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

May 30, 2012

UNITED STATES OF AMERICA, Complainant, v. ASSOCIATED PAINTERS, INC., Respondent.	))))))))	8 U.S.C. § 1324a Proceeding OCAHO Case No. 11A00033

ORDER DENYING GOVERNMENT'S MOTION FOR SUMMARY DECISION

I. PROCEDURAL HISTORY

The Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a three-count complaint alleging that Associated Painters, Inc. (API or the company) violated 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). Count I asserts that API hired Armando Araiza, Oscar Ponce and Jose Ramirez knowing them to be unauthorized for employment in the United States. Count II alleges that API failed to prepare and/or present I-9 forms for four named employees, and Count III charges that the company failed to ensure that the employee properly completed section 1, and/or failed itself to properly complete sections 2 or 3 of the I-9 form for 40 named employees.

API filed an answer denying the material allegations of Count I, admitting liability for Counts II and III, and disputing the reasonableness of the proposed penalties. Presently pending is the government's motion for summary decision for liability as to Count I, to which API filed a response. The motion is ripe for decision. The parties suggest that the basic facts surrounding this allegation are not in dispute, and that once the liability issue is resolved with respect to Count I, it is likely that they can resolve their remaining differences with respect to the appropriate penalties.

II. BACKGROUND INFORMATION

Associated Painters, Inc. is a corporation having its headquarters at 11512 Airport Road in Everett, Washington, and additional working locations in Goodyear, Arizona and Oklahoma City, Oklahoma. The company is engaged in the business of aircraft refinishing, including repainting airplanes and creating special advertising paint schemes for the commercial, military and private markets. Rodney Friese is the owner of API and has served as its president since at least November 22, 2000.

The record reflects that API was the subject of an inspection by legacy INS in October 2000, as a result of which INS sent API a letter dated October 25, 2000 advising that social security administration records could not confirm the accuracy of certain information that had been entered in section 1 of the I-9 forms of 34 of its employees who either attested to being citizens or nationals of the United States or failed to check any box to indicate their immigration or citizenship status. The letter advised that while this did not necessarily mean that the employees were unauthorized continuing to employ an individual after receiving such a notice could subject the employer to penalties for a knowing hire violation if the employer does not resolve the discrepancy and the individual is not work authorized. The letter set out a series of steps INS recommended in order to reverify the status of the listed employees.

A subsequent letter from API to INS dated November 27, 2000 reported that all the questioned employees had been released as of November 24, 2000. The letter also transmitted an "Attestation of Compliance-Reverification of Employees" form dated November 22, 2000 and signed by Rodney Friese. The Attestation noted that reverification was unnecessary for employees who were no longer working for the company, but affirmed that "should any of the individuals listed in this Notice seek future employment, I am required to properly complete a Form I-9 with documents other than those indicated on the Notice."

On or about July 1, 2009, ICE conducted an inspection of the company in the course of which it was discovered that Oscar Ponce had been rehired on October 6, 2004, Jose Ramirez on March 5, 2008, and Armando Araiza on September 16, 2008. In each instance the employee's name was on the list from the October 2000 inspection and the individual had used the same social security number to verify his employment authorization as had been used in the earlier hire. A Notice of Intent to Fine was subsequently served on API on June 18, 2010. The company made a timely request for a hearing on July 15, 2010 and all conditions precedent to the institution of this proceeding have been satisfied.

III. POSITIONS OF THE PARTIES

A. The Government's Position

ICE asserts that there are no genuine issues of material fact and that the only issue in need of

resolution is whether Associated Painters hired Armando Araiza, Oscar Ponce, and Jose Ramirez knowing them to be unauthorized to work in the United States. The government points to regulations that define "knowing" to include,

> not only actual knowledge but also knowledge which may fairly be inferred through notice of certain facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition. Constructive knowledge may include, but is not limited to, situations where an employer:
> ...
> (ii) Has information available to it that would indicate that the alien is not authorized to work, such as Labor Certification and/or an Application for Prospective Employer; or
>
> (iii) Acts with reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its workforce or to act on its behalf.

