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

August 11, 2011

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 10A00034
KETCHIKAN DRYWALL SERVICES, INC., Respondent.	)	

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

This is an action arising under the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a (2006), in which the United States is the complainant and Ketchikan Drywall Services, Inc. (KDS or Ketchikan) is the respondent. The Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a four-count complaint alleging that the company violated 8 U.S.C. § 1324a(b) and 8 C.F.R. § 274a.2(b).

Count I asserts that KDS failed to prepare Form I-9 for 43 employees and seeks penalties of $45,581.25. Count II alleges that KDS failed to ensure that 65 employees properly completed section 1 of the form and seeks $69,377.00. Count III charges that KDS failed to properly complete section 2 of the form for 110 employees, and Count IV asserts that for 53 employees neither section 1 nor section 2 was properly completed. Penalties sought for the latter two counts are $115,192.00 and $56,474.00 respectively. The total sought for all the alleged violations is $286,624.25.

KDS filed an answer denying the material allegations of the complaint, raising an affirmative defense pursuant to 8 U.S.C. § 1324a(b)(6) that it had made a good faith attempt to comply and had appropriate procedures in place, and saying that any failures were only technical or procedural in nature. It also argued that the penalties sought were excessive. Discovery and preliminary motion practice ensued and are now completed. Presently pending are the parties'

cross motions for summary decision. While the respondent filed a response to the government's motion, the government filed no response to the respondent's motion, and the deadline for doing so has passed.[1] Both motions are ripe for decision.

ICE's motion seeks summary decision as to all counts of the complaint as well as to the penalties it requested. KDS' response to the government's motion admitted liability for 130 of the alleged violations but contested the remainder, and also challenged the formula used by the government in computing its penalty calculation as well as the reasonableness of the result. It offered instead an alternative calculation for the violations it acknowledged based on the old INS "Guidelines for Determination of Employer Sanctions Civil Money Penalties," and said the penalties should not exceed $57,200.

Ketchikan's own motion seeks summary decision in its favor for 28 of the 43 violations alleged in Count I, 59 of the 65 violations alleged in Count II, 30[2] of the 110 violations alleged in Count III, and 24 of the 53 violations alleged in Count IV, and seeks an order dismissing these allegations altogether. The motion was silent as to the remaining violations.

II. BACKGROUND INFORMATION

KDS is wholly owned by its founder and president, William Charles Cowin. The company was established in 1981 and has its principal place of business in Woodinville, Washington, where it is engaged in the business of installing drywall and steel stud framing for commercial and residential construction projects in and around the Puget Sound area.

The Declaration of William Cowin asserts that the company's business is seasonal in nature because there is little construction done in the Pacific northwest between November and February owing to steady rain. The declaration describes the business further as "project-oriented," with particular projects lasting anywhere from a few days to 35-40 days or more and requiring anywhere from 3-4 to 35-40 workers at a time. Workers are hired for specific projects and laid off when the project ends; they are then recalled as needed for other projects provided their work is satisfactory.

On March 25, 2008, the government served a Notice of Inspection and Subpoena on Ketchikan

[1] Ketchikan's motion was served by mail December 21, 2010. OCAHO rules allow ten days for response to a motion, and an additional five days when service was made by ordinary mail. 28 C.F.R. §§ 68.8(c), 68.11(b). The government's response was thus due no later than January 5, 2011.

[2] Ketchikan initially sought relief for 34 of the violations alleged in Count III, but subsequently withdrew its challenge as to four of them.

requesting the Employment Eligibility Verification Forms (I-9s) and copies of any attached documents presented at time of I-9 completion for employees who worked between January 1, 2005 and March 25, 2008. According to ICE Forensic Auditor Kristina Eby, KDS made its first production of documents in response to the subpoena on April 2, 2008. The government then served a Notice of Intent to Fine (NIF) on Ketchikan on April 4, 2009. Ketchikan subsequently produced additional documents in June and August 2009, totaling 81 I-9s and 10 copies of employee documents. The government accepted both these late productions, revised its NIF accordingly, and served a revised NIF on Ketchikan on October 30, 2009. KDS made a timely request for a hearing. The complaint filed in this matter is based on the revised NIF.

III. EVIDENCE CONSIDERED

A. Exhibits Accompanying the Government's Motion

The government identified its exhibits as G-1) the complaint filed in this matter (17 pages); G-2) the Declaration of Special Agent Lynda M. Buehring dated December 17, 2010 (4 pages); G-3) the Declaration of Forensic Auditor Kristina Eby dated June 28, 2010 (11 pages); G-4) Notice of Inspection and Subpoena issued to Ketchikan Drywall, Inc. dated March 25, 2008 (3 pages); G-5A) Count I Spreadsheet of 43 named individuals, together with supporting documentation for employment and date of hire (187 pages); G-5B) Count II Spreadsheet of 65 named individuals, together with copies of Forms I-9 and work authorization documents (112 pages); G-5C) Count III Spreadsheet of 110 named individuals, together with copies of Forms I-9 and work authorization documents (167 pages); G-5D) Count IV Spreadsheet of 53 named individuals, together with copies of Forms I-9 and work authorization documents (82 pages); G-6) Ketchikan Drywall Services, Inc. Employee Rosters for 2005, 2006 and 2007, and Employee Earnings History Report and Master File Listing for 2008 (18 pages); G-7) Memorandum from Paul W. Virtue, INS Acting Exec. Comm'r of Programs, "Interim Guidelines: Section 274A(b)(6) of the Immigration & Nationality Act" (Mar. 6, 1997), together with appendices A – H ("Virtue Memorandum") (22 pages); G-8) signed U.S. income tax returns for Ketchikan Drywall Services, Inc. for 2005, 2006, 2007, 2008 and 2009 (61 pages); G-9) I-9 Audit Results for Ketchikan Drywall Services, Inc. for 235 named individuals (5 pages); G-10) INS Attestation of Compliance dated October 27, 2000, INS 3-count Warning Notice served on Ketchikan Drywall, Inc. on October 12, 2000 (8 pages); G-11) ICE internal memorandum dated April 13, 2009 documenting service of documents upon Ketchikan's counsel (1 page).

B. Exhibits Accompanying the Respondent's Motion

The respondent identified its exhibits numerically. For clarity, the letter "R" (for respondent) is added before the numerical designation. The exhibits accompanying KDS' motion include R-1) the government's response to interrogatory no. 6A (4 pages); R-2) the government's response to interrogatory no. 9A (7 pages); R-3) the government's response to interrogatory nos. 12A and

12F (5 pages); R-4) Memorandum from Paul W. Virtue, INS Acting Exec. Comm'r of Programs, "Interim Guidelines: Section 274A(b)(6) of the Immigration & Nationality Act" (Mar. 6, 1997), together with appendices A & B ("Virtue Memorandum") (11 pages); R-5) Declaration of William Cowin signed December 22, 2010 (4 pages); R-6) Count I Spreadsheet of 28 of the 43 named individuals, together with copies of Forms I-9 and work authorization documents (64 pages); R-6A) Count I – Spreadsheet of 13 of the 43 named individuals, together with Employee Earnings History Summary Report for 2005-2008 (16 pages); R-7) Count II Spreadsheet of 59 of the 65 named individuals, together with copies of Forms I-9 and work authorization documents (112 pages); R-8) Count III Spreadsheet of 34 of the 110 named individuals, together with copies of Forms I-9 and work authorization documents (82 pages); R-9) Count IV Spreadsheet of 24 of the 53 named individuals, together with copies of Forms I-9 and work authorization documents (43 pages).

C. Exhibits Accompanying the Respondent's Response to the Government's Motion

Exhibits accompanying Ketchikan's response in opposition to the government's motion for summary decision include R-10) Supplemental Declaration of William Cowin dated December 29, 2010 (3 pages); R-11) List of 28 employees in continuing employment, together with Employee Earnings History Summary Report from inception to December 27, 2010 (24 pages); R-12) a portion of INS Handbook for Employers, Instructions for Completing Form I-9 (11/21/91) (21 pages); R-13) National Immigration Law Center publication "How Errors in E-Verify Databases Impact U.S. Citizens and Lawfully Present Immigrants" dated March 2010 (4 pages); R-14) Form I-9 Inspection Overview prepared by ICE Worksite Enforcement Unit (7 pages); R-15) Additional I-9 forms for individuals named in Count II (19 pages); R-16) Additional I-9 forms for individuals named in Count IV (6 pages).

IV. APPLICABLE LAW

A. The Employment Eligibility Verification System

The INA imposes an affirmative duty upon employers to prepare and retain certain forms for employees hired after November 6, 1986 and to make those forms available for inspection on three days notice. Any delay in presentation of the Forms I-9 is a violation of the retention requirement. 8 C.F.R. § 274a.2(b)(2)(ii).

Regulations designate the I-9 form as the employment eligibility verification form to be used by employers. 8 C.F.R. § 274a.2(a)(2) (2009). Forms must be completed for each new employee within three business days of the hire, 8 C.F.R. § 274a.2(b)(1)(ii), and each failure to properly prepare, retain, or produce the forms upon request constitutes a separate violation. 8 C.F.R. § 274a.10(b)(2). An employer must retain the original signed copy of the Form I-9 for either three years after the date of hire of the employee, or one year after the date the individual's

employment is terminated, whichever is later. 8 C.F.R. § 274a.2(b)(2)(i).

The form has two parts; section 1 consists of an employee attestation, in which the employee provides information under penalty of perjury about his or her status in the United States, 8 C.F.R. § 274a.2(a)(3), (b)(1)(i)(A), and section 2 consists of an employer attestation under penalty of perjury that specific documents were examined to establish the individual's identity and eligibility for employment. 8 C.F.R. § 274a.2(a)(3), (b)(1)(i)(A). Employers are required to examine either a List A document, or both a List B and a List C document for each employee. 8 C.F.R. § 274a.2(b)(1)(v). List A documents are those that establish both identity and employment eligibility, 8 C.F.R. § 274a.2(b)(1)(v)(A); List B documents establish identity only, 8 C.F.R. § 274a.2(b)(1)(v)(B); while List C documents establish only employment eligibility, 8 C.F.R. § 274a.2(b)(1)(v)(C). Employers are permitted, but not required, to copy the documents they examine. 8 C.F.R. § 274a.2(b)(3). If an employer does make copies of its employees' documents, the copies are to be kept with the I-9 form. *Id.*

Civil money penalties are assessed for paperwork violations according to the parameters set forth in 8 C.F.R. § 274a.10(b)(2): the minimum penalty for each individual with respect to whom the violation occurred after September 29, 1999, is $110, and the maximum penalty is $1,100. The following factors must be considered in assessing the appropriate penalties: 1) the size of the business of the employer, 2) the good faith of the employer, 3) the seriousness of the violation(s), 4) whether or not the individuals involved were unauthorized aliens, and 5) any history of previous violations by the employer. 8 U.S.C. § 1324a(e)(5). The statute does not require that equal weight be given to each factor, nor does it rule out consideration of additional factors. *United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000).[3]

B. The "Good Faith" Defense and the Virtue Memorandum

Section 1324a(b)(6), enacted in 1996,[4] significantly changed the enforcement of the employer sanctions provisions by adding a potential defense to certain technical or procedural violations

[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.

[4] Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Section 411, signed into law on Sept. 30, 1996.

where an employer made a good faith attempt to comply with the requirements. With respect to such violations, an employer must be given a period of not less than 10 days to correct the failure voluntarily. 8 U.S.C. § 1324a(b)(6)(A), (B). The defense has no application to substantive violations.

