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

February 4, 2016

UNITED STATES OF AMERICA, Complainant, v. SKZ HARVESTING, INC., Respondent.	))))))))	8 U.S.C. § 1324a Proceeding OCAHO Case No. 15A00017

FINAL DECISION AND ORDER

APPEARANCES:

Ivan Gardzelewski
for the complainant

Shahid Haque-Hausrath
for the respondent

I. PROCEDURAL HISTORY

This is an action pursuant to the employer sanctions provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324a (2012). The United States Department of Homeland Security, Immigration and Customs Enforcement (ICE, the government, or the complainant) filed a complaint in three counts against SKZ Harvesting, Inc. (SKZ, the company, or the respondent).

Count I alleged that SKZ continued to employ Juan Aguilera, Carlos Ambriz, Jose Bucio, Alejandro Guillen-Gonzalez, and Noe Morellon,[1] in violation of 8 U.S.C. § 1324a(a)(2) knowing that each was unauthorized with respect to such employment. Count II alleged that SKZ failed to prepare and/or present I-9 forms for fifty-five named employees, in violation of 8 U.S.C. §

[1] The complaint identifies this individual as Noe Morellon, but most of the documents refer to him as Noe Alonso-Morellon. The latter name is used throughout the decision.

1324a(a)(1)(B). Count III alleged that SKZ failed to ensure that Elias Aquilera, Austin Boose, Caleb Buxton, Salazar Espino, Jose L. Espino, Cristian Lupercio, Yolanda Maldonado, Miguel Maya, and Karla Zendejas properly completed section 1 of Form I-9 and/or that the company itself failed to properly complete sections 2 or 3 of their forms, in violation of 8 U.S.C. § 1324a(a)(1)(B). ICE seeks a total of $74,587 in civil money penalties for these alleged violations.

SKZ filed a timely answer denying the material allegations and raising various affirmative defenses. Prehearing procedures have been completed. Presently pending and in need of resolution is the government's motion for summary decision, in response to which SKZ filed a memorandum in opposition.

II. BACKGROUND INFORMATION

Kari Zavala is the sole owner and registered agent for SKZ, which she operates with her husband, Roberto Zavala.[2] Zavala's declaration (Ex. R-5) identifies SKZ as a small, family-owned cherry harvesting business that engages in highly seasonal work in the Flathead region of Montana and has only two or three year-round employees. Flathead cherries are known throughout Montana, and are sold statewide in the summer. SKZ does not own the land on which the cherries are grown, but maintains about 100 acres of land and provides harvesting services to thirty to forty property owner clients.

Zavala describes the beginning of the harvesting season as "highly chaotic." Zavala Declaration at 1. SKZ has to hire fifty or sixty employees mostly on a single day around the last week in July just before the harvest begins. There are no interviews; anyone who shows up and is able to complete the paperwork is hired, and all are welcome to return for the following season unless terminated for a specific reason. The harvesters work for only a few weeks, after which they depart until the next season, if they choose to return, which many do.

ICE served SKZ with its first Notice of Inspection (NOI) on August 10, 2010. In response, SKZ presented an employee list, approximately 116 I-9 forms, and various other documents. On August 17, 2010, ICE served SKZ with a Notice of Suspect Documents (NSD), listing the names of seventy-one employees, including the five individuals named in Count I. On October 28, 2010, ICE issued SKZ a Form I-846 Warning Notice.

[2] The Notice of Intent to Fine and a few other documents refer to Kari Zavala as a co-owner. Because the declaration is sworn and the other filings are not, this conflict creates no genuine factual issue. The factual allegations in the Zavala Declaration are accordingly taken as true for purposes of this motion.

On September 20, 2013, ICE served SKZ with a second NOI, and on October 22, 2013, the government served the company with a second NSD listing the names of sixty-two employees, again including the same five workers whose names appear in Count I. On April 10, 2014, ICE served SKZ with a Notice of Intent to Fine (NIF). The government subsequently amended that NIF, and served the amended NIF on SKZ on October 21, 2014. [3] SKZ filed a timely request for a hearing and ICE filed the instant complaint on December 8, 2014. All conditions precedent to the institution of this proceeding have been satisfied.

III. THE POSITIONS OF THE PARTIES

A. The Government's Motion

ICE's motion contends that there are no genuine issues of material fact and that the government is entitled to summary decision as to liability for all three counts, as well as to the requested penalty.

1. Count I

In support of the allegations in Count I, the government first points out that Juan Aguilera, Carlos Ambriz, Jose Bucio, Alejandro Guillen-Gonzalez, and Noe Alonso-Morellon were identified in the NSD issued on August 17, 2010, as having presented suspect documents, and that SKZ did not respond to that NSD or contest the inclusion of these employees on the list. ICE says the NSD provided SKZ with specific information indicating that the individuals were probably ineligible for employment, after which the company continued to employ them having actual and constructive knowledge that they were not authorized to work in the United States. The government says the declaration of Special Agent James Dobie (Ex. G-11) and the certifications of the CIS records custodian (Ex. G-12) demonstrate that none of these five individuals ever obtained lawful status in the United States.

ICE acknowledges that in July 2013, before the second NOI was issued, the respondent created new I-9 forms for Aguilera, Ambriz, and Alonso-Morellon, but says that all the individuals used the same social security numbers on both their respective 2010 and 2013 I-9 forms. Two individuals, Aguilera and Ambriz, presented different Permanent Resident Cards for their 2013 forms than they had for their initial 2010 forms, but the cards presented in 2013 had issue dates prior to the dates they completed their initial forms in 2010. Alonso-Morellon used the same Permanent Resident Card on both forms. Bucio claimed to be a United States citizen on his 2010 form, but he is a native and citizen of Mexico who was granted voluntary departure on May 31, 2011.

[3] The original NIF was amended by removing Vincente Herrera-Cisneros' name from Count I based on information provided by the company after SKZ received the original NIF.

2. Count II

Count II asserts that SKZ hired fifty-five named individuals for whom it failed to prepare or present I-9 forms. ICE says the names of these individuals were taken from SKZ's own Employee Contacts Lists, and SKZ's claim that Ubaldo Guillen, Paulo Gutierres, Jorge Pacheco, and Juan Maldonado-Magana never worked for the company contradicts the company's own records.

