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

August 24, 2012

UNITED STATES OF AMERICA, Complainant, v. SANTIAGO'S REPACKING, INC., Respondent.	))))))))	8 U.S.C. § 1324a Proceeding OCAHO Case No. 11A00134

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 Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a complaint in three counts alleging that the respondent Santiago's Repacking, Inc. engaged in 55 violations of 8 U.S.C. § 1324a(b). Count I asserted that the company hired 24 named individuals and failed to prepare or present I-9 forms for them upon request. Count II asserted that the company hired 30 additional named individuals and also failed to prepare or present I-9 forms for them upon request, but requested lesser penalties. Count III asserted that the company hired one individual for whom it failed to ensure that the individual properly completed section 1 of the form and/or failed itself to properly complete section 2 or 3. Penalties sought were assessed at the rate of $981.00 for each of the violations in Count I, $935.00 for each of the violations in Count II, and $935.00 for the violation in Count III, for a total civil money penalty of $52,529.00.

Santiago's Repacking filed an answer in which it acknowledged the violations in Counts I and II, but denied the allegations in Count III and stated that the only individual named in that count, Santiago Moreno, was not an employee of the company. It also denied that it was a corporation as alleged in the complaint. The company also said that ICE had not fully considered all the

mitigating factors and that these needed to be considered further. Prehearing procedures ensued and each party filed a prehearing statement. Presently pending is ICE's motion for summary decision. The company filed a timely response and the motion is ripe for decision. Both parties are represented by counsel.

II. BACKGROUND INFORMATION

Santiago's Repacking was formed as a general partnership under Arizona law in 2005 and its business is located in Nogales, Arizona. The record reflects that ICE served Santiago's Repacking with a Notice of Inspection on or about July 1, 2009 in which it requested that the company produce its I-9 forms, payroll records, and other employment records for its then current employees and for former employees who were terminated after January 1, 2009. Santiago's Repacking produced various documents in response, but only one I-9 form, that of Santiago Moreno.

Moreno was interviewed on July 1, 2009 at which time he said he was the owner of the company and was responsible for all the hiring. He said his practice was to ask all new employees for documents and that he routinely made and retained copies of the documents employees proffered. At a follow-up interview on July 7, 2009, Moreno said he had never completed a Form I-9 in fifteen years in business, and lacked knowledge about the form. The company provided copies of documents for 60 individuals, but had no I-9s for them.

A Notice of Suspect Documents was issued to the company on or around April 19, 2010 with the names of 31 individuals ICE said appeared to be unauthorized for employment in the United States. According to the Affidavit of Keith Campton, ICE came to this conclusion after taking information from photocopies of the documents Santiago's Repacking presented, and querying DHS databases for alien registration numbers, running database searches for names, dates of birth, and immigration status for the persons whose alien numbers were given, and conducting other searches using social security numbers, names, and dates of birth. Selected inquiries were also made for pending residence or employment authorization applications. State issued identification card numbers, driver license numbers, and other types of information were queried through a secure database that interfaces with state motor vehicle departments, as well as through state and federal criminal record databases. Passport numbers were queried through the Department of State and social security numbers through multiple law enforcement and government databases as well as private commercial databases. The results disclosed that alien registration numbers for 31 employees were assigned to other individuals or had never been assigned. Twenty four of those employees were employed in the first and second quarters of 2009; these are the 24 individuals named in Count I.

After concluding its inspection ICE issued a Notice of Intent to Fine (NIF) to Santiago's Repacking on September 10, 2010 and a timely request for hearing was made on October 8, 2010. All conditions precedent to the institution of this action have been satisfied.

III. LIABILITY FOR THE VIOLATIONS ALLEGED

A. The Government's Motion

ICE's motion seeks summary decision as to all counts. It asserts that the facts are undisputed as to the violations in Counts I and II, and says that the record reflects as to Count III that Santiago Moreno was not just an owner, but also an employee of the business. The government says that Moreno's responsibilities extended further than those of simply an owner and that he identified himself as the person responsible for hiring other employees. Moreno's was the only I-9 presented and visual inspection of the form reflects that it contains a number of substantive violations, including the lack of a signature or date in the section 2 attestation, failure to identify proper List A or List B and C documents on the form, and the examination and recording of only a List C document.

Exhibits accompanying the motion included G-1) the complaint with attachments (17 pp.); G-2) the Affidavit of Auditor Keith Campton dated July 9, 2012 with attachments (25 pp.); G-3) Notice of Inspection dated July 1, 2009; G-4) undated I-9 form for Santiago Moreno; G-5) Record of Sworn Statement of Santiago Moreno dated July 7, 2009 (2 pp.); G-6) Employee contact list (4 pp.); G-7) Unemployment Tax and Wage Reports for calendar quarters ending June 30, 2009 and March 31, 2009, together with a list of employees for whom no I-9 was provided (8 pp.); G-8) a Partnership Agreement dated November 18, 2005, with Santa Cruz County Recorder's Office Search Result as of January 25, 2010 (4 pp.); G-9) a Notice of Suspect Documents dated April 19, 2010 (4 pp.); and G-10) ICE Report of Investigation, Case no. NG19NR09NG0001.

