initiated by SRF, but the company did send ICE a letter dated October 6, 2009, asking the government which specific documents it was questioning in each case. ICE responded by letter dated October 8, 2009, explaining that the questioned documents were those

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[1] 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.

that had been entered on the I-9 forms for the named employees. The letter asked the company again to contact Shanahan with any new or corrected documentation it may have received. Meanwhile, the first inspection resulted in the service of a Notice of Intent to Fine (NIF) on October 5, 2009, and an amended NIF on February 1, 2010, alleging various paperwork violations. Count I of the amended NIF alleged that the company failed to prepare or present I-9 forms for sixteen named individuals, and Count II alleged that the company failed to ensure that I-9 forms were properly completed for fifty-five named individuals. No allegations were made in the amended NIF about the employment of the individuals listed in the 2009 NSD. The parties reached a settlement with respect to the amended NIF, and on or about June 17, 2010, they executed their settlement agreement resolving the paperwork allegations.

Almost a year later, on June 15, 2011, ICE served the company with a second NOI, followed shortly by a second NSD dated August 30, 2011, containing the names of the nine individuals listed in Count II of the instant complaint, all of whom were also listed on the first NSD the government had previously issued to Split Rail almost two years earlier.[2] The second NSD instructed the company once again that unless these employees presented valid documents other than the ones they had previously produced, ICE would consider them to be unauthorized. Again, the notice said that if the company or the employees believed the determination was not correct, they should contact forensic auditor Melissa Shanahan immediately. Again, no such contact was ever initiated.

The government subsequently served Split Rail with a second NIF on September 26, 2011 alleging the violations now charged in Counts I and II of the instant complaint. Split Rail filed a timely request for hearing, and all conditions precedent to the institution of this proceeding have been satisfied.

III. THE POSITIONS OF THE PARTIES

A. The Government's Motion

ICE points out first that Split Rail hired Jaime Lopez Ramirez on or about October 5, 2009, and verified his employment eligibility by examining his foreign passport, which contained a temporary I-551 stamp that authorized him to work until September 13, 2010. Split Rail nevertheless continued to employ Jaime Lopez Ramirez at least through the June 20, 2011 audit[3]

[2] A tenth individual, Jose Meza Martinez, was named in the second NSD, but not the first. The government makes no allegations about this individual and presents no evidence involving him, so the employment eligibility of Jose Meza Martinez is not an issue in this case.

[3] Jaime Lopez Ramirez actually worked for SRF until April 29, 2013.

without reverifying his eligibility. The government says that failure to reverify an employee's work authorization after it expires is a substantive paperwork violation.

With respect to Count II, the government observes that the company accepted self-serving statements from nine employees listed on the first NSD, and never asked these individuals to present additional documents other than the ones they had originally presented when they were first hired. ICE points out as well that Split Rail no longer claims that Aaron Apodaca had valid work authorization, but the company continued to employ him until more than a year after the first NSD.[4] ICE says it gave Split Rail notice on two separate occasions that these nine individuals were not authorized for employment in the United States and were required to present other documents, but Split Rail took no action to request other documents from any of them.

In addition to notifying the company that the documents the employees had previously presented pertained to other individuals or had alien registration numbers that had never been issued, ICE also points to the certifications of Records Manager Barbara J. Koenigsberg. These certifications state in pertinent part that the government maintains a centralized index of immigrant aliens entering the United States on or after June 30, 1924, and of non-immigrant aliens entering on or after June 30, 1948, as well as a centralized index of all persons naturalized on or after September 27, 1906. The certifications also state that ICE performed a search for records pertaining to each individual named in Count II and found none. The government said it searched not only its Central Index System (CIS), but also databases consisting of Enforce Alien Removal Module (EARM) and Computer Linked Application Management System (CLAIMS), and that no records were found indicating that any of the individuals named in Count II had obtained permission from the Attorney General at any time prior to March 1, 2003, or from DHS after February 28, 2003, either for legal immigrant status or for lawful admission into the United States.

The government seeks a penalty of $660 for the violation in Count I involving failure to reverify the employment eligibility of Jaime Lopez Ramirez. The government set a baseline fine for this violation at $550, using the penalty matrix provided by internal DHS guidance. It treated the company's size as a neutral factor, but aggravated the penalty by five percent for the seriousness of the violation, by another five percent for lack of good faith, and by five percent each for the fact that the individual was unauthorized and the fact that the company had a history of violations. The total penalty recommended for Count I is $660.