The distinction between substantive violations and those that are technical and procedural in nature is elaborated in a Memorandum from Paul W. Virtue, INS Acting Exec. Comm'r of Programs, Interim Guidelines: Section 274A(b)(6) of the Immigration & Nationality Act Added by Section 411 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (Mar. 6, 1997) (the Virtue Memorandum or Interim Guidelines), *available at* 74 Interpreter Releases 706 app. 1 (Apr. 28, 1997). As explained in *United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1071, 11 (2001), wide dissemination of the Interim Guidelines to the public may be viewed as an invitation for the public to rely upon them as representing agency policy. The Interim Guidelines define the ambiguous statutory concept of technical and procedural violations in a manner that is arguably more generous than is required by the strict statutory language. *Id.* at 10.

Pursuant to the Interim Guidelines, a failure to complete an I-9 form at all is not a technical or procedural failure; it is substantive in nature and defeats the purpose of the law. Virtue Memorandum, app. A; *see also United States v. DJ Drywall, Inc.*, 10 OCAHO no. 1136, 3-4 (2010). Other violations in section 1 of the form that the Interim Guidelines characterize as substantive rather than technical or procedural in nature include inter alia: the lack of an employee signature, lack of a check mark in any box, employee attestation not completed within three days of hire, and employee attestation to status as a lawful resident or authorized alien without providing an alien number and/or expiration date unless the employer included the A number in section 2 or on a legible copy of the document produced during the inspection. Violations in section 2 that the Interim Guidelines characterize as substantive include: the lack of an employer signature in the attestation section, listing of improper documents to establish identity or employment eligibility, and the lack of a complete document title, identification number, and/or expiration date where no legible copy of the document is retained with the I-9 and presented at the inspection. Virtue Memorandum, apps. A & B.

C. Summary Decision Standards

OCAHO rules[5] provide that a complete or partial summary decision may issue if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that the moving party is entitled to summary decision. 28 C.F.R. § 68.38(c). This rule is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in federal cases. Accordingly OCAHO jurisprudence looks to federal case law interpreting that rule for guidance

[5] 28 C.F.R. pt. 68 (2010).

in determining when summary decision is appropriate. *See United States v. Candlelight Inn*, 4 OCAHO no. 611, 212, 222 (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. *Santiglia v. Sun Microsystems, Inc.*, 9 OCAHO no. 1110, 8 (2004) (citing William W. Schwarzer, Alan Hirsch & David J. Barrans, *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441, 499 (1992)).

V. THRESHOLD ISSUES

KDS' motion raised two threshold issues of law that are relevant to multiple counts of the complaint and to the motions of both parties. With both its motion for summary decision and its response to the government's motion KDS filed copies of additional employee documents that evidently had not previously been produced to ICE in 2008 and 2009, and now seeks to have the newly filed document copies considered nunc pro tunc in conjunction with the I-9s previously produced. These documents were included as attachments to exhibits R-6 (Count I), R-7 (Count II), R-8 (Count III), R-9 (Count IV), R-15 (Count II), and R-16 (Count IV).

As is explained in the Virtue Memorandum, there are certain specific omissions on the I-9 form which would otherwise constitute substantive violations that are not considered as such when the omitted information appears on a copy of a document that is retained with the form and presented at the I-9 inspection. KDS belatedly seeks to use some of the newly filed copies of employee documents for this purpose as though these copies had originally been produced with the I-9 forms and presented at the inspection. Second, Ketchikan suggests that an employer's having made copies of the employees' documents is sufficient to relieve it from liability for any omissions in section 1 or section 2 of the I-9 form. KDS appears to read the statute as if it offers employers an option either to complete the I-9 form or to copy the employees' documents.

A. Whether the Newly Produced Document Copies May be Considered Nunc Pro Tunc to Supplement Previously Produced I-9 Forms

The Declaration of William Cowin asserts that because of a misunderstanding by Ketchikan regarding the scope of the government's subpoena, it did not produce copies of all the List A, B or C documents it copied at the time the original I-9 forms were completed. The declaration says that as a matter of company policy, Cowin instructed employees always to make copies of the documents presented, but that the I-9 forms were kept in a "separate 'I-9 file' and copies of the

documents that the worker presented were kept in the individual worker's personnel file." Cowin said KDS understood the subpoena to request only the I-9 forms and documents attached to them, so that copies of documents kept in the individual personnel files were not produced because they were not "attached" to the I-9s. Cowin asserts without further explanation that Ketchikan did produce these additional document copies at "a later date," evidently not, however, with any of the productions of documents made to ICE in 2008 and 2009. KDS says it should not be penalized due to its misunderstanding about the scope of the government's subpoena, because the government is solely responsible for the wording of the subpoena and that the company should be able to present these additional document copies belatedly because there is no requirement that the document copies be kept with the Form I-9.

KDS evidently must have kept at least some of the document copies with the I-9 forms, because it did produce some copies of documents with its three productions of documents, so the description of the company's separate filing systems appears not to be accurate for all cases. In some instances, moreover, the newly proffered document copies belatedly provided do not match the information Ketchikan recorded on the Form I-9 and it is simply impossible that the document copy was made at the time of completion of the Form I-9, as Ketchikan alleges it was. In Count III, for example, the I-9 for Robert Hanson (employee no. 34) was signed on October 26, 2007 according to Exhibit G-5C. The expiration date that was entered for Hanson's driver's license was August 21, 2008, but the copy of the driver's license Ketchikan submitted with its motion was issued on August 22, 1995, and expired on August 21, 1999. The dates are a complete mismatch and the copy is clearly not the document the I-9 says was examined.

Similarly, in Count IV, Guzman-Cortes' (employee no. 26) I-9 was signed on September 28, 2006, and the expiration date entered on the form for his driver's license is January 17, 2007. The copy of the driver's license Ketchikan submitted with its motion was issued on February 23, 2007, and expires on January 1, 2012. The license that was copied was not even issued until five months after the original I-9 form was signed, and this copy cannot possibly be the document Ketchikan examined in 2006. Also in Count IV, the I-9 form for employee no. 52 (Mario Vergara-Melendrez) was signed on May 2, 2007, and shows the expiration date for his driver's license as February 19, 2008. The copy of the driver's license Ketchikan filed with its motion was issued on January 9, 2008, and expires on February 19, 2013. Again, the license that was copied was not even issued until many months after the original I-9 form was signed, and this copy cannot possibly be the document Ketchikan examined at the time the I-9 was signed in 2007.

In any event, the company acted at its own peril in keeping the document copies separate from the I-9s. Crediting the factual allegations in the Cowin declaration, as I must, it does not follow that the newly produced documents should be considered. While the regulations do not require an employer to make copies of the employees' documents, they plainly do require that if an employer makes copies, those copies are to be kept with the Form I-9. 8 C.F.R. § 274a.2(b)(3) ("If such a copy or electronic image is made, it must be retained with the Form I-9"). To support

its contention to the contrary, Ketchikan cites to 75 Fed. Reg. 42575, 42576 (July 22, 2010), but omits the title of that provision, which is "Electronic Signature and Storage of Form I-9." This recently enacted rule permits employers to complete, sign, scan, and store Form I-9 electronically under certain circumstances, rather than retaining paper, microfilm or microfiche copies. After publication of the interim final rule in 2006, several commentators sought guidance with respect to the storage of the actual I-9's and ancillary documents used to verify the employee's eligibility; the context of the guidance set out in this 2010 Federal Register notice makes clear that it is Form I-9 and the verification documentation (together), that "may be stored in a separate Form I-9 file or as part of the employee's other employment records."

The document copies that KDS filed with its motion for summary decision or with its response to ICE's motion will not be considered. As the Virtue Memorandum makes clear, the omissions on an I-9 form that may potentially be cured by presentation of a document are limited to those instances when the information is contained "on a legible copy of a document retained with the Form I-9 and presented at the I-9 inspection." Virtue Memorandum, apps. A & B, (emphasis added). Where the document was neither retained with the I-9 form nor presented at the I-9 inspection, it is not relevant to the inquiry made here and the proffered documents will not be considered further.

B. Whether Copying Documents Relieves an Employer from Liability for Omissions on Form I-9

KDS' motion asserts that "the statute authorizes an employer to make copies of the documents presented 'for the purpose of complying with the requirements of this subsection,'" and concludes from this that "copying documents relieves an employer of liability with respect to omissions in Section 1 and Section 2 of the I-9 form." The contention is wrong, and the respondent's assertion is contrary both to the regulations and to OCAHO case law. First, copying documents instead of fully completing section two will not satisfy an employer's I-9 responsibilities, as the regulations make perfectly clear. They specifically provide in pertinent part that,

> An employer … may, but is not required to, copy or make an electronic image of a document presented by an individual solely for the purpose of complying with the verification requirements of this section. If such a copy or electronic image is made, it must be retained with the Form I-9. The copying or electronic image does not relieve the employer from the requirement to fully complete section 2 of the Form I-9.

8 C.F.R. 274a.2(b)(3) (emphasis added).

The language could not be more explicit, and OCAHO case law has long and repeatedly

emphasized this requirement. *See United States v. Corporate Loss Prevention Assocs., Ltd.*, 6 OCAHO no. 908, 967, 970 (1997) (Modification by the Chief Administrative Hearing Officer); *United States v. Christie Auto. Prods.*, 2 OCAHO no. 361, 485, 495-96 (1991); *United States v. Mario Saikhon, Inc.*, 1 OCAHO no. 279, 1811, 1821-22 (1990); *United States v. San Ysidro Ranch*, 1 OCAHO no. 183, 1204, 1210-12 (1990). The failure of an employer to attest to its review and verification of the employee's documents demonstrating identity and work authorization are serious violations which lie at the heart of the verification process. *United States v. Reyes*, 4 OCAHO no. 592, 1, 10 (1994); *United States v. J.J.L.C., Inc.*, 1 OCAHO no. 154, 1089, 1098 (1990) ("failure to attest on Part 2 of Form I-9 is a serious violation, implying avoidance of liability for perjury"). This is so regardless of whether copies of the employees' documents are attached.

Second, failure to ensure that an employee attests to his immigration status is similarly among the most serious of violations. *United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1062, 7 (2000); *United States v. Fortune East Fashion, Inc.*, 7 OCAHO no. 992, 1075, 1080 (1998) (omission of the individual's immigration status defeats the whole purpose of the verification process); *United States v. Task Force Sec., Inc.*, 4 OCAHO no. 625, 333, 341 (1994) (lack of employee signature subverts the Congressional mandate that employees attest under penalty of perjury that they are authorized for employment in the United States). Again, omission of the attestation is a violation regardless of whether the employer copied documents.

KDS' citation to *Denardo v. WH Smith USA Travel*, 9 OCAHO no. 1080 (2002), in support of its contention that copying documents is a substitute for completing the I-9 form is both misplaced and disingenuous. To begin with, *Denardo* is an employment discrimination case pursuant to 8 U.S.C. § 1324b in which the complainant refused to allow an employer to copy his passport, 9 OCAHO at 2, and it did not purport to adjudicate any issues respecting § 1324a. Second, the precise language KDS quoted does not support the proposition that failure to complete section 2 can be excused by copying documents. In finding that the employer's uniform policy of copying documents did not discriminate against the complainant, *Denardo* made certain observations passim about the purpose of a copying policy, noting that "[c]opying and retaining an employee's Form I-9 document(s) protects the employer from any *human error in the transcription of the information from the documents to the Form I-9*, and is therefore a means of ensuring compliance with the law." *Denardo*, 9 OCAHO no. 1080 at 8 (emphasis added). Copying the documents may well serve to insulate an employer from errors in transcribing the information, but nothing in this language purports to excuse an employer who fails to transcribe any information at all. Nothing in the governing statute, the applicable regulations, or in OCAHO case law will do that either.