ICE notes that SKZ's answer admits that the company hired the remaining fifty-one employees and failed to present I-9s for them in response to the second inspection. The answer says that although the I-9s were prepared for many of the individuals, the forms could not be presented because Kari Zavala inadvertently destroyed a box containing I-9s and attached document copies. The government says SKZ's destruction of its own records does not give rise to a valid defense of impossibility, and there is no genuine issue of material fact as to whether the forms were presented.

3. Count III

The government asserts that on the I-9 forms for nine employees, the company either failed to ensure that the employee properly completed section 1, or failed itself to properly complete section 2. ICE points out that pursuant to the Virtue Memorandum[4] each of the violations involved is classified as substantive. The government also notes that the Ninth Circuit, in which this case arises, held in *Ketchikan Drywall Services, Inc. v. ICE*, 725 F.3d, 1103, 1113 (9th Cir. 2013) that the Virtue Memorandum was entitled to *Skidmore*[5] deference, and says ICE is accordingly entitled to summary decision as to liability for these violations.

Specifically, ICE says visual examination of the forms reflects that the I-9 for Elias Aguilera was not signed or dated by the employee in section 1, the form for Yolanda Maldonado was not signed by the employee in section 1, and the I-9 for Karla Zendejas does not contain a checked box in section 1 showing the employee's immigration status. In addition, ICE points out that section 2 of the I-9 form for Austin Boose was not signed or dated by the employer and that section 2 of the forms for Caleb Buxton, Salazar Espino, and Jose L. Espino do not show a document number or expiration date for the List B document entered, or a document number for the List C document entered, and no legible copies of the documents were presented at the time of inspection. Section 2 of the I-9 for Cristian Lupercio does not contain a List B document or a

[4] Memorandum from Paul W. Virtue, INS Acting Executive Commissioner 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), *available at* 74 No. 16 Interpreter Releases 706 (Apr. 28, 1997).

[5] *See Skidmore v. Swift & Co.*, 323 U.S. 134 (1944).

document number for the List C document, and no legible copies were presented at the time of inspection. Section 2 of the form for Miguel Maya was left blank.

These are all substantive violations.

4. Penalties

The government seeks $2,725 for each of five violations in Count I, totaling $13,625. For Count II the government seeks $981.75 for each of twenty-three violations involving unauthorized individuals, and $935 for each of thirty-two authorized individuals. For Count III, the penalties sought include $981.75 for the violation involving one unauthorized individual and $935 each for the remaining eight violations. The totals are $52,500.25 for Count II and $8,461.75 for Count III.

To reach this result, ICE first set the baseline for each paperwork violation in Counts II and III at $935 based on internal agency guidance. The government then considered the statutory penalty factors as directed by 8 U.S.C. § 1324a(e)(5), including the size of the business, the good faith of the employer, the seriousness of the violation, whether the individual was an unauthorized alien, and any history of previous violations. The government found SKZ to be a small business that acted in good faith, and mitigated the penalties by five percent for each of these positive factors. Based on the seriousness of the violations, however, the government aggravated the penalties by five percent for each violation.

ICE contends that Cesar Ambriz-Ramirez, Bacilio Barajas, Silberio Cardenas, Salvador Diaz, Manuel Diaz-Diaz, Juan Espinosa, Adrian Fuentes-Coria, Paulo Gutierres, Antonio Hernandez, Javier Hernandez, Maximina Hernandez, Juan Lariz-Villalpando, Gonzalo Lopez, Juan Lopez, Miguel Lopez, Juan Maldonado-Magana, Raul Marin-Sanchez, Gerado Ramiraz,[6] Ivan Ramos, Jose Ruiz, Maria Torres, Rosa Torres, and Felipe Villagomez, named in Count II, were unauthorized to work, and that Miguel Maya, named in Count III was also unauthorized. The government aggravated the penalties by an additional five percent for each of these violations.

Finally, ICE aggravated all the penalties by another five percent based on a history of previous violations because the company received a Warning Notice in October 2010. The government contends that SKZ did not take adequate steps after this notice to ensure either a lawful workforce or I-9 compliance.

B. SKZ's Position

[6] The name Gerado Ramiraz does not appear in the NSD. The declaration of Special Agent James Dobie acknowledges this, noting that the omission was "due to an oversight."

SKZ's response to the government's motion says that the penalties proposed are unduly punitive and would cripple this small business, and that most of the violations are the result of a single bad decision. Kari Zavala says she was unable to present the I-9s for 2010, 2011, and 2012 because she inadvertently destroyed them, which she reported to Agent Dobie. Some of the forms for 2010 were subsequently found, but not in time for their timely presentation. Zavala says further that although the forms were not presented in 2013, they were actually prepared, and that ICE already had copies of the 2010 I-9s in its custody from the previous inspection. SKZ also argues that because the 2013 NOI asked for information for "employees since August 12, 2010," the only information required was for individuals hired after that date.

SKZ points out further that because its business is seasonal in nature, it was not obligated to prepare new I-9s for its continuing employees who reported for work in the following season. ICE already had I-9s for these individuals from the 2010 audit and, according to the Employer Handbook, seasonal employees may continue in their employment status despite an interruption in the work. SKZ says the company tried using the E-Verify program[7] in 2011, but stopped because the program proved too difficult to utilize in conjunction with the completion of the I-9 forms given the haste in which the hiring had to be done.

1. Count I

SKZ argues that it had neither actual nor constructive knowledge of the unauthorized status of the individuals listed in Count I. SKZ points out that by the time the first NSD issued on August 17, 2010, the harvesting season was already over, the employees had dispersed, and there was no opportunity for the company to notify the employees on the list that their status had been questioned. The Zavala Declaration states that Agent Dobie had originally said that Pedro Zavala, Julian Espino, Vincente Herrera-Cisneros, and Maria Alvarez were unauthorized, but each in fact turned out to be authorized. According to the company's memorandum, when Vincente Herrera-Cisneros returned in 2011, he was cleared by E-Verify and ICE removed him from the list. Pedro Zavala and Julian Espino were shown to be authorized after the 2013 NSD, and Maria Alvarez was also discovered to have been work-authorized all along, thus casting doubt on the accuracy of ICE's determinations.

[7] The E-Verify program is an internet-based employment eligibility verification system operated by DHS's Citizenship and Immigration Services (CIS) in cooperation with the Social Security Administration (SSA). The program provides a way to compare information from an employee's I-9 form against data in DHS, SSA, and Department of State records to determine whether the information matches government records and whether a new hire is authorized to work in the United States.