8 C.F.R. § 274a.1(*l*)(1). ICE asserts that Associated Painters had actual and constructive knowledge of the unauthorized status of the three individuals based on Rodney Friese's actual notice in 2000 and his acknowledgment at that time that if any of the employees on that list were to be rehired the company would have to require that they present different documents for reverification than those they presented in 2000.

In support of its motion the government cited *Collins Food International, Inc. v. INS*, 948 F.2d 549, 555 (9th Cir. 1991), in which the court elaborated on the findings of constructive knowledge it upheld in *Mester Manufacturing Co. v. INS*, 879 F.2d 561 (9th Cir. 1989) and *New El Rey Sausage Co. v. INS*, 925 F.2d 1153 (9th Cir. 1991). ICE contends that the undisputed facts in this case are "just as compelling" as those in *Mester* and *New El Rey*, that Friese at minimum acted with "reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its workforce," and that this is sufficient to support a finding of constructive knowledge.

The government's motion was accompanied by exhibits G-1) the complaint with attachments (8 pp.); G-4)[1] the Notice of Inspection and document subpoena dated July 1, 2009, and Receipt for Property dated July 8, 2009 (5 pp.); G-5) Forms I-9 for Armando Araiza, Oscar Ponce and Jose Ramirez (3 pp.); G-6) Washington state unemployment insurance quarterly wage detail report for quarter 4 of 2008 (3 pp.); G-8) a letter dated Oct. 25, 2000 from INS to Associated Painters, Inc.

[1] The government identified exhibits G-2, G-3, G-7, G-10 or G-11 in its prehearing statement but did not include them with its motion.

(3 pp.); G-9) a letter dated Nov. 27, 2000 from Associated Painters, Inc. to INS and an Attestation of Compliance-Reverification of Employees signed on Nov. 22, 2000 by Rodney Friese (2 pp.); G-12) a Summary of Unauthorized Employees (2 pp.).

B. The Company's Position

API acknowledged its errors, but contends that Friese's conduct amounts to negligence only, and does not rise to the level of reckless disregard needed to support a finding of constructive knowledge. In support of its position the company relies principally on the certified statement of Rodney Friese.

The statement says that because of the company's decentralized recordkeeping, the lapse of time, and the number of employment applications considered, these hiring errors took place without the oversight and knowledge of the owners and officers of API, and that the company has now corrected the breakdown in checks and balances by enrolling in the e-verify system. The Friese statement points out that the hires actually took place from four to eight years after the Attestation of Compliance was signed in 2000, that the three individuals were hired in two different locations by three different managers, and that the individuals simply slipped through the cracks unknowingly. The statement is uncontested.

API's response was accompanied by exhibits A) Respondent's President Certified Statement (5 pp.); and B) printouts from Associated Painters, Inc.'s and Federal Aviation Administration's websites (18 pp.).

IV. LEGAL STANDARD

The boundaries of constructive knowledge are not fully developed in OCAHO case law. *See United States v. Jonel, Inc.*, 8 OCAHO no. 1008, 175, 188 (1998).[2] It is well established, however, that constructive knowledge may be found when an employer receives specific information from a governmental enforcement agency that casts doubt on the employment authorization of an employee, and the employer subsequently continues to employ the individual

[2] 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.

without taking adequate steps to reverify the individual's employment eligibility. *See United States v. Candlelight Inn*, 4 OCAHO no. 611, 212, 223-24 (1994); *United States v. Noel Plastering & Stucco, Inc.*, 3 OCAHO no. 427, 296, 298-300 (1992), *aff'd*, 15 F.3d 1088 (9th Cir. 1993); *United States v. New El Rey Sausage Co.*, 1 OCAHO no. 66, 389, 408-11 (1989), modified on other grounds by the Chief Administrative Hearing Officer, 1 OCAHO no. 78, 542 (1989), *aff'd*, 925 F.2d 1153 (9th Cir. 1991); *United States v. Mester Mfg. Co.*, 1 OCAHO no. 18, 53, 76-77 (1988), *aff'd*, 879 F.2d 561 (9th Cir. 1989). *See generally*, John B. Kaiser, Note, *IRCA's Employer Sanctions Provisions Under* Mester v. INS: *Constructing a Constructive Knowledge Standard*, 4 Geo. Immigr. L.J. 681 (1990).