B. Santiago's Repacking's Response

The company's response conceded liability as to the allegations in Counts I and II, but said there were genuine issues of material fact with respect to Count III in that the business entity named in the complaint is a general partnership, not a corporation as the government had initially alleged, and that it files an annual return on IRS Form 1065, not a corporate return on IRS Form 1120. Attached to the response in support of this contention is exhibit 1, a copy of a U.S. Return of Partnership Income for 2010, IRS Form 1065 (6 pp.).

The company also argues that Santiago Moreno, the sole individual named in Count III, is a partner in the business, and a partner cannot simultaneously be an employee, citing Rev. Rul. 56-326, 1956-2 C.B. 100 and *Papineau v. Comm'r of Internal Revenue*, 16 T.C. 130, 132 (1951). The company contends that although Moreno is paid wages and has employment taxes withheld, his "treatment as an employee is for the convenience of the partnership and payments to him may be more accurately characterized as guaranteed payments under partnership taxation rules."[1]

C. Discussion and Analysis

Notwithstanding some initial confusion about the company's legal status, the government's motion acknowledged that the business entity is a partnership, not a corporation, and there is accordingly no genuine issue of material fact as to its status. Neither is there any dispute with respect to the factual basis for the violations alleged in Counts I and II. The government's motion for summary decision will accordingly be granted as to liability for these counts. As to Count I, Santiago's Repacking hired Jose Israel Alcaraz Ramos, Guadalupe Anaya, Karla Bajeca, Gabriela Berrellez, Baudel Berrelleza, Jose Angel Blanco Calderon, Juan Borquez, Margarita Campoa, Emilio Candelario Aquino, Raymundo Davila Pena, Camila Fregozo Dias, Ramon Hernandez, Raul C. Hernandez, Alfredo Ibarra Mendivil, Cecilia Martinez, Dulce Osorio, Cristina Sanchez, Veronica Soto Garcia, Vaneth Valdez, Isela Valle Vazquez, Arturo Villa, Cuahutemoc Villa, Denisse Villa, and Luis Villa and failed to prepare or present I-9 forms for them upon request.

As to Count II, Santiago's Repacking hired Herminia Campos Montoya, Selene Cruz Guerrero, Maria Encinas Teran, Sandra Farias de Chavez, Maria Trinidad Gallo Tapia, Jesenia Garcia, Laura Hernandez, Marisa Hernandez, Francisco Hernandez Ballesteros, Liz Ibanez, Maria Juarez, Laura Leon, Jesus Eduardo Lopez, Marisela Martinez, Ricardo Mendivil, Richard I. Mendivil, Francisca Miranda Orosco, Jorgue Moiza, Raquel Ortiz, Humberto Peralta, Guadalupe Pillado, Jose Edgar Quijada, Patricia Ramirez, Lidia Rodriguez, Ramon Sabori Encinas, Manuela Santa Cruz, Maria Valdez, Sonay Nayeli Vega Verdin, Abel Velasco, and Sarah Lynette Waite and failed to prepare or present I-9 forms for them upon request.

There is also no real dispute that Santiago Moreno is one of three partners in the business. The general rule is that an individual is not an employee of an enterprise if the individual has an ownership interest and controls all or part of the enterprise. Restatement (Third) of Employment Law § 1.03. Neither party referred to the regulatory definitions; these provide with unhelpful circularity that an employee is "an individual who provides services or labor . . . for wages or

[1] *See generally* 9 Mertens Law of Fed. Income Tax'n § 35:62, Salaries and interest as guaranteed payments.

other remuneration" and that an employer is a person or entity "who engages the services or labor of an employee . . . for wages or other remuneration." 8 C.F.R. §§ 274a.1(f), (g). Nothing in this language, however, suggests that an individual may simultaneously be both an employer and an employee in the same work setting.

While the government's motion seeks to treat Moreno as an employee based on its exhibit G-7, Unemployment Tax and Wage Reports for calendar quarters ending June 30, 2009 and March 31, 2009, the company cites tax rulings for the proposition that a partner can never be an employee. The company's prehearing statement characterizes the presence of Moreno's name on the tax and wage reports as "a procedural error made by an unsophisticated businessman" that should not result in finding an additional violation. Neither party explained why the single factor of the tax treatment of Santiago's compensation should be regarded as determinative, and neither addressed the question of what factors other than compensation might be relevant to determining whether a working partner should be treated as an employee.