The company says that in any event, new I-9s were created in 2013 for Aguilera, Ambriz, and Alonso-Morellon, and new forms *may* have been created for Bucio and Guillen-Gonzalez in 2011 or 2012, but that cannot be determined because the forms from those years were destroyed.

2. Count II

SKZ argues that it did not fail to prepare or present I-9s for many of the individuals for whom the government seeks penalties in Count II. The company says that the workers whose forms SKZ actually prepared and provided to the government at the time of the first inspection in 2010 were seasonal workers who continued in their employment in subsequent seasons, and for whom the company was not required to prepare new I-9s because there was no "rehire." Regulations specifically provide that under such circumstances the employer need not complete either a new I-9 or section 3 of the old I-9. 8 C.F.R. § 274a.2(b)(1)(viii).

SKZ asserts that more than forty of the individuals named in Count II completed I-9s in 2011 or 2012 that were subsequently destroyed, but that SKZ has E-Verify verifications for Vidal Baraja, Jose Celis, Salvador Diaz, Manuel Guzman-Lopez, Nicolas Ramirez-Garcia, and Yonathan Rodriguez. Although the company was unable to present forms for these individuals, they were still completed. SKZ asserts in addition that Lynn Day, Leonel Diaz, Rigoberto Gil, Miguel Moreno, Mario Zavala, and Pedro Zavala completed I-9s in 2010, and the company should not be penalized for not producing their I-9s for two reasons. First, the government already had these I-9s in its possession from the initial inspection in 2010, and second, although they were not presented in response to the 2013 NOI, their I-9s were subsequently discovered and submitted to ICE.

According to SKZ, Ubaldo Guillen, Paulo Gutierres, and Jorge Pacheco never actually showed up for work, and accordingly were not employees despite the fact that their names appeared on an employee contact list.[8] SKZ says further that the company was no longer required to retain the I-9s for Joshua Espino, Julian Espino, and Manuel Diaz-Diaz at the time of the second inspection, and no penalty can be assessed for the failure to present them. Finally, the company says an I-9 form was completed for Gerardo Saldago in 2013, but was not presented for inspection because it got caught in other paperwork and was inadvertently not sent to ICE.

3. Count III

SKZ challenges only two of the nine violations charged in Count III. The company points to the Virtue Memorandum, which it says provides that when a legible copy of a document accompanies a Form I-9, missing information that is contained in the attached document does not

[8] SKZ originally denied that Juan Maldonado-Magana was an employee, but its response to the summary decision motion challenges the employment status only of Guillen, Gutierres, and Pacheco.

constitute a substantive violation. SKZ contends that because Miguel Maya's Permanent Resident Card and social security card were attached to his I-9, the fact that section 2 was left blank should not be considered a substantive violation, and because copies of Karla Zendejas's valid Employment Authorization Card, driver's license, and social security card were attached to her I-9, the lack of a checked box in section 1 should not be considered a substantive violation either.

4. Penalties

SKZ contends that no penalties are warranted for the violations alleged in Count I, and that the penalties proposed for the violations alleged in Count II and III should be dramatically reduced. According to the company, ICE failed to take into account several factors including: 1) the majority of the penalties derive from Zavala's bad decision to dispose of the old I-9s; 2) the I-9s for 2010 were already in ICE's possession; and 3) new I-9s were not required for employees who continued in their seasonal employment after 2010. SKZ contends in addition that the totality of the circumstances demonstrates the company's good faith, and that the fine is too harsh given SKZ's inability to pay it. Zavala states that, unlike a number of her competitors, she keeps excellent payroll and employment records, which ironically results in her being fined while her competitors who keep no records are able to avoid penalties.

The company also questions the accuracy of ICE's determinations with respect to the unauthorized status of some of its workers, given the fact that there was no opportunity for the employees to contest the allegations. Finally, SKZ points to the general policy of leniency in the Regulatory Flexibility Act, 5 U.S.C. § 601 note (2006), amended by § 223(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), Pub. L. No. 104-121, 110 Stat. 864 (1996), and to the disproportion between the size of the penalty and the company's ordinary business income for 2011-2014. SKZ notes as well that the compensation Kari and Roberto Zavala received from the business was relatively modest.

IV. EVIDENCE CONSIDERED

The government's motion was accompanied by exhibits consisting of: G-1) State of Montana Business Report and incorporation records for SKZ (3 pp.); G-2) Notice of Inspection, dated August 10, 2010 (2 pp.); G-3) Notice of Suspect Documents, dated August 17, 2010 (3 pp.); G-4) Warning Notice, dated October 28, 2010 (5 pp.); G-5) Notice of Inspection, dated September 20, 2013 (2 pp.); G-6) SKZ Employee Contact List, dated September 27, 2013 (3 pp.); G-7) SKZ Employee Contact List, dated October 23, 2013 (3 pp.); G-8) Forms I-9, Forms W-2, and Montana Department of Labor Forms UI-5 (27 pp.); G-9) Forms W-2, SKZ Payroll Summary dated 2010-2012, and Forms UI-5 (107 pp.); G-10) Forms I-9 (17 pp.); G-11) Declaration of Special Agent James Dobie (9 pp.); G-12) Certificates of Nonexistence of Record and A-file

records related to employees identified in Count I of the Amended Notice of Intent to Fine (20 pp.); G-13) Complainant's Response to Respondent's First Set of Discovery Requests (18 pp.).

The response was accompanied by exhibits consisting of: R-1 through R-3) Form I-9's, attachments, W-4's, and E-Verify printouts relating to Counts I, II, and III (162 pp.); R-4) Tax Returns from 2011-2014 (30 pp.); R-5) Declaration of Kari Zavala (5 pp.); R-6) [Reserved for Declaration of Roberto Zavala, not submitted]; R-7) [Reserved for Declaration of Yonathan Rodriquez-Alvarez, not submitted]; R-8) E-Verify record for Maria Alvarez (2 pp.); R-9) Excerpt from Handbook for Employers (rev. 4-30-13) (2 pp.); R-10) Notice of Intent to Fine, dated April 10, 2014 (6 pp.).