In reversing the administrative law judge's finding of constructive knowledge in an initial hiring case however, the court in *Collins* gave clear warning that the doctrine must be "sparingly applied" in order to preserve congressional intent. *Collins* emphasized that the Immigration Reform and Control Act of 1986 (IRCA) was "delicately balanced" to prevent the employment of unauthorized aliens while still avoiding discrimination, and said that too expansive a view of constructive knowledge would risk encouraging employers to avoid liability through discriminatory practices. 948 F.2d at 554-55. The court distinguished its prior decisions in *Mester* and *New El Rey*, noting that unlike the employer in *Collins*, both *Mester* and *New El Rey* involved employers that had been given express notice from INS that the suspect employees were using false cards or alien registration numbers belonging to someone else, after which the company continued to employ those individuals without reverifying their authorization. The court reiterated more recently in *Aramark Facility Services v. Service Employees' International Union*, 530 F.3d 817, 825 (9th Cir. 2008), that constructive knowledge must be narrowly construed and sparingly applied in order to preserve the original congressional intent.

United States v. Jewell, 532 F.2d 697, 700-02 (9th Cir. 1976), upon which the decisions in *Mester* and *New El Rey* were predicated, explains the historical criminal law basis for the doctrine of constructive knowledge, noting that both English and American law authorities agree that the term "knowledge" can include a state of mind that includes "willful blindness," that is, a circumstance where an individual has suspicion aroused, but omits to make further inquiries thereby avoiding confirmation. *See* Ira P. Robbins, *The Ostrich Instruction: Deliberate Ignorance as a Criminal Mens Rea*, 81 J. Crim. L. & Criminology 191 (1990).

V. DISCUSSION

As an initial matter, API's suggestion that liability cannot attach simply because the owners and officers of a company themselves lack the requisite knowledge must be rejected. Our case law is clearly to the contrary. Owners and managers routinely delegate all kinds of responsibilities to their agents, and are routinely held responsible for the acts of those agents. *United States v. Y.E.S. Indus., Inc.*, 1 OCAHO no. 198, 1306, 1319 (1990) (a principal is chargeable with and bound by notice to its agents).

I cannot, however, concur with the government's assertion that the facts in this case are as compelling as those in *Mester* and *New El Rey*. Those cases involved employers who continued to employ suspect employees without interruption and without taking any corrective action at all after the employers had received specific notice from INS about the questionable status of the employees. Unlike the employers in those cases, the company here did not continue to employ the individuals on the list without interruption or corrective action after it received notice of the discrepancies in their documents in 2000; either it took prompt action to terminate them or they left after being requested to submit additional documents, but none continued to be employed by API after November 2000. The four to eight year period intervening between 2000 and the rehire of those three individuals readily distinguishes the facts in this case from those in *Mester* and *New El Rey.*

As Judge McGuire observed in *United States v. Aid Maintenance Co.*, 7 OCAHO no. 951, 475, 485 (1997), moreover, both *Mester* and *New El Rey* made express findings of "willful blindness." That state of mind has also been characterized as "conscious disregard," "deliberate ignorance," or by some other formulation implying a conscious avoidance of positive knowledge. The basic principle as it has been articulated in OCAHO case law is that the employer is not entitled to cultivate deliberate ignorance. *See United States v. Sunshine Building Maintenance, Inc.*, 7 OCAHO no. 997, 1122, 1151 (1998); *Aid Maintenance*, 7 OCAHO no. 951 at 485. The state of mind described is one that involves a degree of culpability greater than mere negligence.

In this case, what happened during the four to eight years intervening between 2000 and the hiring of the suspect employees is nowhere elaborated. For all that the record reflects, Friese promptly forgot about the Attestation of Compliance and did nothing at all to implement it. On the other hand, for all that the record discloses he took prompt steps to implement the Attestation by issuing directives to all the supervisors and hiring managers and by providing specific training for I-9 preparers every six months. We simply do not know. Similarly, apart from the general assertions in the Friese declaration about the volume of applications, the decentralized recordkeeping, and the lapse of time, we have minimal information as to exactly how it came about that the three individuals "slipped through the cracks."