To the extent that the Virtue Memorandum excuses a specific omission when a copy of the document is retained with the form and presented at the time of inspection, those instances will be considered on a case by case basis. But there is no general rule that omissions are cured by copying documents.

VI. THE GOVERNMENT'S MOTION CONSIDERED

Because the government bears the burden of proof both as to liability and penalties, I consider its motion first. For ease of reference, the employees in each separate count are identified by sequential numbers; an appendix reflects their corresponding names.

A. Count I

The government's motion asserts as to Count I that Ketchikan failed to prepare I-9 forms for 43 named individuals, 33 of whom have multiple dates of hire, termination, and rehire, and 10 of whom have a single date of hire. The company's response admitted 15 of the violations alleged (employees 5, 6, 8, 14, 17, 18, 23, 24, 26, 27, 30, 31, 32, 40, and 42), but contended that it did provide I-9s and supporting documents for the other 28 employees named in Count I (employees 1, 2, 3, 4, 7, 9, 10, 11, 12, 13, 15, 16, 19, 20, 21, 22, 25, 28, 29, 33, 34, 35, 36, 37, 38, 39, 41, and 43), and, because these were seasonal employees who continued in their employment and did not have to be "rehired," it satisfied the requirements of the regulations governing continuing employment or rehiring of a previous employee. *See* 8 C.F.R. § 274a.2(b)(1)(viii), (c). The company argues that these employees were periodically laid off for lack of work and later recalled.

The government contends that (1) Ketchikan's internal records indicate the employees in question were terminated, and (2) even if Ketchikan could satisfy the regulatory requirements for continuing employment, it did not present updated Forms I-9 that reflected the rehire dates in Section 3. Because the government made no response to KDS' motion however, and did not contradict the factual assertions in the Cowin declarations, those assertions must be deemed true.

I therefore find as facts for purposes of this inquiry that KDS' workers are routinely laid off at the completion of a particular project and recalled for work on new projects, that KDS has a past history of recalling its laid off employees, that the company was an ongoing, profitable concern with the financial ability during the relevant period to rehire laid off individuals for new projects, and that its oral communications with its employees were such that employees with satisfactory performance records could generally expect to resume their employment within a reasonable time in the future.

1. Whether Particular Employees Were Terminated or Continued Their Employment

The government's motion argues that there was no continuing employment because KDS' own internal employee rosters reflect termination dates for all the contested individuals. ICE argues that when the employer's own records show a termination, those records are conclusive evidence that there was no continuing employment relationship, and an employer seeking to show

otherwise must impeach its own records by providing a persuasive explanation that the records are in error, citing *United States v. Mester Mfg.*, 1 OCAHO no. 18, 53, 72 (1988).

But an employer will not be deemed to have hired an individual for employment if the individual is continuing in his or her employment and has a reasonable expectation of employment at all times. 8 C.F.R. § 274a.2(b)(1)(viii). If an employer has not hired an individual for new employment, it has no obligation to complete another I-9, and it will not have violated 8 U.S.C. § 1324a by failing to do so. Regulations define the term "continuing in employment," and provide specific examples, including, inter alia, when an individual is either temporarily laid off for lack of work or is engaged in seasonal employment. 8 C.F.R. § 274a.2(b)(1)(viii)(A)(3), (8). Regulations further provide that an employer claiming that an individual is continuing in employment bears the burden to show both that the individual expected to resume employment at all times and that the individual's expectation is reasonable. 8 C.F.R. § 274a.2(b)(1)(viii)(B).

Whether the individual's expectation is reasonable is determined on a case by case basis taking into consideration several factors, among which the most relevant to the instant case are the employer's past history of recalling absent employees for employment (which indicates a likelihood that the individual in question will resume his or her employment within a reasonable time), the financial condition of the employer (which reflects that the employer is able to permit the individual to resume employment within a reasonable time), and any oral and/or written communication between employer, its supervisory employees and the individual (which indicates that it is reasonably likely that the individual can expect to resume employment within a reasonable time). 8 C.F.R. § 274a.2(b)(1)(viii)(B)(3), (6), (7).

The Declaration of William Cowin describes KDS' system for maintaining its personnel files, and notes that files are maintained for both "active" and "inactive" employees. A laid off worker's file is maintained as "inactive." The computer records list inactive workers as "terminated," which in KDS terms means only that the employee is not currently working. The declaration says further that the computer system is used to generate payroll reports and these reports would be too cumbersome if all the laid off workers were included. Thus the category "terminated" is simply a record-keeping category, not an error but a workaround solution that allows the company to print its payroll reports in a manner that is not bogged down with names of employees who are not receiving a paycheck for that particular pay period. The Cowin declaration says that KDS uses the payroll reports as a management tool to track who is actually on the payroll at any particular time, and the computer system does not distinguish between employees who are actually terminated and those who are just laid off.

In *Mester*, the employer argued that two employees whose personnel records indicated they had "quit" and been rehired three months later, had actually been on a leave of absence during the three month period. *Mester*, 1 OCAHO no. 18 at 72. Various forms in the employees' personnel files, including attendance and vacation schedules and employee payroll cards, included the notation that these employees had "quit," a term that had to be specially written on the form by

the employer. *Mester*, 1 OCAHO no. 18 at 72. In contrast to the instant case, the company had no reason for recording that the employees had quit other than the accurate maintenance of its personnel files. This is the context in which it was said that the employer had to impeach its own records and present a persuasive explanation that the records are in error in order to overcome personnel records made in the ordinary course of business. *Mester*, 1 OCAHO no. 18 at 72. Those records were taken at face value in *Mester* because the employer offered no persuasive explanation why they should not be. The facts and circumstances in *Mester* are not analogous to those here and nothing in that case precludes consideration of KDS' explanation of its recordkeeping practices.

The government did not contest the factual allegations in the Cowin declaration and the company's explanation that the pre-established code (DOT or Date of Termination) used in the respondent's computer system was simply a workaround solution to exclude the names of laid off employees from its payroll roster is taken as true. The Cowin declaration asserts in addition that an employee's actual work expectations would depend upon direct verbal communication with the employee at the end of a project: employees who performed adequately were told they could come back when Ketchikan started another project. If there weren't enough jobs to bring back every worker, KDS used a seniority system to allocate available positions, and the fact that an employee was not brought back on one project did not mean that the employee would not be brought back on the next project.

The term "reasonable time" is not defined either in the regulation or in OCAHO case law, and must be assessed on a case by case basis, in light of a common sense assessment of the particular facts and circumstances under which the particular employer calls seasonal employees back to work. Given the facts and circumstances and the description of Ketchikan's business, I find that if an employee was employed during a particular calendar year, a reasonable time for recall would include any time later that same calendar year or within the next calendar year, which would be the next season. If an employee who worked in one year was not recalled at any time within the next year or season, the possibility of recall two years later could not without more be characterized as being within a "reasonable" time.

Payroll records reflect that 19 of the 28 contested employees, nos. 1, 2, 3, 9, 10, 11, 12, 13, 15, 16, 21, 25, 28, 33, 34, 38, 39, 41 and 43, worked during each successive season in the years 2005, 2006, and 2007, and these 19 may be considered as continuing in their employment. Failure to complete new I-9 forms for these employees thus results in no violation. Nine of the 28, on the other hand, nos. 4, 7, 19, 20, 22, 29, 35, 36, 37, worked only during the 2005 and 2007 seasons, but not at all in 2006. Even construing the facts in the light most favorable to the respondent, an entire year is too significant a break in employment to permit a laid off employee to have any reasonable expectation of employment at "all times." After more than a year, such an employee cannot be considered continuous and would have to be viewed as a rehire.

2. Whether Particular Employees Were Rehired

An employer who rehires a former employee does not necessarily need to complete a new Form I-9 for that employee. 8 C.F.R. § 274a.2(c)(1). If the individual is rehired within three years of the date of the initial execution of the previous I-9 form and, upon inspection of the I-9 the employer determines the individual is still eligible to work, the previous I-9 form is sufficient. 8 C.F.R. § 274a.2(c)(1)(i). In such a case, however, the employer is required to update Section 3, the Updating and Reverification Section of the form, to reflect the date of rehire, and to sign and date the employer attestation. 8 C.F.R. § 274a.2(d)(1); U.S. Citizenship and Immigration Services, Handbook for Employers 4-5 (1991).

Ketchikan argues that if a previous employee was rehired and it did not update Section 3 of the existing I-9 form by entering the rehire date, such a violation would be technical or procedural, not substantive. The Virtue Memorandum does provide that failure to list the date of rehire is a technical or procedural violation. Failure of the employer to sign and date Section 3 attesting that the rehired employee is still eligible to work, however, is a substantive violation.

For employee no. 22, ICE alleges that the respondent did not either complete a new I-9 or complete Section 3 and sign the attestation, but attached to the government's motion as exhibit G-5C (page 101) in support of Count III is a new I-9 for employee 22 prepared as of his rehire date. No Count I violation will be found for employee 22 with respect to preparation of a new I-9, and this I-9 will be evaluated further in relation to Count III.[6]

Employees 4, 19 and 29 were not rehired within three years of the completion date of the original I-9, thus failing to satisfy the regulatory requirement for rehired employees. For the employees identified as nos. 7, 20, 35, 36 and 37, Ketchikan produced no timely I-9 to the government at all. Failure to present the form upon three days' notice is a substantive violation that is not cured by proffering the form two years later. KDS accordingly cannot avoid liability for 8 of the 9 individuals under the rehire regulations.

The government is entitled to summary decision for 15 uncontested violations and 8 disputed violations, or 23 of the 43 violations alleged in Count I. No violation is found with respect to the other 20 employees: 19 continuing employees and 1 employee for whom a new I-9 was prepared upon rehire.

B. Count II

Count II alleges that KDS failed to ensure that 65 employees properly completed section 1 of Form I-9. KDS did not contest the violations involving the employees identified as nos. 6, 35, 49, 53, 62, and 64,[7] but did contest the remainder. There are thus 59 disputed violations.

[6] The employee identified as no. 22 in Count I is designated for purposes of Count III as no. 61.

[7] *See* Ex. R-7, p. 112-13.

1. No Box Checked and no Alien Number Entered

Employees 3, 5, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 23, 24, 27, 29, 33, 36, 38, 42, 44, 45, 46, 47, 51, 52, 54, 57, 60, and 61 did not check any box reflecting status as a U.S. citizen, lawful permanent resident or alien authorized for work, and did not write an Alien number on the line provided for this information. In some instances, KDS produced a copy of the resident alien or LPR card to the government, while in others it did not.

Where KDS did produce a copy of the resident alien or LPR card, the company argues that there is no substantive violation because the employee was clearly claiming to be a lawful permanent resident by virtue of having presented the card and signed section 1. Where the company produced no timely copy of the card, KDS argues that by signing the attestation, the employee still did all that is necessary because "[t]here is no statutory requirement that an applicant for a job must tell the employer specifically whether s/he is U.S. citizen, a permanent resident, or an alien authorized to work."

The statute provides in pertinent part that,

> [t]he individual must attest, under penalty of perjury on the form designated or established for purposes of paragraph (1), that the individual is a citizen or national of the United States, an alien lawfully admitted for permanent residence, or an alien who is authorized under this chapter or by the Attorney General to be hired, recruited, or referred for such employment.