V. DISCUSSION AND ANALYSIS

A. Count I

The state of mind that must be shown to establish constructive knowledge has been characterized by such terms as conscious disregard, deliberate ignorance, or other expressions implying a conscious avoidance of positive knowledge. The basic principle as it has been articulated in OCAHO case law is that an employer is not entitled to cultivate deliberate ignorance or avoid acquiring knowledge of whether an employee is authorized to work in the United States. *See United States v. Sunshine Bldg. Maint., Inc.*, 7 OCAHO no. 997, 1122, 1151-52 (1998); *United States v. Aid Maint. Co.*, 7 OCAHO no. 951, 475, 485 (1997). [9]

Cases in the Ninth Circuit have emphasized that the doctrine of constructive knowledge should be narrowly construed. *Aramark Facility Servs. v SEIU, Local 1877*, 530 F.3d 817, 825 (9th Cir. 2008); *Collins Foods Int'l, Inc. v. INS*, 948 F.2d 549, 554-55 (9th Cir. 1991) (emphasizing the doctrine's potential in a sanctions case to upset the balance between preventing unauthorized employment and simultaneously avoiding discrimination). In *United States v. Heredia*, 483 F.3d 913 (9th Cir. 2007) (en banc), the appeals court revisited the decision in *United States v. Jewell*, 532 F.2d 697 (9th Cir. 1976) (en banc), which originally provided the criminal law basis for its willful blindness doctrine. *Jewell* characterized the state of mind required as "a mental state in

[9] 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.

which the defendant is aware that the fact in question is highly probable but consciously avoids enlightenment." 532 F.2d at 704. The *Heredia* court declined to overrule *Jewell* as requested, and reiterated its two-prong standard requiring not only that the defendant be aware that the conduct was probably unlawful, but also that the defendant "deliberately avoided learning the truth." 483 F.3d at 924.

The application of a willful blindness standard in a civil context was expressly approved in *Global-Tech Appliances, Inc. v. SEB S.A.*, in which the Court surveyed the case law from various circuits and concluded,

> While the Courts of Appeals articulate the doctrine of willful blindness in slightly different ways, all appear to agree on two basic requirements: (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact. We think these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence. Under this formulation, a willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing, and who can almost be said to have actually known the critical facts.

563 U.S. 754, __, 131 S.Ct. 2060, 2070-71 (2011) (footnote omitted). Among the cases cited in the survey was the Ninth Circuit's decision in *Heredia*. *See id.* at 2070 n.9.

The record reflects that Juan Aguilera, Carlos Ambriz, Jose Bucio, Alejandro Guillen-Gonzalez, and Noe Alonso-Morellon all worked during the 2010 harvesting season. Guillen-Gonzalez returned for the 2011 season only. The other four did not return in 2011, but were employed for both the 2012 and the 2013 seasons. ICE's evidence (Ex. G-12) demonstrates that at the time each of the five was unlawfully present in the United States and unauthorized for employment.

The declaration of Kari Zavala says that,

> Regarding the employees that DHS claims we "knowingly" hired, all I can say is that we did not knowingly hire unauthorized workers. We tried our best to weed out the ones whom we were not supposed to hire, by giving my hiring partners a list. We did turn people away many people who were on that list, but we also seem to have missed some. It was not deliberate—I know it is difficult to understand, but please consider the chaos of the day in which 50-60 workers and their families show up looking to begin work.

Zavala Declaration at 4.

The declaration says in addition that some of the other employees whose documents had been questioned presented new documents showing themselves to be authorized, and that at least as to five of the people on the list, the government turned out to be wrong.

This is not a case in which job seekers visited an office to fill out applications, after which the employer had an opportunity to consider those applications at leisure in an orderly fashion. As observed in *United States v. Associated Painters, Inc.*, 10 OCAHO no. 1151, 6 (2012), context matters. The totality of the circumstances matters. Zavala describes the hiring process as highly chaotic, and it is not altogether surprising that during the course of hiring fifty to sixty people in an outdoor setting on one very long day and night, some of the individuals on the NSD list could escape notice or slip through the cracks. Even were I to find that SKZ was negligent or careless that day, which I do not, simple negligence or carelessness does not satisfy the rigorous standard set out in *Global-Tech*. *See also Associated Painters*, 10 OCAHO no. 1151 at 6 (explaining that the degree of culpability for constructive knowledge requires more than mere negligence). Applying the *Global-Tech* standard to the facts in this case, I find no evidence that would support a finding that Kari Zavala or anyone at SKZ "deliberately avoided learning the truth" or took "deliberate actions to avoid confirming a high probability of wrongdoing."

Unlike the company president who deliberately refused to credit two specific notices from ICE or to take appropriate steps to inquire further, *see United States v. Split Rail Fence Co*., 11 OCAHO no. 1216a, 13 (2015), Zavala took steps to provide the list of the suspected former employees to the individuals helping her with the hiring and screening process. That those steps were not entirely successful does not mean that those efforts were not made. OCAHO cases finding constructive knowledge have uniformly presented factual scenarios involving far more egregious conduct than is reflected in the record here. *See Associated Painters*, 10 OCAHO no. 1151 at 7 (collecting cases).

Regulations provide that constructive knowledge may include situations where an employer "[a]cts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its work force or to act on its behalf." 8 C.F.R. § 274a.1(*l*)(1)(iii). The record in this case does not permit a finding of reckless or wanton disregard, or of constructive knowledge. Heeding the cautions expressed in *Collins Foods* and *Global-Tech*, I find that the government is not entitled to summary decision as to liability for the violations alleged in Count I, and these allegations will be dismissed.

B. Count II

It is undisputed that SKZ failed to produce I-9 forms within three days of the September 20, 2013, NOI for the following individuals: 1) Cesar Ambriz-Ramirez, 2) Vidal Barajas, 3) Bacilio

Barajas, 4) Miguel Barrera, 5) Silberio Cardenas, 6) Jose Celis, 7) Lynn Day, 8) Leonel Diaz, 9) Salvador Diaz, 10) Manuel Diaz-Diaz, 11) Jonathan Espino, 12) Pierre Espino, 13) Juan Espinosa, 14) Adrian Fuentes-Coria, 15) Rigoberto Gil, 16) Ubaldo Guillen, 17) Paulo Gutierres, 18) Manuel Guzman-Lopez, 19) Dave Hand, 20) Joshua Espino, 21) Julian Espino, 22) Antonio Hernandez, 23) Javier Hernandez, 24) Maximina Hernandez, 25) Ross Holcomb, 26) Serena Holcomb, 27) Elidio Juarez-Rios, 28) Juan Lariz-Villalpando, 29) Gonzalo Lopez, 30) Juan Lopez, 31) Miguel Lopez, 32) Juan Maldonado-Magana, 33) Raul Marin-Sanchez, 34) Heirberto Mendez, 35) Antonio Mendoza, 36) Miguel Moreno, 37) Jorge Pacheco, 38) Gerado Ramiraz, 39) Gerado Ramirez-Garcia, 40) Nicolas Ramirez-Garcia, 41) Ivan Ramos, 42) Maurillio Ramos-Guzman, 43) Rosa Rivera, 44) Veronica Rivera, 45) Yonathan Rodriguez, 46) Jose Ruiz, 47) Gerardo Saldago, 48) Ramon Sanchez, 49) Alfonso Sisneros, 50) Maria Torres, 51) Rosa Torres, 52) Beatriz Valencia, 53) Felipe Villagomez, 54) Mario Zavala, and 55) Pedro Zavala.