Context matters. The totality of the circumstances matters. Inferences are drawn from facts, not from legal syllogisms and not from the air. The undisputed facts presented here are that Friese made a commitment in 2000 to reverify the employment eligibility of 34 named individuals, and that three of those individuals somehow got hired four to eight years later without the reverification Friese promised. This record is otherwise devoid of evidence as to any surrounding facts and circumstances from which it may be inferred that Araiza, Ponce, and Ramirez were hired because Friese or others at API failed to exercise reasonable care, abandoned their I-9 responsibilities, elected to look the other way, acted recklessly, or otherwise engaged in culpable conduct. Not only do we not know what Friese did in 2000 to notify the hiring managers, we do not know what the qualifications of those managers were, what training was provided to them, or what their turnover rate was. We know virtually nothing about the

circumstances under which the hires took place in 2004 and 2008.

The regulatory language of 8 C.F.R. § 274a.(*l*)(1) speaks of "knowledge which may fairly be inferred through notice of facts and circumstances which would lead a person, through the exercise of reasonable care, to know about a certain condition," but where the particular facts and circumstances surrounding the hiring events are nowhere disclosed, there is no factual basis upon which to assess whether or not API exercised reasonable care. ICE contends that API acted with "reckless and wanton disregard for the legal consequences of permitting another individual to introduce an unauthorized alien into its workforce," and for all we know maybe it did. On the other hand, maybe it didn't. The record provides us no factual basis upon which to make a finding either way, and speculation does not provide a sufficient basis either.

OCAHO cases finding constructive knowledge uniformly present factual situations involving more egregious conduct than is reflected in the scant record here. In *Sunshine*, 7 OCAHO no. 997 at 1161, for example, the employer was found liable based on constructive knowledge where a preponderance of the evidence established that the company's contract manager had actually abandoned his I-9 responsibilities to subordinates who in some cases didn't speak English, did not understand the employment eligibility verification system, or were themselves unauthorized for employment in the United States. In *United States v. Carter*, 7 OCAHO no. 931, 121, 144-46 (1997), constructive knowledge was found based on evidence that Carter delegated the I-9 responsibilities to a foreman who did not understand the instructions in English and the company did not provide any training whatsoever to that individual. The evidence in *United States v. Cafe Camino Real, Inc.*, 2 OCAHO no. 307, 29, 38-39 (1991), showed that the employer-owner of a restaurant permitted a friend to introduce a stranger into the workforce as a busboy without making any inquiry at all as to individual's status and without preparing an I-9 form for him. While Carter denied knowledge of the individual's immigration status, his friend knew that the individual was unauthorized. Constructive knowledge was found because Carter abandoned the company's I-9 responsibilities altogether. No such facts are alleged here, and no such evidence has been presented.

Finally, I note that it is not altogether even clear on this record that Araiza, Ponce, and Ramirez were each unauthorized for employment in the United States. The Friese statement asserts that ICE issued a correction letter indicating that one of the individuals was actually authorized for employment, but that individual is not named, no other details were provided, and the correction letter was not made a part of the record.

Aramark warns us that the concept of constructive knowledge must be narrowly construed and sparingly applied. 530 F.3d at 824-85. *Collins*, too, cautions us against taking too expansive a view of constructive knowledge. 948 F.2d at 554-55. Considering those admonitions as well as the thrust of OCAHO case law, liability may not be found on this record. While there is no doubt that Friese or another agent or agents of API breached the company's duty to reverify the employment eligibility of Armando Araiza, Oscar Ponce, and Jose Ramirez, the bare facts in

evidence in this case do not support a conclusion that either Friese or others actually knew of any suspicious circumstances at the time of hire and deliberately chose to look the other way. There is no circumstantial or other evidence to support an inference that the employer or agents of the employer acted with a level of culpability sufficient to support a finding of constructive knowledge.

