

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

September 19, 2014

UNITED STATES OF AMERICA,)	
Complainant,)	
)	8 U.S.C. § 1324a Proceeding
v.)	OCAHO Case No. 14A00010
)	
SPEEDY GONZALEZ CONSTRUCTION, INC.,)	
Respondent.)	
_____)	

ORDER GRANTING IN PART AND DENYING IN PART THE GOVERNMENT’S
MOTION FOR SUMMARY DECISION AS TO LIABILITY, AND SCHEDULE
FOR SUPPLEMENTAL FILINGS

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), in which the United States Department of Homeland Security, Immigration and Customs Enforcement (ICE or the government) filed a six-count complaint alleging that Speedy Gonzalez Construction, Inc. (SGC or the company) engaged in various violations of 8 U.S.C. 1324a(a)(1)(B).

Counts I through IV of the complaint allege that SGC failed to ensure that eighty-four employees properly completed section 1 of Form I-9, and/or that SGC itself failed to properly complete section 2 or 3 of their forms. ICE grouped these eighty-four alleged violations into four separate counts based on its calculation of the proposed penalties.¹ Counts V and VI allege that the

¹ Count I names one employee for whose I-9 violation the government found no mitigating or aggravating circumstances; Count II names nineteen employees for whose I-9 violations ICE applied a five percent penalty enhancement; Count III names twenty-nine employees for whose I-9 violations ICE applied a ten percent penalty enhancement; and Count IV names thirty-five employees for whose I-9 violations the government applied a fifteen percent enhancement.

company failed to prepare and/or present I-9 forms for 101 employees. These violations too were listed in separate counts based on the penalty calculations.²

SGC filed an answer denying the material allegations and raising affirmative defenses, after which the parties completed prehearing procedures. Presently pending is the government's motion for summary decision which is addressed only to the issue of liability. The company filed a timely response in opposition to the government's motion, and the issue of liability is ready for resolution. The question of penalties is taken under advisement and a schedule will be provided for supplemental filings as to the question of penalties.

II. BACKGROUND INFORMATION

Speedy Gonzalez Construction, Inc. is a construction company located in Glendale, Arizona. The company's Annual Report and Certificate of Disclosure identifies Salvador Gonzalez as its president and the owner of forty-nine percent of the shares, and Mary Gonzalez as the company's vice-president and owner of fifty-one percent of the shares. Salvador and Mary Gonzalez are the company's only shareholders and officers.

ICE served SGC with a Notice of Inspection (NOI) and administrative subpoena on November 19, 2009, in response to which the company produced I-9 forms for 156 active and terminated employees, in addition to other documents including payroll records. ICE served the company with a Notice of Suspect Documents (NSD) on March 10, 2010, identifying thirty-eight current and seventeen former employees who appeared to be unauthorized for employment. The government subsequently served a notice of discrepancies identifying an additional three employees who appeared to be unauthorized. On August 11, 2011 ICE served another NSD on the company, identifying forty-two individuals who appeared to be unauthorized for employment. ICE also served the company with a Notice of Technical or Procedural Failures (NTPF) on August 11, 2011.

On November 23, 2011, ICE served SGC with a Notice of Intent to Fine, after which the company made a timely request for hearing on December 27, 2011. ICE filed its complaint on December 3, 2013, and all conditions precedent to the institution of this proceeding have been satisfied.

² Count V names sixty employees for whose I-9 violations ICE applied a ten percent enhancement, and Count VI names forty-one employees for whose I-9 violations ICE applied a fifteen percent enhancement.

III. THE GOVERNMENT'S MOTION

The government seeks summary decision as to liability for 185 violations, and says that there are no genuine issues of material fact with respect to the allegations. First, the motion contends that simple visual inspection of the I-9 forms at issue in Counts I-IV readily establishes the violations alleged. With respect to nine of these employees, ICE says visual inspection demonstrates that the company failed to ensure that they properly completed section 1 of their I-9 forms. ICE points out that there is no employee signature on the section 1 attestation for Arturo Garcia, Christopher Nelson, or Agustin Delamora, no immigration status checked on the forms for Delamora, Ernesto Franco, Jose Jauregui, Sergio Pelayo Martinez, or Francisco Garcia Vargas, and no lawful permanent resident number entered on the forms for Martin Nunez or Jesus Valencia. An employer's failure to ensure that the employee signs the attestation, checks a box to show his or her immigration status, or includes his or her alien registration number, are all serious, substantive violations.

ICE next asserts that no material factual dispute exists as to eighty-three section 2 violations alleged in counts II through IV, and visual inspection of the I-9 forms reflects that the company failed in each instance to properly complete section 2. Finally, with respect to Counts V and VI, ICE contends that there is no factual dispute as to whether the company failed to timely prepare and/or present I-9 forms for the 101 employees named in these counts. The government says that ICE compared Arizona Department of Economic Security documents and SGC's own payroll records with the I-9 forms the company presented, and that ICE's inspection revealed the names of 101 employees for whom the company did not present I-9 forms.