For Count II, ICE started with a penalty of $3200 for each violation, which it characterized as the standard fine for a second offense. It then applied the statutory factors in the same way as it did

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[4] Apodaca was hired on March 25, 2009. The first NSD was issued on September 11, 2009, and Apodaca continued to work at SRF until December 10, 2010.

for Count I. ICE says that while Split Rail is not a large business, it is nevertheless not a "mom and pop" operation either. The government contends that continuing to employ the individuals named in Count II evidences both a lack of good faith and extremely serious violations, that all the individuals in question were unauthorized for employment in the United States, and that two of them were using legitimate Social Security numbers that actually belong to United States citizens. Because the employer has a history of previous violations as evidenced by the prior settlement agreement, ICE says Split Rail should be treated as a recidivist violator. The net result is a penalty of $3840 for each of the violations and a recommended total of $34,560 for Count II.

The government's motion was accompanied by exhibit G-16. The exhibit includes a group of documents consisting of answers to interrogatories (14 pp.), together with various Bates-stamped information related to discovery (6 pp.); I-9 forms and supporting documents (26 pp. labeled SFR0007-0032); and a legal actions list (14 pp. labeled SRF0033-0046). Exhibits previously presented with ICE's prehearing statement include G-1) Articles of Incorporation (6 pp.); G-2) Notice of Inspection and subpoena (5 pp.); G-3) email from Colorado Dep't of Labor and Employment containing SRF's tax withholding record (3 pp.); G-4) wages paid report for April 1, 2010 to June 15, 2011(12 pp.); G-5) I-9 form and supporting documents for Jaime Lopez Ramirez (4 pp.); G-6) I-9 forms and associated documents for Count II employees (19 pp.); G-7) Notice of Suspect Documents dated September 11, 2009 (3 pp.); G-8) letter to ICE from SRF's counsel dated October 6, 2009 and letter from ICE to SRF's counsel dated October 8, 2009 (2 pp.); G-9) Notice of Suspect Documents dated August 30, 2011 (2 pp.); G-10) [excluded] (3 pp.); G-11) DHS Reports of Investigation (41 pp.); G-12) affidavit of Aaron Paul Apodaca dated May 11, 2012 (3 pp.); G-13) affidavit of Gilbert I. Valdez dated May 10, 2012 (2 pp.); G-14) unsigned Certificates of Nonexistence (18 pp.); and G-15) signed Certificates of Nonexistence (18 pp.).

B. Split Rail's Response

With respect to Count I, SRF says that under the I-9 instructions in effect at the time when Jaime Lopez Ramirez' temporary I-551 stamp expired, employers were not required to reverify an employee's work authorization. The instructions on the I-9 form for section 1 state that "[e]mployers should note the work authorization expiration date (if any) shown in Section 1. For employees who indicate an employment authorization date in Section 1, employers are required to reverify employment authorization for employment on or before the date shown." Split Rail points out that Jaime Lopez Ramirez checked the box in section 1 identifying himself as a lawful permanent resident, and that he entered his alien number on the line next to the box. The company says it followed the instructions provided on the I-9 form for section 1, and that because no expiration date appeared in section 1 of the I-9 form for Jaime Lopez Ramirez, the company was not obligated to reverify his status.

SRF says with respect to Count II that contrary to the government's claim that it took no action,

Split Rail made specific efforts after the 2009 NSD to reverify the status of the employees named in the notice. In his affidavit, Tom Barenberg states in pertinent part that upon receipt of the 2009 NSD, Split Rail served thirty-two then-current employees with copies of the notice, and videotaped the service. Twenty-three employees would not affirm that they were authorized and all twenty-three were terminated. The other nine verified that they were authorized to work in the United States. Split Rail says it also "independently confirmed that the Count II employees possessed Colorado driver's licenses, had bank accounts within the state, filed worker's compensation claims, some owned real property and had qualified for FHA-backed mortgages, and other verifiable indicia of legal residency." SRF says that in addition the company secured an opinion from the Department of Justice "which indicated that [the company] was not obligated to re-verify facially valid employment documents, even in response to an ICE NSD." The company says it sought guidance in 2009 from the Civil Rights Division of the Department of Justice about the appropriate way to respond to the 2009 NSD, and the response from the Department of Justice concluded that reverification was unnecessary for the Count II employees.

Split Rail argues further that ICE cannot satisfy its burden with respect to Count II because the government fails to establish the unauthorized status of the employees and because ICE's database searches are insufficient to support a summary decision. SRF points to the testimonial affidavit of Todd L. Johnson, a retired special agent with twenty-three years of experience, including experience in worksite enforcement. In his affidavit, Johnson sets out his opinion that a records search is only as thorough as the person performing it; that misspellings, surname misplacement, or typographical errors can create false "no records" results; and that the absence of a record does not necessarily mean that an individual lacks legal status. Split Rail also says there is a genuine issue of material fact as to whether its actions were taken in good faith, and that its state of mind is not susceptible to ascertainment in a summary decision proceeding.