8 U.S.C. §1324a(b)(2).

If Congress had intended only that an employee attest that he or she was authorized to work, there would plainly be no need to require the employee to check one of the boxes as Form I-9 so clearly directs the employee to do. The employee's failure to attest to any immigration status in section 1 is accordingly a substantive violation, *see WSC Plumbing*, 9 OCAHO no. 1062 at 7, and this is true whether or not Ketchikan produced document copies to the government. As is recognized in *Mario Saikhon*, 1 OCAHO no. 279, at 1822, the purpose of the section is to demonstrate that the employee verified the accuracy of information he or she provided. If the employee failed to provide information sufficient to disclose his or her immigration status on the face of the form, the employee's signature would actually attest to nothing at all, and the statutory requirement would not be satisfied. ICE is accordingly entitled to summary decision for these 30 employees.

2. No Box Checked but an Alien number Entered

Employees 1, 8, 9, 15, 21, 22, 25, 26, 28, 32, 37, 39, 40, 41, 43, 48, 50, 55, 56, 58, 59, 63, and 65 did not check any box attesting to status as a U.S. citizen, lawful permanent resident or alien authorized for work, but did sign the form and write an Alien number on the line provided next to the words "A Lawful Permanent Resident." In some cases, KDS copied the employee's LPR card, in other cases it copied the employee's driver's license and social security card.

KDS says that a person who writes an Alien number on the I-9 form next to the box indicating lawful permanent residency is clearly attesting to status as a permanent resident of the United States, and OCAHO case law appears to support the proposition that when the relevant section of Form I-9 is signed and the information entered on the form makes clear what information the presented document reflects, the employer may have substantially complied with the statute despite a failure to check the box. *See Candlelight Inn*., 4 OCAHO no. 611 at 232-33. In *Candlelight Inn*, the employer did not check the box in section 2 for a social security card,[8] but did write in the actual social security number in the space provided. Judge McGuire held in that instance that the employer had substantially complied with the requirement because, while the employer had neglected to check the appropriate box, it was nevertheless clear that the document examined was a social security card. *Id.* Based on this rationale, I find that when the employee writes an Alien number on the line next to the words, "A Lawful Permanent Resident," and then signs the section 1 attestation, the employee is attesting to being a Lawful Permanent Resident and has substantially complied with the requirements of the statute. The government's motion will be denied as to these 23 employees.

3. Box Checked but no Alien Number Entered

Employees 2 and 30 did check the box reflecting status as a lawful permanent resident, but did not enter an alien number on the line provided. For employee no. 2, no copies of the supporting documents were provided to the government, and for employee no. 30, KDS produced copies of the employee's driver's license and social security card. KDS argues that by producing copies of the documents that show identity and employment authorization and by ensuring that the employee signed section 1, the employer has met its obligations under the statute.

This is not sufficient, however, because neither a driver's license nor a social security card includes the individual's Alien number or immigration status. When the employee fails to write in an Alien number on the Form I-9, the government is unable to verify the employee's status in the United States, defeating the purpose of the Form I-9. These are substantive violations and the government is entitled to summary decision for employee nos. 2 and 30.

4. Multiple Boxes Checked

[8] The May 7, 1987 version of the I-9 form, the one then in use, contained three boxes for List C documents, one of which was for a social security card.

Employees 16, 31, and 34[9] checked more than one box. Employees 16 and 34 each checked the box reflecting status as a lawful permanent resident and also checked the box reflecting status as a citizen of the United States. Employee 16 also entered an Alien number on the adjacent space provided. Both these employees provided conflicting information because status as a lawful permanent resident at any given point in time is inconsistent with status as a citizen of the United States. A lawful permanent resident may become a citizen, but no one can be both simultaneously. Substantive violations are established for both employee 16 and employee 34.

Employee 31, on the other hand, entered an Alien number, and checked the box indicating status as a lawful permanent resident, as well as the box indicating status as an alien authorized to work in the United States. Because the statuses checked are not mutually exclusive I cannot without more find a substantive violation for employee 31.

5. New I-9 for Rehired Employee

Employee no. 4 was rehired within two months of the original hire date, and KDS chose to complete a new I-9 for the subsequent hire. The employer may complete a new Form I-9 for a rehired employee, or, if the employee is rehired within 3 years of the date of execution of the earlier I-9, the employer may update section 3 of the original I-9 to reflect the date of rehire. *See* 8 C.F.R. § 274a.2(c).

The problem with respect to employee no. 4 is that KDS had made a copy of the original I-9 after the employee had completed section 1 but before it had completed section 2. KDS used this copy when preparing the subsequent I-9, so that section 1 of the subsequent I-9 is merely a photocopy of section 1 of the original I-9. The employee signature on the subsequent I-9 was thus not an original signature. KDS then completed section 2 of the subsequent I-9 with the new hire information for the employee. Had KDS provided this information in section 3 of the original I-9 form, there would be no violation. But when KDS chose to complete a new I-9 form, rather than completing section 3 of the original I-9 form, the employee was required to sign section 1 of the new I-9 form and did not do so. The government is entitled to summary decision for employee no. 4.

ICE is accordingly entitled to summary decision with respect to the 6 uncontested and 35 of the 59 contested violations, or a total of 41 violations in Count II. Its motion must be denied with respect to the remaining 24 violations alleged in this count.

C. Count III

[9] The NIF identifies Jose L. Nunes-Gonzales as employee no. 34 and Ramon Nunez as no. 35. The government's table of employees, exhibit G-5B, however, transposed these names and identified Nunes-Gonzales as no. 35 and Ramon Nunez as no. 34. Ketchikan's summary table, exhibit R-7, conforms to the NIF. This order also uses the numbers in the NIF.

ICE's motion urges that visual examination of the I-9 forms for the 110 individuals for whom KDS allegedly failed to properly complete section 2 reflects that the employer attestation is unsigned in 77 of the forms, and that information is missing in 58 of the forms and no legible copy of the employee documents was attached or presented at the time of the I-9 inspection. In addition, ICE asserts that 9 of the forms listed improper documents and 9 listed only a List B or only a List C document.

KDS' motion says it identified 34 instances (the employees identified as nos. 7, 9, 16, 18, 20, 27, 28, 30, 34, 35, 45, 46, 47, 50, 51, 54, 56, 61,[10] 64, 73, 78, 81, 82, 83, 84, 91, 96, 97, 102, 103, 104, 105, 106 and 110) in which it signed the I-9 form and retained copies of the documents, but did not provide the document copies in response to the government's subpoena because they were in the individual personnel files.[11] While belatedly filed documents are not considered, the government acknowledged that for 5 of these individuals, employees 35, 47, 50, 81, and 105, copies of documents were timely provided with the I-9s and these documents will be considered. With respect to the allegations regarding improper or insufficient documents listed in section 2, KDS' response conceded the 4 violations involving employees 96, 104, 106 and 110. There are accordingly 30 contested violations remaining.

1. No Employer Attestation

For four of the disputed violations involving employees 35, 47, 50 and 81, Ketchikan did not sign the employer attestation portion of Section 2. 8 C.F.R. § 274.a.2(a)(3). While the government acknowledged that copies of documents were timely produced for these employees, the copies have no bearing on the employer's responsibility to complete and sign the attestation, and failure to do so is a substantive violation. *See DJ Drywall*, 10 OCAHO no. 1136 at 11 (failure to provide attestation is substantive so notice and opportunity for correction need not be offered). The government is entitled to summary decision for these 4 violations.

2. Incomplete Information Recorded

The government's motion contends that Ketchikan did not properly record information about the documents it examined, nor did it attach and timely produce legible copies of the documents with the I-9 form for 20 violations involving the employees identified as nos. 7, 9, 16, 18, 20, 27, 45, 46, 54, 56, 61, 73, 78, 82, 83, 84, 91, 97, 102, and 103.

a. No Issuing Authority for Driver's License

[10] This is the same employee who was identified in Count I as no. 22.

[11] These are the documents submitted as exhibit R-8 accompanying KDS' motion.

For the 15 violations involving employees 7, 9, 16, 18, 20, 27, 45, 46, 54, 61, 78, 82, 84, 97 and 102, a driver's license is recorded as a List B document but the name of the state issuing the license was not entered. No timely copy of the license was produced to the government with the I-9 form for any of these individuals. Failure to list the issuing authority for a List B document is not characterized by the Virtue Memorandum as either a substantive or a procedural/technical violation. Our case law has nevertheless consistently penalized such violations *United States v. Carter*, 7 OCAHO no. 931, 121, 187-92 (1997); *Candlelight Inn*, 4 OCAHO no. 611 at 212, 232-33, and the government is entitled to summary decision for these 15 individuals.

b. Insufficient Information

For employee no. 56, Ketchikan did not record the document number or issuing authority for a List A document, a resident alien card, or the issuing authority for a List C document, a birth certificate, nor did it timely produce a copy of either of the documents. The government is entitled to summary decision for employee no. 56.

For employees 73, 83, 91 and 103, KDS recorded no information at all for any documents, whether List A, B or C. Failure to identify the documents examined is a substantive violation whether or not copies of documents are presented because copying documents does not relieve an employer of the obligation of attesting to the examination of specific documents. The government is thus entitled to summary decision for employee nos. 73, 83, 91, and 103.

3. Missing or Improper Documents

For six individuals, employees 28, 30, 34, 51, 64, and 105, Ketchikan did not record a proper List A document and either did not record a List B or List C document, or recorded an improper List B or List C document.

For employees 28 and 64, KDS recorded information for a driver's license, a List B document evidencing identity, but entered no information for a List C document to show employment eligibility. KDS also entered the words, "Active Duty Disc." on the form for employee 28 in the section for List A, but a military discharge is not a valid List A document. The government is entitled to summary decision for employees 28 and 64.

For employee no. 30, Ketchikan entered in the section for a List B document the words "Mexico Consult," together with a seven digit number and a future expiration date. The company urges that the document examined was a "Matricula Consular" card, valid as a List B document because it is an identity card issued by a federal government agency (of Mexico). The words "Mexico Consult," however, do not even identify a Matricula Consular card, let alone a valid List B document. Where the regulations intend that a foreign document is acceptable, moreover, they specifically identify the document. *See* 8 C.F.R. § 274a.2(b)(1)(v)(B)(1)(ix) (List B documents may include a driver's license issued by a Canadian government authority). The

government is entitled to summary decision for employee no. 30.

For employee no. 51, Ketchikan entered the word "visa" on the form as a List B document, together with an eleven digit number and an expiration date of July 21, 2007. KDS argues that a visa issued by a U.S. consulate is an "identity card issued by a 'federal, state, or local government agency.'" No authority is cited for this bald assertion and I am aware of none. A visa ordinarily does not contain a photograph, and is neither an identification card nor a valid List B document. The government is entitled to summary decision as to employee 51.

For employees 34 and 105, KDS entered an improper List C document on the I-9 form. For employee no. 34, Ketchikan wrote the words "Social Security letter." Ketchikan explained that it actually did examine a social security card, but mistakenly wrote the word "letter" on the form. No timely copy of the card was produced to the government with the I-9 form. While a social security card is a valid List C document, a letter is not, and the government is entitled to summary decision for employee no. 34.

For employee no. 105, Ketchikan recorded that it examined a social security card, and produced a copy of the card to the government. The card produced, however, is marked "Valid for Work Only with INS Authorization," and was not accompanied by a document evidencing authorization to work. A social security card containing such a notation is not, standing alone, a valid List C document, and the government is entitled to summary decision for employee no. 105.

With respect to Count III, ICE's motion will be granted as to all 110 of the alleged violations.

D. Count IV

Count IV asserts that for 53 employees, the respondent failed to ensure that the employee properly completed section 1 of Form I-9, and failed itself to properly complete section 2. KDS contested only 24 of these violations, thus tacitly admitting the other 29.