SKZ puts forth a variety of arguments and potential defenses as to why it should have been unnecessary to produce these forms. First, SKZ says that I-9s were actually prepared for most of these individuals, but that Zavala made the mistake of throwing them away. OCAHO case law recognizes that impossibility may provide a valid affirmative defense to the failure to present I-9 forms where the forms were actually completed but later became unavailable through no fault of the employer. *See United States v. Noel Plastering & Stucco, Inc*., 2 OCAHO no. 396, 763, 768 (1991) (finding that a defense of impossibility could potentially succeed if the respondent could prove that fire destroyed the offices where I-9s were kept); *United States v. Alvand, Inc*., 2 OCAHO no. 352, 378, 383 (1991) (finding that impossibility could be a valid defense if evidence established that the forms had been completed but were subsequently lost or destroyed in the course of a burglary).

Impossibility is simply not available as an affirmative defense, however, when the destruction of the documents is owing to the company's own actions. *See United States v. Barnett Taylor, LLC*, 10 OCAHO 1155, 8-9 (2012) (stating that where an employer's own employee voluntarily destroys its I-9 forms, the defense is unavailable). While the fact that these forms were actually prepared may be taken into account in setting a penalty, it cannot operate to avoid liability for these violations.

SKZ also argues that no penalties should be assessed for the violations on the I-9s for Mario Zavala, Pedro Zavala, Lynn Day, Leonel Diaz, Miguel Moreno, Yonathan Rodriguez, and Rigoberto Gil because their forms were submitted to the government in 2010 and were thought to be destroyed, but later found and presented. Our case law, however, holds to the contrary that unless an extension of time is granted, the employer cannot avoid liability by submitting I-9 forms at some later point in the process. *See United States v. Horno MSJ, LTD.*, 11 OCAHO no. 1247, 7 (2015); *United States v. A&J Kyoto Japanese Rest., Inc.*, 10 OCAHO no. 1186, 7 (2013) (noting that late-produced I-9s did not absolve employer of liability for failure to present them initially); *United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 5 (2013) (observing that the violations occurred at the time of the inspection). The company also suggests that because the

2013 NOI requested forms "for employees since August 12, 2010 only," SKZ had to present I-9s only for the individuals hired after August 12, 2010. Although the argument is creative, the NOI obviously refers to anyone who was employed on or after August 12, 2010, not just those who were initially hired after that date.

While SKZ contends that its use of E-Verify corroborates that it completed the I-9 forms for Vidal Barajas, Jose Celis, Salvador Diaz, Manuel Guzman-Lopez, Nicolas Ramirez-Garcia, and Yonathan Rodriguez, the E-Verify program does not purport to insulate an employer from the necessity of proper I-9 completion. *See United States v. Golf Int'l*, 10 OCAHO no. 1214, 6 (2014). The E-Verify Memorandum of Understanding, which employers must sign as a condition of participation in the program, expressly provides that participation in the program does not exempt an employer from the requirements to complete, retain, and produce I-9 forms for its employees. *See* USCIS, *E-Verify Program for Employment Verification Memorandum of Understanding*, at 3-4 (last revised Sept. 1, 2009).[10]

SKZ next asserts that although their names appear on an employee list, Ubaldo Guillen, Paulo Gutierres, and Jorge Pacheco were never actually employees of the company. The term "employee" means a person "who provides services or labor for an employer for wages or other remuneration." 8 C.F.R. § 274a.1(f). Case law makes clear that the appearance of an individual's name on a list, or even on an I-9 form, without a scintilla of evidence that the individual actually provided any services or labor to the company or ever actually received any wages or other forms of remuneration, is insufficient to establish that the person was an employee. *See United States v. Speedy Gonzalez Constr., Inc.*, 11 OCAHO no. 1228, 8 (2014); *United States v. Two for Seven, LLC*, 10 OCAHO no. 1208, 6 (2014) (declining to hold employer liable for failing to complete I-9s for individuals for whom it did not appear that any wages were ever paid). The record is devoid of payroll records or any other documentation suggesting that these three individuals received any wages from or performed any services for SKZ at any time and SKZ will accordingly not be held liable for the alleged violations in Count II involving Ubaldo Guillen, Paulo Gutierres, and Jorge Pacheco. The fact that Gerardo Saldago's I-9 was completed but inadvertently not sent to ICE, however, does not excuse the company's failure to present it and SKZ is liable for this violation.

An employer is required to retain the I-9 of a former employee for a period of three years after that employee's hire date, or one year after that employee's termination date, whichever is later. 8 U.S.C. § 1324a(b)(3); 8 C.F.R. § 274a.2(b)(2)(i); *United States v. Ojeil*, 7 OCAHO no. 984, 982, 992 (1998). SKZ contends that the retention period for the I-9s of Manuel Diaz-Diaz,

[10] The current version of USCIS's Memorandum of Understanding similarly states "[t]he Employer agrees that, although it participates in E-Verify, the Employer has a responsibility to complete, retain, and make available for inspection Forms I-9 that relate to its employees." USCIS, *E-Verify Memorandum of Understanding For Employers*, at 2 (last revised June 1, 2013).

Joshua Espino, and Julian Espino had already expired at the time of the 2013 NOI. But SKZ has neither pointed to nor presented evidence clearly showing that these individuals were ever terminated. SKZ cannot have it both ways; the company contends that its workers were continuing seasonal employees who could return for subsequent seasons without having to be rehired unless they were terminated for a specific reason. SKZ made no showing that these individuals were affirmatively terminated.

SKZ will accordingly be held liable for fifty-two of the fifty-five violations alleged in Count II. The allegations respecting the I-9s for Ubaldo Guillen, Paulo Gutierres, and Jorge Pacheco will be dismissed.