With respect to the penalties proposed, Split Rail says the company qualifies as a small business and any penalties should be mitigated on this basis, as well as on the basis of its good faith efforts to comply with the employment eligibility verification system. The company says ICE's pursuit of sanctions in this case is out of line with congressional intent because the government has not tried to prosecute SRF's competitors that are now employing the workers SRF terminated in response to the 2009 NSD. Barenberg says he is aware that most, if not all, of the employees SRF terminated went to work for competing fence companies in the Denver area, and that to the best of his knowledge, no enforcement actions have been brought against those companies.

Split Rail's response to the government's motion was accompanied by exhibits consisting of R-1) affidavit of Todd L. Johnson (2 pp.); R-2) resume of Todd L. Johnson (5 pp.); R-4) letter dated February 3, 2010 from the Office of Special Counsel to SRF's counsel (2 pp.); R-5) Split Rail's answers to interrogatories (15 pp.); R-6) letter from Split Rail to ICE dated February 17, 2012 (6 pp.); R-7) affidavit of Ann Allott (3 pp.); R-8) Notice of Intent to Fine dated February 8, 2010 (5 pp.); R-9) I-9 form with instructions (5 pp.); and R-10) affidavit of Tom Barenberg dated January

30, 2014 (3 pp.) Exhibit R-3, various records relating to Aaron Apodaca, was filed with the company's prehearing statement but not included among the exhibits accompanying the response to the motion.

IV. DISCUSSION AND ANALYSIS

A. Count I

Examination of the I-9 and accompanying documents for Jaime Lopez Ramirez, the employee named in Count I, reflects that Split Rail hired this individual for employment and failed to properly complete both section 2 and section 3 of his I-9 form. Jaime Lopez Ramirez was hired on October 5, 2009, at which time he presented a Mexican passport with a temporary I-551 stamp[5] showing an expiration date of September 13, 2010. The only entry SRF made in section 2, however, was "Passport, Mexico."

But a foreign passport by itself is not a valid List A document. *See United States v. Super 8 Motel & Villella Italian Rest.*, 10 OCAHO no. 1191, 9 (2013) (noting that a Serbian passport is not a valid List A document). Split Rail's artful parsing of section 1 of Form I-9 wholly ignores its responsibilities in completing section 2 of the form. Employers are required at the time of hire to examine specific documents establishing an individual's identity and employment eligibility and to record certain specific information about those documents in section 2 of the individual's I-9 form. 8 C.F.R. § 274a.2(b)(1)(ii). As set out in 8 C.F.R. § 274a.2(b)(1)(v)(A)(3), a foreign passport that contains a temporary I-551 stamp, or a temporary I-551 printed notation on a machine-readable immigrant visa, does satisfy the I-9 requirements for a List A document, but as the regulation expressly notes, the identification number and expiration date for all the documents must be entered in the space provided in section 2 of the I-9 form. 8 C.F.R. § 274a.2(b)(1)(v). SRF failed to do that. The company entered the number and expiration date for Jaime Lopez Ramirez' passport, but did not record the number or expiration date for his temporary I-551 stamp as required.

When an individual initially presents an unexpired permanent resident card (Form I-551 or "green card"), that individual's eligibility for employment need not, indeed should not, be reverified.[6] When the individual presents a foreign passport with a temporary I-551 stamp,

5 The temporary I-551 stamp is popularly referred to as an "ADIT" stamp. The reference is to the Alien Documentation, Identification, and Telecommunication Systems.

6 Once verified, a United States passport, a permanent resident card, or a List B identity document need not be reverified upon its expiration. While Split Rail contends that due process is violated if a lawful permanent resident presenting valid List A document is reverified, this is

however, the employer is obligated not only to enter the expiration dates for the passport and the temporary authorization in section 2 of Form I-9, but also to reverify the individual's eligibility no later than the date the employment authorization expires. *See* 8 C.F.R. § 274a.2(b)(1)(vii). The employer must require the employee to present evidence of new or continuing authorization prior to the expiration of the temporary stamp. *See Handbook for Employers* at 36, 47.[7] Presentation of a permanent resident card, a Social Security card, or any other acceptable List A or List C document could satisfy this requirement. *Id*.

While the I-9 Split Rail prepared for Jaime Lopez Ramirez does not itself record the fact, copies of supporting documents accompanying his I-9 reflect that the temporary I-551 stamp on Jaime Lopez Ramirez' Mexican passport was valid until September 13, 2010. Had Split Rail properly completed section 2 of his I-9 form, it would have been evident on the face of the form that the company was required to reverify Jaime Lopez Ramirez' employment eligibility prior to September 13, 2010, the expiration date shown on his temporary stamp. Because the company failed to do that, I conclude that Split Rail hired Jaime Lopez Ramirez for employment and continued to employ him after the expiration of his employment authorization document without updating and reverifying his eligibility by completing section 3 of Form I-9 as required.