As explained in *EEOC v. Sidley Austin Brown & Wood*, 315 F.3d 696, 705 (7th Cir. 2002), the problem of line drawing arises "whenever legal consequences turn on classification as partner versus employee, whether in tax and tort cases or in discrimination cases" (citations omitted). That line was subsequently examined in *Clackamas Gastroenterology Associates v. Wells*, 538 U.S. 440, 448-50 (2003), in which the court observed that in considering the question of when partners, officers, members of boards of directors, and major shareholders could qualify as employees for purposes of the Americans with Disabilities Act, the particular title a person has is not necessarily determinative of whether he or she is an employee or a proprietor. The court noted that, "[t]oday there are partnerships that include hundreds of members, some of whom may well qualify as 'employees' because control is concentrated in a small number of managing partners" (citations omitted).

Even before *Clackamas*, courts considering the question looked to a similar rationale in concluding, for example, in *Simpson v. Ernst & Young*, 100 F.3d 436, 443-44 (6th Cir. 1996), that an individual denominated as a partner in a large international accounting firm more closely resembled an employee than a proprietor when he had no right to participate in management decisions or vote for those who did, and lacked other indicia of ownership. And in *Strother v. Southern California Permanente Medical Group*, 79 F.3d 859, 865-66 (9th Cir. 1996), it was held that the district court erred in granting the Medical Group's motion to dismiss the plaintiff's claim of racial discrimination on the grounds that as a bona fide partner in the group she could not be an employee covered by California's Fair Employment and Housing Act (FEHA). Because the district court had resolved the coverage issue solely on the basis of the complaint, the partnership agreement, and the label, "partner," the reviewing court held that there were too many unanswered questions to permit summary judgment at that point without further inquiry.

Id. at 867-68. The court pointed to the fact that there were 2400-2500 "partners" in the Group and that while Strother had some rights, the affairs of the partnership were conducted by a Board of Directors over which she had little control, her compensation was significantly determined by her performance, she could be disciplined for poor performance, and her actual partnership rights were limited. *Id.*

More recently the court in *Solon v. Kaplan*, 398 F.3d 629, 634 (7th Cir. 2005) applied the *Clackamas* rationale to find that where the plaintiff was one of only four general partners and substantially controlled the direction of the firm, his employment and compensation, and the hiring, firing, and compensation of others, he was an employer as a matter of law, and not an employee. While the record here is relatively undeveloped, it appears that Santiago Moreno's situation is more like Solon's than like Strother's. As explained in *Bryson v. Middlefield Volunteer Fire Department, Inc*., 656 F.3d 348, 352 (6th Cir. 2011), the question of a person's employment status is a mixed question of fact and law and in the absence of a factual issue can be resolved as a matter of law. *Accord Simpson*, 100 F.3d at 439. While remuneration is one factor that may be considered in making that determination, that one factor cannot be assigned a determinative role. *Bryson*, 656 F.3d at 354-55.

The business entity here is not one with hundreds of so-called partners as referenced in *Clackamas*. Unlike the partners found to qualify as employees in *Simpson*, Santiago's Repacking is not a large national firm in which any "partner" lacked meaningful control or voting rights. Santiago Moreno is one of only three original partners in Santiago's Repacking. The government's exhibit G-8 reflects that he has a one-third interest and shares equally in profits and losses as well as in the management of the partnership business. The government made no suggestion that Moreno is subject to supervision, discipline, or performance evaluations, or that, apart from the appearance of his name on the unemployment tax and wage reports, there are any other indicia of employee status. The preponderance of the evidence accordingly indicates that Moreno's status is that of a working partner, not an employee.

The government's motion for summary decision will be denied as to liability for Count III and summary decision will be issued in favor of Santiago's Repacking because Moreno is not an employee for whom an I-9 form needed to be prepared.

IV. PENALTIES

A. The Government's Motion

ICE's motion does not expressly address the question of penalty and evidently relies on the Campton affidavit to support its position. The affidavit notes that the fine was calculated in

accordance with ICE methodology[2] based on the percentage of I-9 forms with fineable violations and this resulted in a base fine of $935.00 per violation. Based on the number of employees and the wages reported, the company was found to be a small business, warranting mitigation in the amount of 5%. No finding was made of good faith but neither was there a finding of bad faith, so this factor was treated as neutral. Based on the seriousness of the violations, all the penalties were aggravated by 5%. Because 31 of 60 employees, or 51.7%, were alleged to be unauthorized, additional aggravation in the amount of 5% was added for the 24 violations in Count I. There was no history of previous violations and this factor was treated as neutral. The affidavit says further that negotiations were had about the amount of the fine but that the company had not provided records to support its assertions of financial hardship nor had it demonstrated an inability to pay.

B. Santiago's Repacking's Response

The response also stated that the fines should be adjusted and requested a hearing "for the sole purpose of determining a fine that would constitute an appropriate penalty for the infractions admitted to in Counts I and II." The company did not, however, point to any specific factual issue with respect to any of the statutory penalty factors.