C. Count III

Section 2 of Miguel Maya's I-9 is entirely blank, while Karla Zendejas did not check a box in section 1 to indicate her status as a U.S. citizen, lawful permanent resident, or alien authorized to work. This means in effect that SKZ failed to attest under oath to the examination of any facially valid documents to establish Maya's identity or employment eligibility, and also failed to ensure that Zendejas attested under oath to her immigration status in the United States. Whether or not documents are attached to the form, the required information has not been affirmatively attested to under oath.

SKZ contends that because copies of documents containing the missing information accompanied the forms, the omissions should not constitute substantive violations. The Virtue Memorandum, however, characterizes both these violations as substantive and neither is capable of being cured by attaching documents. *See United States v. Ketchikan Drywall Servs., Inc.*, 10 OCAHO no. 1139, 10 (2011) (citations omitted) (attestation to the review and verification of documents lies at the heart of the verification process whether or not document copies are attached to the form); *United States v. Employer Solutions Staffing Grp. II, LLC*, 11 OCAHO no. 1242, 11 (2015) (describing section 2 as "the very heart" of the verification process).[11] OCAHO cases hold in addition that failure to ensure that the employee attests to a specific immigration status in section 1 is among the most serious of paperwork violations. *United States v. WSC Plumbing, Inc.*, 9 OCAHO no. 1062, 7 (2000).

SKZ is accordingly liable for the nine violations alleged in Count III.

[11] Regulations also make clear that copying documents without completing section 2 does not satisfy an employer's I-9 responsibilities. *See* 8 C.F.R. § 274a.2(b)(3) (copying a document does not satisfy the employer's duty to fully complete section 2).

D. Penalties

Civil money penalties are assessed for paperwork violations according to the parameters set forth at 8 C.F.R. § 274a.10(b)(2): the minimum penalty for each individual with respect to whom a violation occurred after September 29, 1999, is $110, and the maximum is $1100. Penalties for the sixty-one paperwork violations established in this case range from $6710 to $67,100. The government has the burden of proof with respect to the penalty, *United States v. March Construction, Inc.*, 10 OCAHO no. 1158, 4 (2012), and must prove the existence of any aggravating factor by a preponderance of the evidence, *United States v. Carter*, 7 OCAHO no. 931, 121, 159 (1997).

The governing statute sets out five factors for consideration in setting penalties, 8 U.S.C. § 1324a(e)(5), but does not require that equal weight be given to each factor, nor does it rule out consideration of such other factors as may be appropriate in the particular circumstances. *See United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000). Additional factors often considered include a company's ability to pay the proposed penalty, as well as public policies of leniency established by statute. *See United States v. Keegan Variety, LLC*, 11 OCAHO no. 1238, 6-7 (2014).

The parties agree that respondent is a small business and this factor operates to SKZ's favor. ICE based its finding of good faith on the fact that SKZ complied with the NOI and cooperated during the inspection. Our case law assessing good faith has principally focused, however, on what steps the employer took prior to the NOI to ascertain what the law requires and to conform its conduct to the law. *See e.g., United States v. Durable, Inc.*, 11 OCAHO no. 1229, 14 (2014). The record nevertheless furnishes no basis to contradict ICE's finding, and this factor too is favorable to the company.

While ICE contends that the government's prior Warning Notice constitutes a history of previous violations, OCAHO case law has long held otherwise. *See Hernandez*, 8 OCAHO no. 1043 at 666 (noting that to show a history of previous violations the government must establish, inter alia, that a NIF was issued, that a complaint was filed, and that the company was afforded the opportunity for a due process hearing). A prior Warning Notice is accordingly not sufficient to show that there was a previous violation of § 1324a. *See United States v. Honeybake Farms, Inc.*, 2 OCAHO no. 311, 91, 95 (1991). Absent a formal judgment or an admission, no previous violation has been shown and this factor also weighs in SKZ's favor, not against it.

Seriousness may be evaluated on a continuum, because not all violations are equally serious. *United States v. New Sun Transit, Inc.*, 10 OCAHO no. 1194, 4 (2013). Here it is undisputed that the I-9s actually were prepared. While Zavala's inability to present them does not excuse the violations, the fact of their preparation is a mitigating factor to some degree when it comes to setting a penalty. The violations in Count III are also considered serious, *Ketchikan*, 10 OCAHO

no. 1139 at 10; W*SC Plumbing,* 9 OCAHO no. 1062 at 7, but they are not as serious as a failure to prepare or present the form.

ICE's evidence with respect to the unauthorized status of the individuals named in Counts II and III rests on the declaration of Special Agent James Dobie (Ex. G-11). Dobie notes that he initially consulted federal and commercial databases and determined that the individuals named in the October 30, 2013, NSD did not appear to have valid work authorization. Kari Zavala provided documents for Pedro Zavala and Julio Espino in response to the NSD, but because most of the harvesters had already dispersed, there was no opportunity to provide the workers with notice or an opportunity to show other documents.

For twenty of the twenty-four individuals named in Counts II and III, Dobie said there was no response to the NSD, and the individuals had used social security numbers that were in conflict with their names. Dobie Declaration at 8. For the remaining four employees, Cesar Ambriz-Ramirez, Silberio Cardenas, Juan Lopez, and Miguel Maya, Dobie said he "confirmed in Central Index System and other DHS databases that they were unauthorized aliens with respect to their employment." *Id.* Unlike the documents the government furnished to demonstrate the unauthorized status of the individuals named in Count I, however, no specifics were provided.[12]

As explained in *Aramark*, social security mismatches arise for a variety of reasons, including typographical errors, name changes, compound last names, and inaccurate or incomplete employer records. 530 F.3d at 826. By its own estimate, SSA's database contains millions of errors. *Id*. A social security mismatch accordingly does not serve to establish that a particular individual is unauthorized for employment. A NSD is not sufficient in itself to establish a worker's unauthorized status either. *United States v. Romans Racing Stables, Inc.*, 11 OCAHO no. 1230, 8 (2014). It is for this reason that our case law has generally approached the question of a worker's status cautiously when there is no evidence that the individual was provided with notice and given an opportunity to present alternative employment verification documents. *See United States v. PM Packaging, Inc.*, 11 OCAHO no. 1253, 11 (2015); *United States v. Liberty Packaging, Inc.*, 11 OCAHO no. 1245, 10 (2015). Because there are substantial doubts as to the status of most of these individuals, no adjustment will be made to the penalties based on that factor.