B. Count II

While Split Rail purports to read an opaque letter from the Office of Special Counsel to contain "advice" that the company did not need to reverify the employment eligibility of the workers in question, SRF mischaracterizes the OSC letter, which actually says nothing of the sort. SRF's response to the government's motion characterizes the letter as "an opinion of the United States Department of Justice which indicated that [the company] was not obligated to re-verify facially valid employment documents, even in response to an ICE NSD." But examination of the letter reflects instead that it consists for the most part of a generic recital of nondiscrimination principles, prior to which the agency expressly cautions SRF that OSC "*cannot provide an advisory opinion on any particular instance of alleged discrimination or on any set of facts involving a particular individual or entity*" (emphasis added). The letter patently does not tell SRF that the company is free to disregard the government's NSD, and OSC's express disclaimer forecloses any reasonable basis for SRF to conclude that it does.

As the affidavit of Todd L. Johnson reflects, it is possible for errors to occur in government

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true, if at all, only when the individual actually presents a permanent resident card, not just a temporary authorization stamp on a foreign passport.

[7] Form M-274, U.S. Citizenship and Immigration Services (rev. 7/31/09). Although the *Handbook for Employers* has subsequently been revised, the 2009 version was in effect at the time of the events in question.

database searches. OCAHO case law specifically recognizes this potential for error, and for that reason consistently holds that a NSD standing alone does not definitively establish the unauthorized status of every individual named therein. *See, e.g., United States v. Platinum Builders of Cent. Fla., Inc.*, 10 OCAHO no. 1199, 9 (2013) (noting that a reference to discrepancies or suspect documents is not in itself sufficient to establish an individual's unauthorized status). This is precisely the reason why the notice itself extends the opportunity to the employer and the employee to challenge the government's preliminary findings and to present alternative documentation sufficient to establish the individual's eligibility for employment.

But Split Rail did not ask the employees to present additional documents, and the company continues to rely on the same I-9s it completed for these employees in July 2009 and the same documents they initially presented, notwithstanding the fact that ICE has told the company twice that those documents were suspect and that absent alternative documents the government would consider the individuals to be unauthorized. Tom Barenberg says in an affidavit, however, that the company had additional knowledge about the circumstances of each individual. Barenberg sent a letter to ICE dated February 17, 2012 in which he set out in detail with respect to these employees what he characterizes as verifiable indicia of legal residency such as ownership of cars, driver's licenses, real property, bank accounts, or mortgages, and/or the fact that some of the individuals filed successful workers' compensation claims. Barenberg's letter also emphasized that many of these individuals are long-term employees who have been involved with their spouses and children in company social events, parties, and picnics over the years of their employment. The company says it presented substantial proof of reasonable reverification efforts for eight of the nine employees named in Count II,[8] and that "we have a very valid basis to believe that they are here as authorized labor." Barenberg concludes in this letter that "I have had absolutely no reason to believe either now or at any time in the past that any of these individuals are anything but law abiding residents of the United States of America." He evidently declined to credit two specific notices from the government telling him otherwise, or even to acknowledge the government's authority to make that determination.

But as the law and its implementing regulations tell us, evidence acceptable to establish an individual's identity and employment eligibility consists of one document from List A on the List of Acceptable Documents, or a combination of one document from List B and one document from List C. 8 U.S.C. § 1324a(b); 8 C.F.R. § 274a.2(b)(1)(v). The employment eligibility verification system that Congress enacted in 1986 directs that in order to verify an employee's identity and eligibility, the employer must examine specific documents from a list of those that

[8] Although Split Rail no longer contends that Aaron Apodaca was authorized for employment, he too was one of the nine individuals Barenberg initially credited when they "verified that they were authorized to work in the U.S." As ICE points out, Apodaca continued to work at SRF for more than a year after the first NSD.

the government deems acceptable for these purposes. The employment eligibility verification system does not recognize lengthy employment tenure, marriage, parenthood, property ownership, possession of insurance policies, or pursuit of successful workers' compensation claims as valid or acceptable evidence either of identity or employment eligibility. Attendance at company social events does not constitute such evidence either. Neither do these activities or characteristics constitute evidence of lawful presence in the United States.

The government does not rely solely on the NSD to make its case. In addition to noting that the numbers on the documents presented by these nine individuals either did not exist or belonged to other individuals, ICE also presented certifications from its records custodian that no record exists showing that any of these individuals ever obtained permission for lawful immigrant status or for lawful admission into the United States. Responses to SRF's document requests reflect in addition that ICE declined on the basis of law enforcement privilege to produce the information it derived from databases that are owned and operated by agencies other than itself. With respect to at least two of the individuals named in Count II, however, the government did present additional investigative reports.