C. Discussion and Analysis

Hearings are not ordinarily conducted in the absence of a genuine issue of material fact, 28 C.F.R. § 68.38(e), because parties should not be put to the burden and expense of a hearing unless it is shown that there are genuine issues of material fact to be determined. Agencies routinely decline to hold hearings where there is no factual dispute of substance. *Veg-Mix, Inc. v. Dep't of Agriculture*, 832 F.2d 601, 607-08 (D.C. Cir. 1987).

It is apparently undisputed that Santiago's Repacking is a small business and that it has no history of previous violations. ICE treated good faith as a neutral factor and Santiago's Repacking did not contest this treatment. Neither did the company dispute the seriousness of the violations or challenge the government's prima facie showing that the 24 individuals named in Count I were unauthorized for employment.

[2] Worksite Enforcement, U.S. Immigration & Customs Enforcement, *Guide to Administrative Form I-9 Inspections and Civil Monetary Penalties* (2008). The relevant portion of the Guide is included in U.S. Immigration and Customs Enforcement (ICE), *Form I-9 Inspection Overview* (2012), *available at* http://www.ice.gov/news/library/factsheets/i9-inspection.htm.

The fines proposed are at the high end of the permissable penalty range. Considering the record as a whole, the statutory factors, and the evidentiary submissions, it appears that they should be adjusted. This is a small company with ordinary business income in 2010 of only $58,457.00; its payroll for that entire year was $226,531.00. The penalties as proposed are thus quite close to the total of the company's business income for 2010. In the exercise of discretion the penalties will be adjusted to $400.00 for each of the violations in Count I and $350.00 for each of the violations in Count II for a total of $20,100.00.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Santiago's Repacking was formed as a general partnership under Arizona law in 2005 and its business is located in Nogales, Arizona.

2. ICE served Santiago's Repacking with a Notice of Inspection on or about July 1, 2009 in which it requested that the company produce its I-9 forms, payroll records, and other employment records for its then current employees and for former employees who were terminated after January 1, 2009.

3. Santiago's Repacking provided ICE with copies of various documents for 60 individuals, but had no I-9s for them.

4. Santiago's Repacking provided ICE with only one I-9 form, that of Santiago Moreno.

5. Santiago Moreno told ICE that he had never completed a Form I-9 in fifteen years in business, and lacked knowledge about the form.

6. Santiago Moreno told ICE his practice was to ask all new employees for documents and that he routinely made and retained copies of the documents employees proffered.

7. Santiago's Repacking hired 54 individuals for employment in the United States and failed to prepare or present I-9 forms for them upon request.

8. A Notice of Suspect Documents was issued to Santiago's Repacking on or around April 19, 2010 with the names of 31 individuals ICE said appeared to be unauthorized for employment in the United States.

9. ICE issued a Notice of Intent to Fine (NIF) to Santiago's Repacking on September 10, 2010.

10. Santiago's Repacking filed a request for hearing on October 8, 2010.

B. Conclusions of Law

1. Santiago's Repacking is an entity within the meaning of 8 U.S.C. § 1324a(a)(1).

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

3. The general rule is that an individual is not an employee of an enterprise if the individual has an ownership interest and controls all or part of the enterprise. Restatement (Third) of Employment Law § 1.03.

4. In considering the question of when partners, officers, members of boards of directors, and major shareholders could qualify as employees for purposes of the Americans with Disabilities Act, the particular title a person has is not necessarily determinative of whether he or she is an employee or a proprietor. *Clackamas Gastroenterology Associates v. Wells*, 538 U.S. 440, 448-50 (2003).

5. The preponderance of the evidence in this case indicates that Santiago Moreno is a working partner, and not an employee of Santiago's Repacking.

6. Agencies routinely decline to hold hearings where there is no factual dispute of substance. *Veg-Mix, Inc. v. Dep't of Agriculture*, 832 F.2d 601, 607-08 (D.C. Cir. 1987).

7. The government is entitled to summary decision as to liability for failure to present I-9 forms upon request for 54 current and former employees.

8. The government is not entitled to summary decision with respect to violations in the I-9 form for Santiago Moreno because he is not an employee for whom the company was required to present an I-9 form.

9. In the exercise of discretion, the penalties are adjusted to $400.00 for each of the violations in Count I and $350.00 for each of the violations in Count II, for a total of $20,100.00.

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 government's motion for summary decision is granted as to liability for Counts I and II and denied as to liability for Count III. Summary decision as to Count III is entered in favor of the respondent Santiago's Repacking finding no liability for Count III. Penalties are assessed in the total amount of $20,100.00. The parties are free to negotiate a payment schedule in order to minimize the impact on the business.

SO ORDERED.

Dated and entered this 24th day of August, 2012.

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.