E. CONCLUSION

Our case law makes clear that penalties approaching the maximum permissible should be reserved for the most egregious violations. *See Fowler Equipment*, 10 OCAHO no. 1169 at 6.

[12] Exhibit G-12 consists of copies of certificates from the CIS Records Services Branch and Forms I-123 (Record of Deportable/Inadmissible Alien) showing clearly and unequivocally that each of the five employees named in Count I was unlawfully present in the United States.

Considering the record as a whole and the statutory factors in particular, as well as the general public policy of leniency toward small entities as set out in the Small Business Regulatory Enforcement Fairness Act § 601, the penalties in this case will be adjusted as a matter of discretion to an amount closer to the midrange of permissible penalties.

For the fifty-two violations in Count II the penalties will be $500 for each violation. For the nine violations in Count III, the penalties will be assessed at the rate of $400 each. The total civil money penalty is $29,600.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. SKZ Harvesting, Inc. is a seasonal cherry harvesting business located in the Flathead region of Montana.

2. Kari Zavala is SKZ Harvesting, Inc.'s sole owner and registered agent.

3. SKZ Harvesting, Inc. has only two or three year-round employees.

4. Each year toward the end of July, SKZ Harvesting, Inc. hires around fifty to sixty employees who work for only ten to fourteen days harvesting flathead cherries.

5. Most of SKZ Harvesting, Inc.'s cherry harvesters are hired in a single day by Kari Zavala, assisted by a few of SKZ's employees, working late into the evening.

6. SKZ Harvesting, Inc.'s harvester employees are welcome to return in successive seasons unless terminated for a specific reason, and many do so.

7. The Department of Homeland Security, Immigration and Customs Enforcement, served a Notice of Inspection on SKZ Harvesting, Inc. on August 10, 2010.

8. On August 17, 2010, the Department of Homeland Security, Immigration and Customs Enforcement served SKZ Harvesting, Inc. with a Notice of Suspect Documents containing the names of seventy-one employees.

9. On October 28, 2010, the Department of Homeland Security, Immigration and Customs Enforcement issued SKZ Harvesting, Inc. a Form I-846 Warning Notice.

10. On September 20, 2013, the Department of Homeland Security, Immigration and Customs Enforcement served SKZ Harvesting, Inc. with a second Notice of Inspection.

11. On October 22, 2013, the Department of Homeland Security, Immigration and Customs Enforcement served SKZ Harvesting with a second Notice of Suspect Documents containing the names of sixty-two employees.

12. The Department of Homeland Security, Immigration and Customs Enforcement served SKZ Harvesting with a Notice of Intent to Fine on April 10, 2014.

13. The Department of Homeland Security, Immigration and Customs Enforcement amended its April 10, 2014, Notice of Intent to Fine and served SKZ Harvesting, Inc. with the Amended Notice of Intent to Fine on October 21, 2014.

14. SKZ Harvesting, Inc. filed a request for a hearing before the Office of the Chief Administrative Hearing Officer on May 1, 2014, and renewed its request on October 31, 2014.

15. The Department of Homeland Security, Immigration and Customs Enforcement filed a complaint with the Office of the Chief Administrative Hearing Officer on December 8, 2014.

16. The August 17, 2010, Notice of Suspect Documents included the names Juan Aguilera, Carlos Ambriz, Jose Bucio, Alejandro Guillen-Gonzalez, and Noe Alonso-Morellon.

17. Juan Aguilera, Carlos Ambriz, Jose Bucio, Alejandro Guillen-Gonzalez, and Noe Alonso-Morellon all worked for SKZ Harvesting, Inc. during the 2010 harvesting season.

18. Alejandro Guillen-Gonzalez worked for SKZ Harvesting, Inc. during the 2011 harvesting season.

19. Juan Aguilera, Carlos Ambriz, Jose Bucio, and Noe Alonso-Morellon worked for SKZ Harvesting, Inc. during the 2012 and 2013 harvesting seasons.

20. Juan Aguilera, Carlos Ambriz, Jose Bucio, Alejandro Guillen Gonzalez, and Noe Alonso-Morellon were unlawfully present in the United States and unauthorized to work when SKZ Harvesting employed them.

21. SKZ Harvesting, Inc. hired Cesar Ambriz-Ramirez, Bacilio Barajas, Vidal Barajas, Miguel Barrera, Silberio Cardenas, Jose Celis, Salvador Diaz, Jonathan Espino, Pierre Espino, Juan Espinosa, Adrian Fuentes-Coria, Manuel Guzman-Lopez, Dave Hand, Antonio Hernandez, Javier Hernandez, Maximina Hernandez, Ross Holcomb, Serena Holcomb, Elidio Juarez-Rios, Juan Lariz-Villalpando, Gonzalo Lopez, Juan Lopez, Miguel Lopez, Juan Maldonado-Magana, Raul Marin-Sanchez, Heirberto Mendez, Antonio Mendoza, Gerado Ramiraz, Gerado Ramirez-Garcia, Nicolas Ramirez-Garcia, Ivan Ramos, Maurillio Ramos-Guzman, Rosa Rivera, Veronica Rivera, Jose Ruiz, Ramon Sanchez, Alfonso Sisneros, Maria Torres, Rosa Torres, Beatriz

Valencia, and Felipe Villagomez, and failed to present I-9's for them within three days of the government's request on September 20, 2013.

22. SKZ Harvesting, Inc. hired Gerardo Saldago and failed to present an I-9 form for him within three days of the government's request on September 20, 2013.

23. SKZ Harvesting, Inc. hired Mario Zavala, Pedro Zavala, Lynn Day, Leonel Diaz, Miguel Moreno, Rigoberto Gil, and Yonathan Rodriguez, and failed to present I-9 forms for them within three days of the government's request on September 20, 2013.

24. No evidence was presented reflecting that Ubaldo Guillen, Paulo Gutierres, or Jorge Pacheco performed services for or received wages from SKZ Harvesting, Inc. during the period at issue in this case.

25. No evidence was presented that SKZ Harvesting, Inc. terminated Manuel Diaz-Diaz, Joshua Espino, or Julian Espino prior to September 20, 2013.

26. SKZ Harvesting, Inc.'s employee Elias Aguilera did not sign or date section 1 of his I-9 form.

27. SKZ Harvesting, Inc.'s employee Yolanda Maldonado did not sign section 1 of her I-9 form.

28. SKZ Harvesting, Inc.'s employee Karla Zendejas failed to check a box in section 1 of her I-9 form to attest to a particular status as a U.S. citizen, lawful permanent resident, or alien authorized to work.