ICE's Report of Investigation no. 8, dated May 15, 2012, reflects that on May 9, 2012, Special Agent Jeff York examined photocopies of the documents originally presented by Jesus Nunez and determined that the documents were counterfeit. York's investigation determined that the alien number on the permanent resident card Nunez presented to SRF actually belonged to an alien named Marcial Molina, and that the Social Security number Nunez used actually belonged to a U.S. citizen named Gilberto I. Valdez. York and auditor Shanahan interviewed Valdez, a retired air force major with twenty-five years of service, who said he never loaned his number to another person, never lost his Social Security card, and never thought his information was compromised, although he did lose his military identification around October 1993. Valdez examined a picture of Jesus Nunez and said he had never seen that individual before, and that he, Valdez, had never heard of Split Rail Fence, never applied for work there, and never had any business with the company. Valdez provided an affidavit confirming these facts. SRF's letter of February 17, 2012 nevertheless claims that there is evidence of Nunez' authorization for employment because he has worked for the company since August 1998, has a driver's license, receives a W-2, owns a car and a house with a mortgage, and has insurance. For all that the record discloses, Nunez still works at Split Rail Fence.

Report of Investigation no. 9, dated May 15, 2012, reflects that Special Agent York examined the documents presented to SRF by the person employed under the name Aaron Paul Apodaca, conducted records checks, and determined that the documents were obvious counterfeits. One of the documents was a permanent resident card bearing an alien number that actually belongs to a Spanish-surnamed female. The card bore the female's alien number, but Apodaca's name. The other document this individual presented was a Social Security card bearing a number that belongs to a United States citizen who actually is named Aaron Paul Apodaca. An ICE special

agent and auditor Shanahan interviewed the citizen named Aaron Paul Apodaca, who reported that he was contacted by the Department of Social Security in May 2011 about an earnings statement for wages he did not earn, and that in February 2012 he received a letter from IRS saying he owed $500 in taxes for wages paid to him by SRF. Apodaca said he had applied for work at SRF in early 2009 but was not offered a job and did not provide any documents to the company. He said, however, that he had lost his wallet, Social Security card, and driver's license in 2003. Apodaca provided an affidavit confirming these facts, which SRF no longer attempts to contest.

The basic question presented in this case is whether an employer that receives a second NSD identifying the same individuals whose documents were put in issue almost two years earlier may continue to rely with impunity on the verbal assurances of the employees and the company's own self-designated "evidence" rather than requiring the employees to present documents other than those they had previously produced, as directed by the government. Case law suggests that the answer to this question must be no. In *United States v. New El Rey Sausage Co.*, 1 OCAHO no. 66, 389, 419, 421-22 (1989), *modified on other grounds by CAHO*, 1 OCAHO 78, 542 (1989), *aff'd sub nom. New El Rey Sausage Co. v. INS*, 925 F.2d 1153 (9th Cir. 1991), for example, legacy INS had notified the company that the alien registration numbers some employees had used were either nonexistent or had been issued to someone else.

When management at New El Rey sought to ask these employees if their documents were valid, some had either already left the company, or left upon learning of the INS letter. The production supervisor then met with two remaining employees, and they told the supervisor that their documents were valid. The supervisor said she did not doubt them, because they were "honest people." 1 OCAHO no. 66 at 422. She nevertheless compared photocopies of their documents with the examples of documents in the *Handbook for Employers*, and concluded from the comparison that their documents appeared "real and genuine to me." *Id.* The ALJ found that the respondent did not act reasonably in its attempts to acquire knowledge of the status of these two individuals after being officially told by INS that they were unauthorized to work. *Id.* at 423. The employer was accordingly found liable for continuing to employ them having reason to know they were unauthorized. *Id.* at 428-29. In affirming the result, the Ninth Circuit observed that,

> [c]ontrary 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.

Constructive knowledge is most readily shown when the employer receives information from the government that an employee is unauthorized, but fails to take reasonable steps to reverify the individual's eligibility. *See United States v. Aid Maint. Co.,* 7 OCAHO no. 951, 475, 480-81 (1997); *United States v. Mester Mfg. Co.,* 1 OCAHO no. 18, 53, 85-89 (1988), *aff'd sub nom. Mester Mfg. Co. v. INS*, 879 F.2d 561 (9th Cir. 1989). Like SRF, the employer in *New El Rey* argued that it had no reason to believe its employees were unauthorized. But as the Ninth Circuit pointed out, the ALJ's finding of constructive knowledge was supported by substantial evidence where INS had explained to the company which employees were considered unauthorized and why it had reached that conclusion. *New El Rey*, 925 F.2d at 1159. The court observed that New El Rey's "mere reliance on an assumption that the INS has erred is not enough to satisfy section 1324a(a)(2)." *Id*. (citing *Mester*, 879 F.2d at 567-68).