SECTION 1 VIOLATIONS

1. No Box Checked and no Alien Number Entered

Employees 2, 3, 7, 10, 14, 15, 16, 20, 24, 25, 43, 45, 51, 52, and 53 did not check any box reflecting status as a U.S. citizen, a lawful permanent resident or an alien authorized for work, nor did the employee write an Alien number on the line provided. For the reasons previously stated with respect to Count II, the government is entitled to summary decision with respect to these 15 employees.

2. Box Checked but no Alien Number Entered and no Document Provided

Employees 26, 29, 32, and 36 did each check a box indicating status as a lawful permanent resident, but did not write an Alien number on the line provided. Ketchikan did not timely produce a copy of a document containing the Alien number, and the government is entitled to summary decision with respect to these 4 employees.

3. Box Checked but no Alien Number Entered

Employee no. 27 did check the box indicating status as a lawful permanent resident, but did not write an Alien number on the line provided for this information. Notwithstanding the government's assertion to the contrary, examination of the government's own exhibit G-5D, p. 44-45 reflects that Ketchikan did produce a timely legible copy of a document containing the Alien number. As explained in the Virtue Memorandum, when the employee checks a box and signs the form, and the employer timely produces a copy of a document that includes the Alien number, the violation is technical or procedural, not substantive, and the government is not entitled to summary decision with respect to employee no. 27.

4. No Box Checked but an Alien Number Entered

Employees 31 and 39 did not check any box indicating status as a U.S. citizen, lawful permanent resident or alien authorized for work. The employee did, however, write an Alien number on the line provided next to the words "A Lawful Permanent Resident," and did sign the form. For the reasons previously noted with respect to Count II, this substantially complies with the requirements for section 1. The government's motion will be denied as to these 2 alleged violations.

5. Failure to Enter Expiration Date

Employee no. 35 checked the box for "An alien authorized to work until . . . ," but did not fill in the expiration date for the employment authorization. No document copies were produced to the government. ICE argues that without the work authorization date the attestation itself is incomplete, and that this is thus a substantive violation under the Virtue Memorandum. KDS argues to the contrary that by signing section 1 and showing documents, the employee has met the statutory responsibilities for section 1, and that the Virtue Memorandum is silent as to whether the failure to include the work authorization expiration date is a substantive violation.

When the employer fails to ensure that the employee has written the expiration date of his or her employment authorization it is impossible for the government to determine at the time of inspection whether the employee is still authorized to work, thus defeating altogether the purpose of the I-9. This is a substantive violation and ICE is entitled to summary decision for employee no. 35.

6. Multiple Boxes Checked

For employee no. 50, the government alleged that the employee did not check a status box, but visual examination reflects that the employee may actually have checked at least two and possibly three boxes. Because a section 2 violation is clearly established for employee no. 50, it is unnecessary to determine if there is also a section 1 violation. I thus make no finding regarding the alleged section 1 violation for employee no. 50.

SECTION 2 VIOLATIONS

1. No Issuing Authority for Driver's License

Employees 2, 3, 10, 14, 15, 16, 20, 24, 25, 32, 35, 36, 39, 43, 45, 50, 51, 52, and 53 each presented a driver's license as a List B document, but no issuing authority was identified on the I-9 form and KDS did not timely produce a copy of the driver's license. ICE is entitled to summary decision as to these 19 substantive violations.

2. Improper List C Document

Employee no. 7 presented a document with the title "Social Security Number Verification" as a List C document to establish employment eligibility, a copy of which KDS produced to the government. The document presented, however, specifically states that "[t]his printout does not verify your right to work in the United States," and cannot be a valid List C document. This is a substantive violation.

3. Conflicting Alien Numbers

For employee no. 31, the Alien number written in the List B column does not match the Alien number written next to the Lawful Permanent Resident box in section 1. KDS produced a legible copy of the employee's resident alien card to the government, and the Alien number on the card matches the Alien number the employer wrote in section 2. Where the employer has produced a copy of a document showing the employee's Alien number, I find that any discrepancy between the numbers in sections 1 and 2 is a technical or procedural violation and there is accordingly no substantive violation found for employee no. 31.

4. No Issuing Authority for Driver's License, but the Document was Provided

The I-9 for employee no. 27 reflects that a driver's license and social security card were presented by this employee. ICE alleged that the issuing authority for the driver's license was incomplete on the I-9 form. However, the government's exhibit G-5-D, p. 44-45 reflects that KDS did timely produce copies of the driver's license and social security card, as well as of the individual's permanent resident card. The copy of the license reflects that it was issued by the state of Washington. Because the document copies were evidently retained with the I-9 form and presented at the time of inspection, the omission must be regarded as technical or procedural in

nature pursuant to the Virtue Memorandum and accordingly does not provide a basis for a substantive violation.

5. Incomplete Information as to Issuing Authority

Employees 26 and 29 each presented a driver's license as a List B document and the acronym "DOL" is included in the description of the license on the I-9 form. As is evident from visual examination of the government's exhibits, the upper left corner of the back of a Washington state driver's license is marked "State of Washington Department of Licensing." *See* Ex. G-5C, p. 160-61. It thus appears that in the state of Washington, the Department of Licensing would be commonly known by the acronym DOL. Neither party has commented upon whether this is sufficient to find that the employer substantially complied with the statute, and I need not resolve that question here in view of the fact that for each of these employees a Section 1 violation was already found so the government is already entitled to summary decision for employees 26 and 29 on that basis.

The government is accordingly entitled to summary decision with respect to 29 uncontested and 22 of the 24 contested violations, or a total of 51 violations in Count IV. Its motion must be denied with respect to the remaining 2 violations alleged in Count IV.

VII. THE RESPONDENT'S MOTION CONSIDERED

For the reasons previously stated, KDS is entitled to summary decision with respect to liability for 20 of the 43 individuals named in Count I, 24 of the 65 individuals named in Count II, none of the 110 individuals named in Count III, and 2 of the 53 individuals named in Count IV.

VIII. PENALTIES

KDS' motion did not address the question of penalties, thus only the government's motion is considered, together with KDS' response. The government bears the burden of proof with respect to the penalty as well as to liability. *See United States v. Am. Terrazzo Corp*., 6 OCAHO no. 877, 577, 581 (1996); *United States v. Skydive Acad. of Haw. Corp*., 6 OCAHO no. 848, 235, 239-40 (1996). For purposes of the government's motion, I view the facts in the light most favorable to the nonmoving party, *United States v. Primera Enters., Inc*., 4 OCAHO no. 615, 259, 261 (1994), and thus draw all reasonable inferences in favor of KDS.

In this forum, there is no single permissible method of calculating penalties, *see United States v. Felipe, Inc.*, 1 OCAHO no. 108, 726, 731 (1989) (affirmation by CAHO). Our case law has utilized both the mathematical approach taken in *Felipe*, *see United States v. Davis Nursery*, 4 OCAHO no. 694, 938-40 (1994), and the judgmental approach, *see United States v. Catalano*,

7 OCAHO no. 974, 860, 869 (1997); *Reyes*, 4 OCAHO no. 592 at 7. ICE uses its own methodology. First, it consults the "Substantive/Uncorrected Technical Violation Fine Schedule" (Fine Schedule) set forth at U.S. Immigration and Customs Enforcement (ICE), *Form I-9 Inspection Overview* 5-6 (2009), *available at* http://www.ice.gov/doclib/news/library/factsheets/pdf/i9-inspection.pdf, and displayed below.

Standard Fine Amount		
1st Offense $110 - $1100	2nd Offense $110 - $1100	3rd Offense + $110 - $1100
$110	$550	$1,100
$275	$650	$1,100
$440	$750	$1,100
$605	$850	$1,100
$770	$950	$1,100
$935	$1,100	$1,100

Then, after making its initial assessment, the government adjusts the result in light of the statutory factors to make its final calculation. Where the government reaches an appropriate assessment, the result need not be disturbed. *See United States v. Jonel, Inc.*, 8 OCAHO no. 1008, 175, 200 (1998) (approving proposed penalties after finding them within the statutory parameters and warranted by the evidence).

A. ICE's Calculation of the Proposed Penalty

The declaration of ICE Forensic Auditor Kristina Eby says that she calculated the base penalty using the Fine Schedule. She first took the number of I-9s with substantive violations (271), then divided it by the total number of I-9s KDS produced to the government (535). Because the resulting percentage, 50.65%, exceeded 50%, the base fine was set at $935 per violation. Eby then considered the statutory factors and concluded that all the base penalties should be aggravated by 10%, 5% each for the size of the business and 5% each for the seriousness of the violations. For 169 of the violations, Eby said she aggravated the penalties by another 5% based on whether the individual involved was an unauthorized alien. Eby said she viewed the other two factors, good faith and any history of previous violations, as not warranting any adjustments, thus she treated them as neutral.

B. KDS' Response

KDS responded by noting that the government's base penalty is inconsistent with the guidelines issued by the INS in 1991.[12] It characterized the current guidelines as inappropriate and leading to excessive penalties. KDS also challenged the government's evaluation of the statutory factors. KDS says it is not that large a company and that aggravation on the basis of its size is unwarranted. It asserts that mitigation of any penalty is warranted based on the factors of good faith, the lack of seriousness of the violations, and the absence of any history of previous violations. KDS argues that the government hasn't proved its case with regard to the employment of unauthorized aliens, and says any aggravation on that basis is unwarranted as well.

C. Discussion and Analysis

The Fine Schedule the government issued in 2009 necessarily supersedes any earlier guidance issued by legacy INS in 1991, and is a statement of current ICE policy. Neither the current guidelines nor those of legacy INS are binding in this forum, however, and neither provides the only method of calculating penalties. *See United States v. Sunshine Building & Maintenance, Inc.*, 7 OCAHO no. 997, 1122, 1175 (1998); *Fortune East*, 7 OCAHO no. 992 at 1078. Even under ICE's own policy, however, its calculations must be revised in light of the fact that KDS has been found liable for only 225 of the 271 violations the government originally alleged. KDS produced a total of 535 I-9s to the government and the number of substantive violations actually found constitutes only 42.06 % of the total, not the 50.65% originally alleged. The base fine using ICE's own formula would result in a penalty of only $770 per violation, or a total of $173,250 for 225 violations.

While § 1324a(e)(5) requires due consideration of the enumerated factors, it does not mandate any particular outcome of such consideration. Nothing in the statute or the regulations requires either that the same weight be given to each of the factors in every case, *cf. United States v. Monroe Novelty Co., Inc.*, 7 OCAHO no. 986, 1007, 1016-17 (1998), or that aggravation or mitigation of a penalty is limited to any particular percentage. Rather, the weight to be given each factor in assessing a penalty depends in my judgment upon the facts and circumstances of the particular case. *United States v. Raygoza*, 5 OCAHO no. 729, 48, 51 (1995) (each factor's significance is based on the specific facts in the case).

1. Size of the Business

The government's contention that KDS is a large business relies upon KDS' advertised description of itself as being "one of the largest merit drywall companies in Washington state," as well as on the amount of KDS' annual gross sales over the five-year period of 2005-2009. The government also asserts that KDS' work force consists of between 125-200 employees, "adjusted

[12] *See* INS Memorandum on Guidelines for Determination of Employer Sanctions Civil Money Penalties, Aug. 30, 1991.

for seasonal fluctuation."