29. SKZ Harvesting, Inc. hired Miguel Maya and left section 2 of his I-9 form completely blank.

30. SKZ Harvesting, Inc. hired Austin Boose and failed to sign and date section 2 of his Form I-9.

31. SKZ Harvesting, Inc. hired Caleb Buxton, Salazar Espino, and Jose L. Espino, and failed to enter a document number or expiration date for the List B document in section 2, or a document number for the List C document in section 2, on their I-9 forms.

32. SKZ Harvesting, Inc. hired Cristian Lupercio and failed to enter a List B document in section 2, or a document number for the List C document in section 2, on his I-9 form.

B. Conclusions of Law

1. SKZ Harvesting, Inc. is an entity within the meaning of 8 U.S.C. § 1324a(a)(1) (2012).

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

3. SKZ Harvesting, Inc. is liable for sixty-one violations of 8 U.S.C. § 1324a(a)(1)(B) (2012).

4. The Department of Homeland Security, Immigration and Customs Enforcement did not satisfy its burden of proof with respect to Count I of the complaint.

5. The Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324a imposes an affirmative duty upon employers to prepare and retain I-9 forms for employees hired after November 6, 1986, and to make those forms available for inspection by the government on at least three business days notice. 8 C.F.R. § 274a.2(b)(2)(ii).

6. Employers are obligated to ensure that each employee checks a box in section 1 of Form I-9 attesting to his or her status as a U.S. citizen, lawful permanent resident, or alien authorized to work in the United States. 8 U.S.C. § 1324a(b)(2). *United States v. Ketchikan Drywall Servs., Inc.*, 10 OCAHO no. 1139, 6, 15 (2011).

7. An employer is required to sign section 2 of Form I-9 to attest under penalty of perjury that it reviewed the appropriate documents to verify the individual's identity and employment authorization. 8 C.F.R. § 274a.2(a)(3), (b)(1)(ii).

8. An employer's failure to sign section 2 of Form I-9 is a very serious violation. *See United States v. Employer Solutions Staffing Grp. II, LLC*, 11 OCAHO no. 1242, 11 (2015) (describing section 2 as "the very heart" of the verification process).

9. Impossibility is not available as an affirmative defense when the destruction of I-9 forms and accompanying documents is due to the voluntary actions of an employer. *United States v. Barnett Taylor*, 10 OCAHO no. 1155, 8-9 (2012).

10. An employee is defined as an individual who provides services or labor for an employer for wages or other remuneration. 8 C.F.R. § 274a.1(f).

11. An employer is required to retain the I-9 of a former employee for three years after the date of hire or one year after the employee's termination, whichever is later. 8 U.S.C. § 1324a(b)(3); 8 C.F.R § 274a.2(b)(2)(i).

12. The government has the burden of proof with respect to the penalty, *United States v. March Construction, Inc.*, 10 OCAHO no. 1158, 4 (2012), and must prove the existence of any aggravating factor by a preponderance of the evidence, *United States v. Carter*, 7 OCAHO no. 931, 121,159 (1997).

13. The governing statute sets out five factors for consideration in setting penalties, 8 U.S.C. § 1324a(e)(5), but does not require that equal weight be given to each factor, nor does it rule out consideration of such other factors as may be appropriate in the particular circumstances. *See United States v. Hernandez*, 8 OCAHO no. 1043, 660, 664 (2000).

14. In assessing good faith, case law looks primarily to an employer's actions before the issuance of the Notice of Inspection, not after. *See United States v. Durable, Inc.*, 11 OCAHO no. 1229, 14 (2014) (assessing good faith by examining "what steps, if any, the employer took prior to the Notice of Inspection to ascertain what the law requires and to conform its conduct to it").

15. An employer's previous receipt of a warning notice does not constitute a history of previous violations within the meaning of 8 U.S.C. § 1324a(e)(5). *United States v. Honeybake Farms, Inc.*, 2 OCAHO no. 311, 91, 95 (1991).

16. The following violations are all very serious: failure to ensure that an employee signs section 1 of Form I-9; failure to ensure than an employee checks a box in section 1 of the form attesting to status as a U.S. citizen, lawful permanent resident, or alien authorized to work; and failure to verify the proper identity and employment authorization documents in section 2 of the form. *See United States v. Ketchikan Drywall Servs., Inc.*, 10 OCAHO no. 1139, 6 (2011).

17. Penalties close to the maximum permissible should be reserved for the most egregious violations. *See United States v. Fowler Equip. Co.*, 10 OCAHO no. 1169, 6 (2013).

18. SKZ Harvesting, Inc. hired Elias Aguilera, Yolanda Maldonado, and Karla Zendejas for employment and failed to ensure that they properly completed section 1 of their respective I-9 forms.

19. SKZ Harvesting, Inc. failed to properly complete section 2 of Form I-9 for Miguel Maya, Austin Boose, Caleb Buxton, Salazar Espino, Jose L. Espino, and Cristian Lupercio.

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

The allegations in Count I are dismissed. The allegations in Count II involving failure to present I-9s for Ubaldo Guillen, Paulo Gutierres, and Jorge Pacheco are dismissed. SKZ Harvesting, Inc. is liable for sixty-one violations of 8 U.S.C. § 1324a(a)(1)(B) and is directed to pay civil money penalties totaling $29,600. The parties are encouraged to enter a schedule for installment payments to minimize the impact on SKZ's business.

SO ORDERED.

Dated and entered this 4th day of February, 2016.

_____

Ellen K. Thomas
Administrative Law Judge

Appeal Information

This order shall become the final agency order unless modified, vacated, or remanded by the Chief Administrative Hearing Officer (CAHO) or the Attorney General.

Provisions governing administrative reviews by the CAHO are set forth at 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. pt. 68. Note in particular that a request for administrative review must be filed with the CAHO within ten (10) days of the date of this order, pursuant to 28 C.F.R. § 68.54(a)(1).

Provisions governing the Attorney General's review of this order, or any CAHO order modifying or vacating this order, are set forth at 8 U.S.C. § 1324a(e)(7) and 28 C.F.R. pt. 68. Within thirty (30) days of the entry of a final order by the CAHO, or within sixty (60) days of the entry of an Administrative Law Judge's final order if the CAHO does not modify or vacate such order, the Attorney General may direct the CAHO to refer any final order to the Attorney General for review, pursuant to 28 C.F.R. § 68.55.

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