It is well established in OCAHO case law that when an employer receives specific information indicating that an alien employee is likely to be ineligible for employment and thereafter fails to undertake further inquiry and appropriate corrective action, the employer may be found liable for continuing to employ the alien knowing the individual to be unauthorized. *See United States v. Foothill Packing Co.*, 11 OCAHO no. 1240, 8-9 (2015); *United States v. Occupational Res. Mgmt. Co.*, 10 OCAHO no. 1166, 5, 10-11 (2013); *United States v. Noel Plastering & Stucco, Inc.*, 3 OCAHO no. 427, 295, 321-22 (1992), *aff'd sub nom. Noel Plastering, Stucco Inc. v. OCAHO*, 15 F.3d 1088 (9th Cir. 1993) (table); *New El Rey,* 1 OCAHO no. 66 at 416-26. That principle applies a fortiori when the employer has been put on clear notice, not once but twice, and nevertheless continues to rely on an assumption that ICE is mistaken, and that it is a better judge of the employment eligibility of its workers than is the United States government.

Split Rail seeks to characterize the government's prima facie showing as "an inference," but ICE's evidence in this case does more than just create one of several competing inferences, it gives rise to a rebuttable presumption. *See New El Rey*, 1 OCAHO no. 66 at 424 (noting that while not conclusive, the government's warnings gave rise to a rebuttable presumption that the employees were unauthorized). An inference is a deduction that may, but need not, logically be drawn from particular facts. Unlike an inference, which is permissive, a presumption requires a finding of the fact presumed, and is mandatory unless the presumption itself is rebutted. *See generally* 21B Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice and Procedure Evidence § 5122.1 (2d ed. 2005). Unlike an inference, moreover, a presumption shifts the burden of going forward to the opposing party to provide substantial countervailing rebuttal evidence. *See, e.g., Conoco, Inc. v. Dir., Office of Worker's Comp. Programs*, 194 F.3d 684, 687-88 (5th Cir. 1999).

A presumption is not rebutted by speculation. *Id*. Thus the fact that errors occasionally occur in government database searches is not sufficient to undermine the validity of every search of every government database. As observed in *New El Rey*, 1 OCAHO no. 66 at 420 n.16, the mere possibility of a computer error is not enough to exculpate the employer where there is no showing of any actual mistake. SRF is not, in other words, at liberty to assume that ICE is just wrong and that all its database searches are worthless. Neither the verbal assurances of the questioned employees nor the opinions of the company president are sufficient to exculpate the employer either. The government is not required to establish its case to such a degree of certainty as to eliminate all other possibilities in order to prevail. No substantial rebuttal evidence having been presented, the presumption must become conclusive.

Split Rail contends that a hearing is necessary to ascertain its actual state of mind. But Split Rail's actual state of mind is not material to this case, and parties are not ordinarily put to the burden and expense of a hearing absent a material factual issue. *United States v. Nebeker, Inc.*, 10 OCAHO no. 1165, 2 (2013). An issue is material only if it might affect the outcome of the case, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986), and only if it must inevitably be decided, *see De Araujo v. Joan Smith Enters., Inc.*, 10 OCAHO no. 1187, 6 (2013) (citing William W. Schwarzer, *Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact*, 99 F.R.D. 465, 480 (1983, 1984)). Split Rail's actual state of mind is not such an issue because the precise question presented here is whether the company was put on notice of facts sufficient to trigger a duty of further inquiry into the legitimacy of the employees' documents. The answer to this question does not depend upon Split Rail's actual state of mind, but on a more objective standard. It is unnecessary to inquire into SRF's actual state of mind because the term "knowing" includes not only actual knowledge, but also notice of specific facts and circumstances that would lead a person exercising reasonable care to make further inquiry. C*f. United States v. Jonel, Inc.*, 8 OCAHO no. 1008, 175, 188 (1998).

ICE provided the company more than once with specific notice that these nine employees were presumptively unauthorized for employment, and the company, believing itself to know better, chose to reject that information. But employers are not at liberty to create their own alternative employment eligibility verification systems; they are obligated to conform to the one that Congress enacted. The approach advocated by Split Rail Fence would leave each employer free to invent its own reason for not reverifying the employment eligibility of its employees when put on specific notice by the government of the necessity for doing that. Such a result would be wholly inconsistent with a statutory and regulatory scheme that is designed to ensure that the identity and employment eligibility of every employee is properly verified by the examination of specific documents deemed acceptable by the government for those purposes. As explained in *Jonel, Inc.*, 8 OCAHO no. 1008 at 190, "the central purpose of the verification system was to shift the burden of verification onto the employer's shoulders," *quoting Mester*, 879 F.2d at 566-67; *Noel Plastering*, 3 OCAHO no. 427 at 322. Like the employer in *New El Rey*, Split Rail

failed to act reasonably to acquire further knowledge after being advised that these employees were unauthorized, and Split Rail is liable for that failure.