KDS suggests its size should instead be treated as neutral, and points out that while it may be large for a drywall company, that does not necessarily mean it is a large company. The unchallenged Supplemental Declaration of William Cowin states that KDS does not have a large permanent staff, and that the maximum number of employees it ever had at any given time was the 270 workers it had at the busiest time in its history during the summer of 2008, but that only 25 of those people were full time year-round employees. Because of the downturn in the economy since 2008, business slowed after that. At the end of December 2010, Cowin says there were only 4 full time year-round employees, together with approximately 20 part time workers.

In determining the size of a particular business, OCAHO case law has historically identified a variety of subfactors in addition to the number of employees that may be considered, depending in part on the nature of the business. *See, e.g., United States v. Valdez*, 1 OCAHO no. 91, 599, 621 (1989) (restaurant's physical size, past and present profitability); *Felipe*, 1 OCAHO no. 108 at 731 (revenue or income, amount of payroll, nature of ownership, length of time in business, nature and scope of facilities); *United States v. Tom & Yu, Inc*., 3 OCAHO no. 445, 521, 524 (1992) (Small Business Administration (SBA) standard for non-institutional eating and drinking places as set out in its Standard Industrial Classification (SIC) Manual, tax data); *United States v. Giannini Landscaping, Inc.*, 3 OCAHO no. 573, 1730, 1738-39 (1993) (seasonal nature of the landscaping business, degree of turnover, lower employee levels in off-season, gross profit); *Skydive Academy*, 6 OCAHO no. 848 at 241-42 (assets, income, profit, SBA classification); *Monroe Novelty*, 7 OCAHO no. 986 at 1012 (rate of new hiring for belt manufacturer, number of divisions or sites, geographical scale, i.e. whether it is local, regional, statewide, or national); *Sunshine Building & Maintenance*, 7 OCAHO no. 997 at 1177 (examining whether cleaning company's turnover rate was standard for the industry). As explained in *United States v. Bakovic*, 3 OCAHO no. 482, 853, 867 (1993), however, while the employer's financial information may be useful in helping to assess the size of a business, "ability to pay" is not itself either a determinant or a consequence of the employer's size. The two should not be conflated.

In *Carter*, 7 OCAHO no. 931 at 161-62, it was observed that while the employer had in the past employed up to 200 individuals, at the time of the hearing there were only 40-50 employees left. Like KDS, the business in *Carter* fluctuated depending upon how many construction jobs were in need of its services. *Id.* at 162. Judge Barton noted that the SBA SIC Code provided that Construction - Special Trade Contractors would still be considered small with annual gross sales of less than $7 million, *id*. at 161 (citing 13 C.F.R. § 121.201 at 198 (1997)), and found that there was no basis for considering Carter's business to be anything but small. *Id*. at 162. KDS appears comparable to Carter in several respects, and other OCAHO cases have held that companies with more permanent employees than KDS have been found not to be large businesses. *See DJ Drywall*, 10 OCAHO no. 1136 at 11 (no more than 66 employees, size of the business regarded as small); *United States v. Vogue Pleating, Stitching & Embroidery Corp*., 5 OCAHO no. 782, 468, 471 (1995) (approximately 100 employees, size of business was small).

It is clear that KDS enjoyed consistent levels of revenue and income during the time it was examined (January 1, 2005 to March 25, 2008), although calendar year 2009 showed a marked drop in revenue from prior years, a reflection of the nationwide downturn in the construction industry. KDS' corporate tax returns for calendar years 2005 - 2009 indicate that KDS was a profitable concern, at least during those years, but no tax information is included for calendar year 2010. Considering the facts and circumstances in light of our case law, I cannot agree with the government that KDS is so large as to warrant an enhanced penalty. Neither, on the other hand, is it the type of small family business that necessarily points to reduction. *See, e.g., United States v. Hanna*, 1 OCAHO no. 200, 1327, 1332 (1990) (3-6 employees and net profit of about $5400 in the first eleven months of 1988). At best KDS was a small to medium size employer during the period at issue.

2. Good Faith

KDS argued that mitigation of any penalties was warranted based on its good faith, citing to the "legislative history underlying the 1998 Proposed Regulations, at 63 Fed. Reg. 16909 (April 7, 1998)." The proposed regulations limit liability for certain technical and procedural violations pursuant to 8 U.S.C. § 1324a(b)(6)(A), (B); neither the proposed regulation nor its legislative history has any application to the question of how the "good faith" factor should be applied in calculating the penalties for substantive violations.

KDS says further that prior to June 2006 it did not have any staff person who had received training concerning I-9 compliance, but that once it hired a new Controller, Kristin Brame, efforts to improve its compliance were begun. Brame recommended changes to KDS' I-9 completion process in July 2007 and attended a training session on "Immigration Issues for the Construction Industry" in August 2007 after which KDS made further improvements to its compliance with I-9 requirements.

That KDS chose until 2006 to delegate its I-9 functions to employees who were not qualified to perform the task does not demonstrate a good faith effort to ascertain what the law requires or conform its conduct to it. *See DJ Drywall*, 10 OCAHO no. 1136 at 12. KDS should have begun educating itself about its I-9 responsibilities much earlier, particularly in light of the fact that the record demonstrates that KDS had already received a Warning Notice from legacy INS in 2000. KDS' mistaken belief that photocopying documents is sufficient to fulfill its I-9 obligations, moreover, does not demonstrate the use of reasonable care either. To the extent that *United States v. Big Bear Market*, 1 OCAHO no. 48, 285, 315 (1989) implies, as KDS suggests, that carelessness is "tantamount to good faith," I reject that proposition. Carelessness or ignorance of the law in 1989, when the statute was relatively new, moreover, does not have the same import as carelessness or ignorance of the law at a point when the statute had already been in effect for more than 20 years and the employer already had a warning notice.

A dismal rate of compliance alone cannot, on the other hand, be used to increase a penalty based

on bad faith. *United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 477, 480 (1995) (modification by CAHO). Culpable conduct beyond the mere failure to comply is required to support such an enhancement. *Id*.

3. Seriousness of the Violations

The government aggravated the penalties for all the violations based on this factor, while KDS argued for mitigation urging that the violations were not serious.

Failure to prepare an I-9 at all is among the most serious of paperwork violations, and case law reflects that the absence of the employee's or employer's attestation in section 1 or section 2 is always a serious violation as well. *WSC Plumbing*, 9 OCAHO no. 1062 at 7 ("An employer's failure to ensure that an employee attests to his immigration status in section 1 of the I-9 form is ... among the most serious paperwork violations."); *Reyes*, 4 OCAHO no. 592 at 10 ("[F]ailure to prepare I-9s [is] serious because that failure frustrates the national policy ... intended to assure that unauthorized aliens are excluded from the workplace."); *J.J.L.C.*, 1 OCAHO no. 154 at 1098 ("failure to attest on Part 2 of Form I-9 is a serious violation, implying avoidance of liability for perjury"). Of the substantive violations for which KDS is found liable, more than half were the result of the employer's failure either to prepare a Form I-9 at all or to ensure that the employee signed section 1, or its failure to sign section 2 itself.

The seriousness of violations is evaluated on a continuum, and not all violations are necessarily equally serious, *see United States v. Snack Attack Deli, Inc*., 10 OCAHO no. 1137, 8 (2010) (citing *Carter*, 7 OCAHO no. 931 at 169)), but KDS provided no reasonable basis upon which to assert that the remaining violations are not serious at all.

4. Whether Any of the Individuals Involved Were Unauthorized Aliens

The government seeks to aggravate the penalty for 169 out of 271 employees it alleges were unauthorized aliens. KDS makes several arguments in support of its contention that the government failed to carry its burden in proving that 169 employees were, in fact, unauthorized. I agree.

The government based its conclusion on verification checks it says were performed on the social security numbers, Alien numbers, and driver's license or identification card numbers provided by the employees and reported on the I-9 Forms and KDS' payroll reports. The Eby declaration, cited by the government in support of this allegation, reports that "ICE" performed the verification checks. None of the names or employee numbers of the alleged unauthorized employees were disclosed and the nature of the "checks" themselves is unclear. The declaration of Special Agent Lynda M. Buehring, to which the government did not refer, also sets out information about these "checks" but similarly discloses neither the specific names nor the employee numbers of the particular employees whose authorization is challenged.

KDS protests that the government has not described its method of conducting the verification check with sufficient specificity to allow it to understand how the government checked the work authorization of the employee. It notes that both immigration and social security records are known to contain inaccuracies, meaning that an employee could be an authorized alien and could enter accurate information on his I-9, but if the information in the immigration or social security system is wrong, the results of the verification check will mistakenly indicate that employee is an unauthorized alien.[13]

It is unclear from the government's motion and exhibits exactly which of the employees are included among the 169 for whom the government seeks to aggravate the penalty. Because not all the 271 violations alleged were actually proved, even were the government's conclusion accepted that some 169 unidentified individuals were unauthorized, I would have to find out specifically who those 169 employees are, and then figure out whether the specific violation alleged for that particular employee was actually proved or not.

The statutory factor for consideration here is not whether some unidentified unauthorized aliens were present in the workforce, it is "whether or not *the individual* was an unauthorized alien." 8 U.S.C. § 1324a(e)(5) (emphasis added). *See also Hernandez*, 8 OCAHO no. 1043 at 668-69. Absent some identification of specific individuals involved, the government has failed to carry its burden of proof on this factor. At best ICE demonstrated that a number of "no-match" results were received from the Social Security Administration: who those specific employees were and whether there was a violation found for each remains unelaborated.

5. Any History of Previous Violations

The government did not allege any history of previous violations and treated the factor as neutral, while KDS argued for mitigation contending that the government's position means in effect that it will never mitigate based on this factor. KDS characterizes this position as unreasonable and inconsistent with Congressional intent, as well as with OCAHO case law granting mitigation of a penalty in the absence of prior violations, citing *United States v. Morgan's Mexican & Lebanese Foods, Inc*., 8 OCAHO no. 1013, 239, 248 (1998) and *United States v. Felipe*, 1 OCAHO no. 93, 626, 637-38 (1989).

But our case law does not require reduction of a penalty in every case just because an employer has not been shown to have violated the law in the past. *See DJ Drywall*, 10 OCAHO no. 1136 at 12 ("Never having violated the law before is not necessarily grounds for leniency, and the company has offered no evidence or argument that such leniency is warranted in this case.");

[13] *See Aramark Facility v. Service Employees Local 1877*, 530 F.3d 817, 826-28 (9th Cir. 2008), discussing Social Security Administration's so-called "no match" letters and the occurrence of administrative errors in the system. *See also* http://www.justice.gov/crt/about/osc/pdf/publications/SSA/Employees.pdf.

United States v. New China Buffet Restaurant, 10 OCAHO no. 1133, 6 (2010) ("As ICE correctly points out, never having violated the law before does not necessarily warrant additional leniency, and it is still appropriate to treat this factor as a neutral one."). *But see Snack Attack*, 10 OCAHO no. 1137 at 9, 11 (finding under the circumstances that the absence of prior violations would "point to mitigation.")

D. Conclusion

The permissible penalties for the 225 violations found in this case range from a minimum of $24,750 to a maximum of $247,500. Considering the record as a whole and the five statutory factors in particular, I find no compelling reason to alter the government's initial calculation of $770 for each violation, or a total of $173,250. While some increase might be justified for the most serious of the violations, the penalties are already on the higher end of the permissible range and they appear sufficiently substantial to ensure compliance in the future. The penalties accordingly will be assessed at the rate of $770 for each of the 225 violations found, or a total of $173,250.

IX. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Ketchikan Drywall Services, Inc. is a company engaged in the business of installing drywall and steel stud framing for commercial and residential construction projects in and around the Puget Sound area, and has its principal place of business in Woodinville, Washington.