Because the government bears the burden of proof to show constructive knowledge by a preponderance of the evidence and has not done so, its motion for summary decision as to Count I of the complaint must be denied.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

In addition to the materials submitted by the parties in connection with the pending motion I have also considered the record as a whole, including pleadings, exhibits, and other materials of record, and on the basis of that record make the following findings and conclusions.

A. FINDINGS OF FACT

1. Associated Painters, Inc. is a private corporation having its headquarters at 11512 Airport Road in Everett, Washington, and additional working locations in Goodyear, Arizona and Oklahoma City, Oklahoma.

2. Associated Painters, Inc. is in the business of aircraft refinishing, including repainting airplanes and creating special advertising paint schemes, and serves the commercial, military and private markets.

3. Rodney Friese is the owner of Associated Painters, Inc., and has served as its president since at least November 22, 2000.

4. Legacy INS inspected Associated Painters, Inc. in October 2000, and on October 25, 2000, sent Associated Painters, Inc. a list of 34 employees for whom information entered in section 1 of their I-9 forms could not be verified; the names of Armando Araiza, Oscar Ponce and Jose Ramirez were on that list.

5. Rodney Friese signed an "Attestation of Compliance-Reverification of Employees" on November 22, 2000 among the terms of which was that if "any of the individuals listed in this Notice seek future employment, I am required to properly complete a Form I-9 with documents other than those indicated on the Notice."

6. On November 27, 2000, Associated Painters, Inc. advised INS that it had "released" all 34 employees included in the INS Notice, including Armando Araiza, Oscar Ponce and Jose

Ramirez.

7. On or about July 1, 2009 United States Department of Homeland Security, Immigration and Customs Enforcement conducted an inspection of Associated Painters, Inc. in the course of which it was discovered that Oscar Ponce was rehired on October 6, 2004, Jose Ramirez was rehired on March 5, 2008, and Armando Araiza was rehired on September 16, 2008 using the same social security numbers to verify their work authorization as were in the 2000 notice.

8. United States Department of Homeland Security, Immigration and Customs Enforcement served a Notice of Intent to Fine (NIF) on Associated Painters, Inc. on June 18, 2010 alleging that Associated Painters, Inc. violated the Immigration and Nationality Act, 8 U.S.C. § 1324a.

9. Associated Painters, Inc. requested a hearing before an administrative law judge on July 15, 2010.

10. The United States Department of Homeland Security, Immigration and Customs Enforcement filed a complaint in three counts against Associated Painters, Inc., Count I of which alleged that Associated Painters, Inc. hired Armando Araiza, Oscar Ponce and Jose Ramirez knowing them to be aliens unauthorized for employment in the United States.

11. Associated Painters, Inc. filed an answer to the complaint denying the material allegations of Count I, but admitting liability for Counts II and III.

12. The parties agreed that there were no genuine issues of material fact respecting Count I of the complaint and sought resolution of the issue of whether the undisputed facts supported a finding of constructive knowledge.

B. CONCLUSIONS OF LAW

1. Associated Painters, Inc. is an entity within the meaning of 8 U.S.C. § 1324a(a)(1) (2006).

2. All jurisdictional prerequisites to this action have been satisfied.

3. A principal is chargeable with and bound by notice to its agents. *United States v. Y.E.S. Industries, Inc.*, 1 OCAHO no. 1998, 1306, 1319 (1990).

4. Associated Painters, Inc. breached its duty to reverify the employment eligibility of Armando Araiza, Oscar Ponce and Jose Ramirez upon rehire by failing to examine different documents than those that were used in the initial verification.

5. In order to support a finding of constructive knowledge, the evidence must demonstrate that the employer or its agents acted with a higher degree of culpability than has been established on

this record.

6. The record in this case does not support a conclusion that API hired Armando Araiza, Oscar Ponce, and Jose Ramirez knowing them to be unauthorized for employment in the United States.

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 as to Count I is denied. The parties are requested to file a status report on or before June 29, 2012 advising whether they have been able to reach agreement about the appropriate penalties for Counts II and III, or, if not, whether assistance from this office will be needed.

SO ORDERED.

Dated and entered this 30th day of May, 2012.

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Ellen K. Thomas
Administrative Law Judge