Accordingly, I find that Split Rail Fence hired Aaron Apodaca, Isidro Ameca Aguilera, Ivan Dominguez, Fernando Morales Arroyo, Jesus Nunez, Juan Perez, Angel Quinones, Esteban Rodriguez Campos, and Juan Sanchez, and continued to employ them after having reason to know that they were unauthorized for employment in the United States.

C. Penalties

Regulations provide that permissible penalties available for a paperwork violation occurring after September 29, 1999 range from a minimum of $110 to a maximum of $1100. The governing statute directs that in setting a penalty for paperwork violations, consideration must be given to the size of the business, the good faith of the employer, the seriousness of the violation, whether or not the individual involved was an unauthorized alien, and the history of previous violations. 8 U.S.C. § 1324a(e)(5).

In setting a penalty of $660 for the violation in Count I, the government reached a reasonable result, notwithstanding the fact that it elected not to mitigate the penalty because of the size of the company. As of June 15, 2011, the company had eighty employees, qualifying SRF as a small employer. The government correctly found that the violation was serious, that Jaime Lopez Ramirez was an unauthorized alien, and that the company had a history of previous violations. Contrary to the government's suggestion that aggravation of the penalty is warranted for lack of good faith, however, the record does not support a finding of bad faith with respect to SRF's failure to reverify the eligibility of Jaime Lopez Ramirez or to complete section 3 of his I-9 form. SRF argues that the question of its good faith may not be adjudicated without a hearing, but there is no necessity for a hearing where the issue is resolved in the company's favor.

The government's argument as to SRF's lack of good faith is in any event actually directed to Count II, but is misdirected because the statutory penalty factors to be considered in setting penalties for paperwork violations have no application to violations where the employer knowingly hires or continues to employ unauthorized workers. While the statute expressly directs that five specific factors are to be considered in setting penalties for paperwork violations, 8 U.S.C. § 1324a(e)(5), these factors appear nowhere in 8 U.S.C. § 1324a(e)(4), and the statute does not suggest that these factors are in any way relevant to setting penalties for violations where the employer knowingly hires or continues to employ unauthorized aliens. *Cf. Occupational Res. Mgmt.*, 10 OCAHO no. 1166 at 28. Had Congress intended to require that specific factors be considered in setting penalties for knowing hire violations, it would have said so. For the reasons more fully explained in *United States v. Sunshine Building Maintenance, Inc.*, 7 OCAHO no. 997, 1122, 1187 (1998), the section 1324a(e)(5) factors should not be extrapolated to section 1324a(e)(4). There is accordingly no necessity to examine Split Rail's

subjective state of mind in setting the penalties for Count II.

The range of civil money penalties for the violations in Count II is from $375 to $3200 for a first offense after March 27, 2008, and from $3200 to $6500 for a second offense after March 27, 2008. While the government suggests that Split Rail should be treated as a serial offender for purposes of Count II, I am not persuaded that a history of previous paperwork violations is sufficient to trigger a finding that these violations can be treated as second offenses. The express language of both the statute and the regulation appears to contemplate that a second offense of this nature occurs only where the previous violation is of the same character, that is, involves a knowing hire or continuing to employ violation. 8 U.S.C. § 1324a(e)(4); 8 C.F.R. § 274a.10(b)(1)((ii)(A),(B). Because I do not believe the statute authorizes the imposition of the penalty ICE recommends, the nine violations in Count II will be assessed at the rate of $3200 for each violation, or a total of $28,800 for Count II.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Split Rail Fence Company, Inc. is located on Brandon Drive in Littleton, Colorado, and is a retailer, wholesaler, and contractor specializing in fence installation, fence repair, and fencing materials.

2. The Department of Homeland Security, Immigration and Customs Enforcement first served Split Rail Fence Company, Inc. with a Notice of Inspection on July 1, 2009.

3. The Department of Homeland Security, Immigration and Customs Enforcement served Split Rail Fence Company, Inc. with a Notice of Suspect Documents on September 11, 2009.

4. On October 5, 2009, The Department of Homeland Security, Immigration and Customs Enforcement served Split Rail Fence Company, Inc. with a Notice of Intent to Fine, and on February 1, 2010 the Notice was amended.

5. The Department of Homeland Security, Immigration and Customs Enforcement and Split Rail Fence Company, Inc. entered a settlement agreement on June 17, 2010 resolving the issues involving the paperwork violations alleged in the amended Notice of Intent to Fine issued on February 1, 2010.

6. The Department of Homeland Security, Immigration and Customs Enforcement served Split Rail Fence Company, Inc. with a second Notice of Inspection on June 15, 2011.

7. The Department of Homeland Security, Immigration and Customs Enforcement served Split Rail Fence Company, Inc. with a second Notice of Suspect Documents on August 30, 2011.