2. The U.S. Department of Homeland Services, Immigration and Customs Enforcement served a Notice of Inspection and Immigration Subpoena on Ketchikan Drywall Services, Inc. on March 25, 2008 requesting original I-9 Forms, (Employment Eligibility Verification Forms) and copies of any attached documents presented at time of I-9 completion for employees working from January 1, 2005 to March 25, 2008.

3. The U.S. Department of Homeland Services, Immigration and Customs Enforcement served a Notice of Intent to Fine (NIF) on Ketchikan Drywall Services, Inc. on April 4, 2009.

4. The U.S. Department of Homeland Services, Immigration and Customs Enforcement served a revised Notice of Intent to Fine (NIF) on Ketchikan Drywall Services, Inc. on October 30, 2009.

5. Ketchikan Drywall Services, Inc. made a request for a hearing before an administrative law judge on April 27, 2009.

6. The U.S. Department of Homeland Services, Immigration and Customs Enforcement

considered Ketchikan Drywall Services's April 2009 request for a hearing to apply to the October 2009 revised Notice of Intent to Fine.

7. The U.S. Department of Homeland Services, Immigration and Customs Enforcement filed a complaint with this office in four counts against Ketchikan Drywall Services, Inc. on December 22, 2009.

8. Ketchikan Drywall Services, Inc. filed an answer to the complaint on January 21, 2010 denying the material allegations of the complaint and asserting affirmative defenses.

9. Ketchikan Drywall Services, Inc. was established in 1981 and is wholly owned by its president, William Charles Cowin.

10. Construction work is a seasonal business in the Pacific Northwest, due to the rainy season of November, December, January and February, during which time little drywall work is available.

11. Ketchikan Drywall Services, Inc. performs work on a project-by-project basis; it does not have ongoing work year-round.

12. Ketchikan Drywall Services, Inc. hires workers for specific projects, routinely lays off workers at the completion of the project, and recalls them when a new project becomes available.

13. Ketchikan Drywall Services, Inc. used the word terminated in its computer payroll system to exclude the names of laid off workers from its payroll roster.

14. Ketchikan Drywall Services, Inc. has a past history of recalling laid off workers whose performance is satisfactory.

15. Ketchikan Drywall Services, Inc. used the seniority system to allocate available positions; an employee not brought back on one project could still expect to be brought back on a future project.

16. Ketchikan Drywall Services, Inc.'s 2009 U.S. income tax return shows gross sales of $9,564,859 and ordinary business income of $1,715,530.

17. Ketchikan Drywall Services, Inc.'s 2008 U.S. income tax return shows gross sales of $19,311,753 and ordinary business income of $2,213,973.

18. Ketchikan Drywall Services, Inc.'s 2007 U.S. income tax return shows gross sales of $13,310,010 and ordinary business income of $1,215,684.

19. Ketchikan Drywall Services, Inc.'s 2006 U.S. income tax return shows gross sales of

$12,627,311 and ordinary business income of $1,232,067.

20. Ketchikan Drywall Services, Inc.'s 2005 U.S. income tax return shows gross sales of $13,855,260 and ordinary business income of $614,361.

21. As of December 2010, Ketchikan Drywall Services, Inc. had 4 full-time year-round employees, and an additional 20 part-time employees.

22. During the period at issue, Ketchikan Drywall Services, Inc. was an ongoing, profitable concern with the financial ability to rehire laid off employees for new projects.

23. Ketchikan Drywall Services, Inc. hired all 271 of the individuals named in the complaint after November 6, 1986.

24. Ketchikan Drywall Services, Inc. failed to prepare the Employment Eligibility Verification Form (Form I-9) for 23 of the individuals named in Count I of the complaint. (See Appendix for employee names, which are hereby incorporated by reference.)

25. Ketchikan Drywall Services, Inc. failed to ensure the employee properly completed section 1 of the Employment Eligibility Verification Form (Form I-9) for 41 of the individuals named in Count II of the complaint. (See Appendix for employee names, which are hereby incorporated by reference.)

26. Ketchikan Drywall Services, Inc. failed to properly complete section 2 of the Employment Eligibility Verification Form (Form I-9) for all 110 of the individuals named in Count III of the complaint. (See Appendix for employee names, which are hereby incorporated by reference.)

27. Ketchikan Drywall Services, Inc. failed to ensure the employee properly completed section 1, and/or failed itself to properly complete section 2, of the Employment Eligibility Verification Form (Form I-9) for 51 of the individuals named in Count IV of the complaint. (See Appendix for employee names, which are hereby incorporated by reference.)

28. The government failed to prove that any of the 225 employees for whom a violation was found was unauthorized for employment in the United States.

B. Conclusions of Law

1. Ketchikan Drywall Services, 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 appear to have been satisfied.

3. Ketchikan Drywall Services, Inc. engaged in 225 separate violations of 8 U.S.C. § 1324a(b).

4. In assessing the appropriate amounts of civil money penalties for violations of 8 U.S.C. § 1324a(b), the law requires consideration of the following factors: 1) the size of the business of the employer, 2) the good faith of the employer, 3) the seriousness of the violation(s), 4) whether or not the individuals involved were unauthorized aliens, and 5) any history of previous violations of the employer. 8 U.S.C. § 1324a(e)(5).

5. 8 U.S.C. § 1324a(e)(5) does not require that equal weight be given to each factor, nor does it rule out consideration of additional factors. *United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000).

6. Ketchikan Drywall Services, Inc. has no history of previous violations of 8 U.S.C. § 1324a.

7. The government failed to show by a preponderance of the evidence that any of the specific individuals whose I-9s were found to contain violations was unauthorized for employment in the United States.

8. More than half the violations found were the result of Ketchikan Drywall Services, Inc.'s failure either to prepare a Form I-9 at all or to ensure that the employee signed section 1, or its failure to sign section 2 itself, all of which are exceedingly serious in character.

9. Ketchikan Drywall Services, Inc.'s poor rate of I-9 compliance is insufficient to show bad faith absent some culpable conduct going beyond the mere failure to comply. *United States v. Karnival Fashion, Inc.*, 5 OCAHO no. 783, 477, 480 (1995) (modification by the CAHO).

10. Ketchikan Drywall Services, Inc.'s choice prior to 2006 to delegate responsibility for preparation of its I-9 forms to employees not qualified to perform the task does not reflect a good faith effort to ascertain what the law requires and to conform it conduct to it. *United States v. DJ Drywall, Inc.*, 10 OCAHO no. 1136, 12 (2010).

11. Considering the facts and circumstances regarding Ketchikan Drywall, Inc.'s business in light of OCAHO case law, it is a small to medium size business.

12. Giving due consideration to the record as a whole and to the statutory factors the penalties will be assessed at the rate of $770 for each 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

ICE's motion for summary decision is granted with respect to liability for 23 of the 43 violations

alleged in Count I, 41 of the 65 violations alleged in Count II, all 110 of the violations alleged in Count III and 51 of the 53 violations alleged in Count IV. KDS' motion for summary decision is granted finding no liability for the remaining 20 violations alleged in Count I, the remaining 24 violations alleged in Count II, and the remaining 2 violations alleged in Count IV.
ICE's motion for summary decision is granted as modified with respect to the penalty issue and KDS is directed to pay penalties totalling $173,250.00. All other pending motions are denied.

SO ORDERED.

Dated and entered this 11th day of August, 2011.

_____

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. Part 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. Part 68. Within thirty (30) days of the entry of a final order by the CAHO, or within sixty (60) days of the entry of an Administrative Law Judge's final order if the CAHO does not modify or vacate such order, the Attorney General may direct the CAHO to refer any final order to the Attorney General for review, pursuant to 28 C.F.R. § 68.55.

A petition to review the final agency order may be filed in the United States Court of Appeals for the appropriate circuit within forty-five (45) days after the date of the final agency order pursuant to 8 U.S.C. § 1324a(e)(8) and 28 C.F.R. § 68.56.

APPENDIX COUNT I VIOLATIONS		
No.	**Employee Name**	**Finding**
1	Alejandro-Servin, Jose G.	No violation
2	Bravo, Mario M.	No violation
3	Briones-Cardenas, Guadalupe J.	No violation
4	Bui, Hien D.	Violation as charged
5	Camacho-Castanon, Hector	Violation admitted
6	Cardenas-Aguilar, Horacio	Violation admitted
7	Defehr, Rick	Violation as charged
8	Derifield, Brandon T.	Violation admitted
9	Escobar, Paciano M.	No violation
10	Felix, Jorge	No violation
11	Gutierrez, Leobardo	No violation
12	Guzman-Cortez, Jose H.	No violation
13	Jensen, Scott W.	No violation
14	Johnson, Frederick W.	Violation admitted
15	Lemons, James	No violation
16	Lopez, Alfredo L.	No violation
17	Lopez-Reyes, Baltazar	Violation admitted
18	Lugarda-Soto, Juan	Violation admitted
19	Luna-Ramirez, Felipe	Violation as charged
20	Martinez-Casillas, Carlos	Violation as charged
21	Martinez-Hernandez, Jose M.	No violation
22	Martinez-Rodriguez, Efren A.	No violation
23	Mazzotta, Margaret A.	Violation admitted
24	Meraz-Aguilar, Julio C.	Violation admitted
25	Molina-Venegas, Rosalio	No violation
26	Morden, Kathleen R.	Violation admitted
27	Phelps, Bret R.	Violation admitted
28	Rincon, Jorge E.	No violation
29	Robledo, Reynaldo H.	Violation as charged
30	Rodriguez, Miguel	Violation admitted
31	Romero, Felix	Violation admitted
32	Salas, Jose A.	Violation admitted
33	Salinas-Perez, Gerardo	No violation
34	Sanchez-Baltazar, Daniel	No violation
35	Smith, Linda M.	Violation as charged
36	Strand, John G.	Violation as charged
37	Tuffs, Patrick E.	Violation as charged
38	Urias, Christian N.	No violation
39	Valencia, Jose A.	No violation

APPENDIX COUNT I VIOLATIONS		
No.	**Employee Name**	**Finding**
40	Varela, Gil D.	Violation admitted
41	Vargas-Martinez, Pascual	No violation
42	Viera, Luis O.	Violation admitted
43	Whitlatch, Franklin A.	No violation

APPENDIX COUNT II VIOLATIONS		
No.	**Employee Name**	**Finding**
1	Aguilar, Modesto Santos	No violation
2	Amayo-Hurtado, Javier	Violation as charged
3	Avilez-Moreno, Rafael	Violation as charged
4	Badillo-Martinez, Eulogio	Violation as charged
5	Beltran-Osuna, Edgardo	Violation as charged
6	Birkland, Jordan O.	Violation admitted
7	Bravo, Mario	Violation as charged
8	Castro, Juan	No violation
9	De La Cruz-Briones, Jovani	No violation
10	Escobar, Paciano M.	Violation as charged
11	Escobar-Gutierrez, Rogelio	Violation as charged
12	Felix, Aaron	Violation as charged
13	Felix, Jorge	Violation as charged
14	Felix-Ochoa, Lino A.	Violation as charged
15	Fonseca, Florentino	No violation
16	Garcia-Torres, Jose J.	Violation as charged
17	Gillaspie, Thomas E.	Violation as charged
18	Guerrero-Romero, Julio C.	Violation as charged
19	Gutierrez, Leobardo	Violation as charged
20	Gutierrez-Suarez, Marcos	Violation as charged
21	Guzman-Cortez, Miguel	No violation
22	Hernandez-Rojo, Jose O.	No violation
23	Jaime, Armando M.	Violation as charged
24	James, Everett W.	Violation as charged
25	Lara-Orozco, Juan	No violation
26	Larios-Santos, Omar B.	No violation
27	Lopez, Jesus M.	Violation as charged
28	Lopez-Llamas, Guillermo	No violation
29	Lucas-Perez, Hector R.	Violation as charged
30	Martinez, Carlos	Violation as charged
31	Martinez, Ricardo C.	No violation
32	Mendoza-Salinas, Raul	No violation
33	Miranda, Adrian G.	Violation as charged
34	Nunez-Gonzales, Jose L.	Violation as charged
35	Nunez, Ramon	Violation admitted
36	Olson, Sharon R.	Violation as charged
37	Ortiz, Jesus N.	No violation
38	Palacios, Martin I.	Violation as charged
39	Pena-Santos, Napoleon	No violation