8. Aaron Apodaca, Isidro Ameca Aguilera, Ivan Dominguez, Fernando Morales Arroyo, Jesus Nunez, Juan Perez, Angel Quinones, Esteban Rodriguez Campos, and Juan Sanchez, all of whom were named in the second Notice of Suspect Documents issued on August 30, 2011, were also listed on the Notice of Suspect Documents issued on September 11, 2009.

9. The Department of Homeland Security, Immigration and Customs Enforcement served Split Rail Fence Company, Inc. with a second Notice of Intent to Fine on September 26, 2011, alleging one substantive paperwork violation and nine instances in which Split Rail Fence Company, Inc. continued to employ individuals knowing that they were or had become unauthorized to work in the United States.

10. Split Rail Fence Company, Inc. hired Jaime Lopez Ramirez for employment on or about October 5, 2009, at which time Jaime Lopez Ramirez presented a Mexican passport with a temporary I-551 stamp authorizing him to work in the United States until September 13, 2010.

11. Split Rail Fence Company, Inc. continued to employ Jaime Lopez Ramirez until April 29, 2013.

12. Split Rail Fence Company, Inc. hired Aaron Apodaca for employment on or about March 25, 2009, and continued to employ him until December 10, 2010.

13. Split Rail Fence Company hired Aaron Apodaca, Isidro Ameca Aguilera, Ivan Dominguez, Fernando Morales Arroyo, Jesus Nunez, Juan Perez, Angel Quinones, Esteban Rodriguez Campos, and Juan Sanchez, and continued to employ each of them after being twice advised by the Department of Homeland Security, Immigration and Customs Enforcement that each was presumptively unauthorized for employment in the United States.

14. At no time after receiving the first or the second Notice of Suspect Documents did Split Rail Fence Company request Aaron Apodaca, Isidro Ameca Aguilera, Ivan Dominguez, Fernando Morales Arroyo, Jesus Nunez, Juan Perez, Angel Quinones, Esteban Rodriguez Campos, or Juan Sanchez to present valid documents other than the ones each of them originally presented at the time of hire.

15. Split Rail Fence Company, Inc. is a small business.

B. Conclusions of Law

1. Split Rail Fence Company, 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. Split Rail Fence Company, Inc. hired Jaime Lopez Ramirez for employment and failed to properly complete both section 2 and section 3 of Form I-9 for him.

4. Split Rail Fence Company, Inc. hired Jaime Lopez Ramirez for employment and continued to employ him after the expiration of his employment authorization document without updating and reverifying his eligibility by completing section 3 of Form I-9.

5. When the government gives an employer proper written or oral notice of reasonably suspected use of fraudulent documents by alien employees, a rebuttable presumption arises that the employees named in the notice are aliens unauthorized to be employed in the United States. *United States v. New El Rey Sausage Co.*, 1 OCAHO no. 66, 389, 419, 428 (1989), *modified on other grounds by CAHO*, 1 OCAHO 78, 542 (1989), *aff'd sub nom. New El Rey Sausage Co. v. INS*, 925 F.2d 1153 (9th Cir. 1991).

6. Split Rail Fence Company, Inc. hired Aaron Apodaca, Isidro Ameca Aguilera, Ivan Dominguez, Fernando Morales Arroyo, Jesus Nunez, Juan Perez, Angel Quinones, Esteban Rodriguez Campos, and Juan Sanchez for employment, and continued to employ them after having reason to know that they were unauthorized for employment in the United States.

7. In setting penalties for paperwork violations, due consideration must be given to the size of the employer's business, the good faith of the employer, the seriousness of the violation, whether or not the individual was an unauthorized alien, and the history of previous violations. 8 U.S.C. § 1324a(e)(5).

8. Violations of 8 U.S.C. § 1324a(a)(1)(A) and (a)(2) require the issuance of a cease and desist order as well as civil money penalties. 8 U.S.C. § 1324a(e)(4).

9. While the governing statute directs that five specific factors be considered in setting penalties for paperwork violations, 8 U.S.C. § 1324a(e)(5), these factors appear nowhere in 8 U.S.C. § 1324a(e)(4), nor does the statute direct that these factors be considered in setting penalties for violations involving the knowing hire or continued employment of unauthorized aliens. *See United States v. Occupational Res. Mgmt., Inc.*, 10 OCAHO no. 1166, 28 (2013).

ORDER

Split Rail Fence Company, Inc. is liable for ten violations of the employer sanctions provisions of the Immigration and Nationality Act, as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a (2012) and is directed to cease and desist from violations of 8 U.S.C. § 1324a(a)(1)(A) and (a)(2), and to pay civil money penalties in the total amount of $29,460.

SO ORDERED.

Dated and entered this 20th day of May, 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.