APPENDIX COUNT II VIOLATIONS		
No.	**Employee Name**	**Finding**
40	Perez, Alfredo J.	No violation
41	Platero-Miranda, Ricardo	No violation
42	Ramirez-Gomez, Jonathan	Violation as charged
43	Reyes-Salvador, Eliseo	No violation
44	Rincon, Jorge Enrique	Violation as charged
45	Rodriquez-Andrade, Jaime	Violation as charged
46	Rodriquez-Venegas, Rafael	Violation as charged
47	Rojas, Leonardo	Violation as charged
48	Rojas-Lopez, Miguel A.	No violation
49	Romero, Florencio Q.	Violation admitted
50	Romero-Romero, Adalberto	No violation
51	Ruiz-Olvera, Mateo	Violation as charged
52	Saldana-Perez, Victor M.	Violation as charged
53	Salinas-Perez, Gerardo	Violation admitted
54	Sanchez, Jeronimo	Violation as charged
55	Sandoval-Jimenez, Moises	No violation
56	Santana-Estrada, Miguel	No violation
57	Schmeling, Forrest E.	Violation as charged
58	Suchil-Hernandez, Enrique	No violation
59	Torres-Esparza, Raul	No violation
60	Urias, Christian N.	Violation as charged
61	Vasquez, Misael A.	Violation as charged
62	Velazquez, Carlos	Violation admitted
63	Villagrana-Olivares, Rogelio	No violation
64	Williams, Elpacino E.	Violation admitted
65	Zambrano-Sarabia, Juan L.	No violation

APPENDIX COUNT III VIOLATIONS		
No.	**Employee Name**	**Finding**
1	Acuna, Sergio A.	Violation admitted
2	Aguilar-Espinoza, Ruben	Violation admitted
3	Barrett, Sid O.	Violation admitted
4	Bogue, Evan L.	Violation admitted
5	Cabanillas-Coronado, Luis E.	Violation admitted
6	Cameron, Scott W.	Violation admitted
7	Castillo, Hector	Violation as charged
8	Cervantes-Jiminez, Ruben	Violation admitted
9	Combes, Zoyia D.	Violation as charged
10	Connelly, Travis D.	Violation admitted
11	Contreras, Adalberto	Violation admitted
12	Coronado-Hernadez, Carlos	Violation admitted
13	Coronado-Partida, Santos S.	Violation admitted
14	Croddy, Collin D.	Violation admitted
15	Deniz-Murillo, Luis U.	Violation admitted
16	Diaz-Diaz, Guillermo F.	Violation as charged
17	Doss, Jeremy J.	Violation admitted
18	Eaton, Cory J.	Violation as charged
19	Emery, Darin M.	Violation admitted
20	Esquivel, Juan C.	Violation as charged
21	Fausto-Garcia, Higinio	Violation admitted
22	Firth, John W.	Violation admitted
23	Fleming, Dale G.	Violation admitted
24	Flores-Hernandez, Juan G.	Violation admitted
25	Fraile-Rubio, Raul	Violation admitted
26	Garvin, Kyle T.	Violation admitted
27	Gayton, Gustavo	Violation as charged
28	Gilmore, Brandon S.	Violation as charged
29	Gladsjo, Joyce D.	Violation admitted
30	Gonzalez-Lopez, Yoni F.	Violation as charged
31	Graham, Perry C.	Violation admitted
32	Green, Daniel P.	Violation admitted
33	Gullicksen, Kurt J.	Violation admitted
34	Hanson, Robert	Violation as charged
35	Hardy, Derrick B.	Violation as charged
36	Hnatowich, Andrew J.	Violation admitted
37	Hernandez-Jimenez, Ramiro	Violation admitted
38	Hill, Isaiah	Violation admitted
39	Hughes, Michael P.	Violation admitted

APPENDIX COUNT III VIOLATIONS		
No.	**Employee Name**	**Finding**
40	Ingersoll, Rhiannan	Violation admitted
41	Irwin, Gavin E.	Violation admitted
42	Jackson, Darrell K.	Violation admitted
43	Jennings, Tim R.	Violation admitted
44	Kelln, Carla S.	Violation admitted
45	Kingcade, Dane M.	Violation as charged
46	Klawitter, Terry E.	Violation as charged
47	Kovesdi, Robert T.	Violation as charged
48	Langston, William C.	Violation admitted
49	Leiker, Eric J.	Violation admitted
50	Longstreth, Danny M.	Violation as charged
51	Lopez-Ramon, Jose	Violation as charged
52	Louis, Amos	Violation admitted
53	Luis-Gonzalez, Jorge	Violation admitted
54	Mahler, Elizabeth M.	Violation as charged
55	Margrave, James M.	Violation admitted
56	Maria, Miguel A.	Violation as charged
57	Markel, Daniel S.	Violation admitted
58	Martinez-Escobar, Ramiro	Violation admitted
59	Martinez-Escobar, Rene	Violation admitted
60	Martinez-Hernandez, Jose	Violation admitted
61	Martinez-Rodriquez, Efren	Violation as charged
62	Matter, Rachael R.	Violation admitted
63	Melena-Sarabia, Ricardo	Violation admitted
64	Melroy, Chuck	Violation as charged
65	Miller, Rodney Jay	Violation admitted
66	Mitchell, Robert Q.	Violation admitted
67	Monroe, Eric J.	Violation admitted
68	Mora, Jesus	Violation admitted
69	Norwest, Greg G.	Violation admitted
70	Ortiz, Alvaro E.	Violation admitted
71	Osuna-Martinez, Alberto	Violation admitted
72	Osuna-Robles, Victor M.	Violation admitted
73	Paisano-Luna, Laman	Violation as charged
74	Partida-Aguilar, Luis N.	Violation admitted
75	Pedro, Teri L.	Violation admitted
76	Pelayo, Idefonso	Violation admitted
77	Pendas, Juan J.	Violation admitted
78	Peralta-Rojas, Raul	Violation as charged

APPENDIX COUNT III VIOLATIONS		
No.	**Employee Name**	**Finding**
79	Perez, Alfredo J.	Violation admitted
80	Perez-Zambrano, Miguel A.	Violation admitted
81	Phelps, Bret R.	Violation as charged
82	Phelps, Chad R.	Violation as charged
83	Pimentel, Raul B.	Violation as charged
84	Posadas-Gonzalez, Gaspar	Violation as charged
85	Quiroz-Games, Ramon F.	Violation admitted
86	Rambo, Robert J.	Violation admitted
87	Ramon-Gomez, Francisco R.	Violation admitted
88	Ramos, Paulino	Violation admitted
89	Rodriguez, Gilberto C.	Violation admitted
90	Rodriguez-Leon, Adrian	Violation admitted
91	Romero, Fidel	Violation as charged
92	Romero, Mathew L.	Violation admitted
93	Roof, Travis J.	Violation admitted
94	Russell, Michael D.	Violation admitted
95	Sanchez-Baltazar, Daniel	Violation admitted
96	Shattuck, Michael A.	Violation admitted
97	Steele, Nat C.	Violation as charged
98	Stillwell, Rich J.	Violation admitted
99	Stuck, Floyd J.	Violation admitted
100	Stuck, Raymond S.	Violation admitted
101	Thompson, Michael L.	Violation admitted
102	Timpe, Ryan T.	Violation as charged
103	Valenzuela-Rodriguez, Ismael	Violation as charged
104	Vasquez, Silvia P.	Violation admitted
105	Vidal, Miguel A.	Violation as charged
106	Williams, Jamie E.	Violation admitted
107	Wycough, Donald J.	Violation admitted
108	Yamamoto, Ronald A.	Violation admitted
109	Young, Isaac A.	Violation admitted
110	Young, Jacob P.	Violation admitted

APPENDIX COUNT IV VIOLATIONS		
No.	**Employee Name**	**Finding**
1	Alvarez-Cortez, Cesar	Violation admitted
2	Aparicio, Francisco S.	Violation as charged
3	Aquino-Rios, Carlos	Violation as charged
4	Araiza, Javier	Violation admitted
5	Araiza-Neri, Raul	Violation admitted
6	Barrett, William	Violation admitted
7	Berry, Jeffrey C.	Violation as charged
8	Brown, Dean W.	Violation admitted
9	Camacho-Molina, Leonardo	Violation admitted
10	Cowin, Robert W.	Violation as charged
11	Cruz, Isaac	Violation admitted
12	Cruz, Roberto	Violation admitted
13	Cruz-Salvador, Eleazar	Violation admitted
14	Diaz-Diaz, Alfonso F.	Violation as charged
15	Diaz-Ruiz, Alfonso R.	Violation as charged
16	Espinoza-Martinez, Andres	Violation as charged
17	Felix, Aaron	Violation admitted
18	Flores-Gutierrez, Juan	Violation admitted
19	Fogelman, Greg G.	Violation admitted
20	Garcia, Efren L.	Violation as charged
21	Garcia, Felipe D.	Violation admitted
22	Gastelum, Enrique	Violation admitted
23	Gaswint, Justin U.	Violation admitted
24	Gomez-Ruiz, Guillermo	Violation as charged
25	Gomez-Vallejo, Sergio	Violation as charged
26	Guzman-Cortes, Jose A.	Violation as charged for Section 1 No finding for Section 2
27	Guzman-Cortez, Jose H.	No substantive violation
28	Jones, Christopher B.	Violation admitted
29	Larsen, Christopher D.	Violation as charged for Section 1 No finding for Section 2
30	Luera, Jose D	Violation admitted
31	Morales-Tenorio, Roberto	No substantive violation
32	Navas, Dorian Xavier	Violation as charged
33	Osuna-Martinez, Gilberto	Violation admitted
34	Panduro, Leonel	Violation admitted
35	Pena, Rogelio	Violation as charged
36	Perez-Vasquez, Isidro	Violation as charged
37	Priciliano-Cruz, Esau	Violation admitted

APPENDIX COUNT IV VIOLATIONS		
No.	**Employee Name**	**Finding**
38	Ramirez, Jose S.	Violation admitted
39	Renteria-Santos, Luis R.	Violation as charged for Section 2 No violation for Section 1
40	Reyes-Salvador, Eliseo	Violation admitted
41	Rios, Edwin	Violation admitted
42	Robbins, James	Violation admitted
43	Rodriguez, Juan Jose	Violation as charged
44	Rojas-Lopez, Jose Mario	Violation admitted
45	Romero, Omar	Violation as charged
46	Sanchez-Zuniga, Rigoberto	Violation admitted
47	Santos-Lopez, Jose R.	Violation admitted
48	Serna-Serna, Alberto	Violation admitted
49	Tutiakoff III, Timothy H.	Violation admitted
50	Ventura, Miguel Angel	Violation as charged for Section 2 No finding for Section 1
51	Vergara-Melendrez, Alejandro	Violation as charged
52	Vergara-Melendrez, Mario	Violation as charged
53	Zambrano-Jahir, Elio	Violation as charged