ICE's exhibits, presented with the government's prehearing statement, include G-1) Complaint and Notice of Intent to Fine (17 pp.); G-2) Certificate of Service; G-3) Notice of Inspection and Administrative Subpoena, Notice of Suspect Documents, Notice of Discrepancies, and Notice of Technical and Procedural Failures (7 pp.); G-4) Confirmation of Notice of Inspection (2 pp.); G-5) Receipt for Property; G-6) I-9 Forms from the company (200 pp.); G-7) Copies of Arizona Department of Economic Security Unemployment Tax and Wage Reports³ (39 pp.); G-8) Arizona Corporation Commission documents (7 pp.), and; G-9) Affidavit of Keith Campton, Auditor (10 pp.).

³ The exhibit includes the Arizona Department of Economic Security's tax wage listing for years 2007 and 2009. For the year 2008, the exhibit includes what appear to be the company's internal records of wage and tax information.

IV. SGC'S RESPONSE

The company's response says that summary decision should be denied because there are genuine issues of material fact regarding whether I-9 forms were required by law for some of the individuals named in the complaint. SGC denies liability for the violation alleged in Count I, for six of the violations alleged in Count II, and for six of the violations alleged in Count III. No specific violations in Count IV were addressed or disputed. SGC contends that some of the individuals named in the complaint either did not work for the company at all or worked fewer than three days, or were owners of the company, not employees. SGC said further that it prepared replacement forms for some of the missing I-9s and contends that it should not be liable for sixteen of the violations alleged. With respect to Counts V and VI, SGC contends either that it was not required to complete I-9s for some of the individuals named, and/or that it substantially complied with the requirements for others.

The affidavit of SGC's office manager, Cristian Diaz, accompanied the company's response. Diaz states in pertinent part that ICE's audit revealed that some of SGC's I-9s were missing from the employee files for reasons unknown to SGC, and that replacement forms were then completed for the individuals who were still employed, with information and documentation supplied by the employees. Diaz says the company put the information on the 2009 version of the form, but dated each form with the employee's actual hire date. No replacement forms were prepared, however, for former employees. Diaz says the reason the employee information was put on the 2009 version of the form was "in order to not give the impression that they were the original Forms I-9, but replacements." The Diaz affidavit states further that the company does not hire day laborers, and that the expectation with every hire is that the individual will be a full-time employee.

For the only individual named in count I, Garcia Arturo, SGC states that although the records reflect a hire date of September 29, 2008 and a termination date of October 4, 2008, this individual either never worked a full day or never returned to work after the first day. The company asserts that Garcia Arturo's information was run through the E-Verify system⁴ and he was determined to be authorized for employment, but that SGC also never paid him any wages for labor.

⁴ E-Verify is an internet-based system operated by the Department of Homeland Security's Citizenship and Immigration Services, in cooperation with the Social Security Administration (SSA). It is used to verify employment eligibility by comparing information from an employee's I-9 form with 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.

With respect to the allegations in Count II, the company specifically identifies six of the nineteen named individuals for whom it says no I-9 was required. The company argues that it should not be held liable for the alleged violations relating to forms for Velia Gonzales, Julio Rodas, Franco Miguel, Christopher Nelson, Jose Pena, and Amber Wallace, because each individual either worked for three or fewer days and did not return, and/or because the company's use of the E-Verify system for the individual constitutes good faith compliance and is "equivalent to the examination certification" in section 2 of the I-9 form.

For count III, the company disputes liability for six of the twenty-nine named individuals. SGC first asserts that neither Mary Gonzalez nor Salvador Gonzalez is an employee of the company because they are the joint owners and have significant control of the company, so they are not individuals for whom I-9 forms are required.

The company denies that the I-9 form for Rodolfo De La Torre was backdated. SGC says De La Torre's hire date was January 19, 2009, and he was run through the E-Verify system that day and found to be authorized, and that his I-9 is not backdated at ICE contends.

SGC asserts further that although Jose Lopez Sandoval's I-9 form could not be found at the time of inspection, company records indicate his information was run through E-verify at the time of his hire on August 11, 2008, and he was found authorized for work. SGC says the E-Verify report is evidence that the company examined the employee's documents and is "equivalent to the examination certification and fulfills the purpose of a Form I-9," thus constituting substantial compliance. Similarly, with respect to Juan Calderon, although section 2 of his I-9 was not properly completed, SGC says he was processed through E-Verify on October 15, 2008, and found eligible for employment. Finally, the company argues that it should not be liable for violation involving Manuel Rodriguez either, because he too was run through E-Verify on his hire date of October 21, 2008, and determined to be unauthorized for employment. Rodriguez was terminated as a result of the report.

The company did not specifically contest liability for any of the violations listed in count IV.

For counts V and VI, the company disputes liability for sixteen of the 101 violations alleged. The company says Victor Arreola worked only for two days despite the fact that SGC's records reflect a hire date of September 10, 2007 and a termination date of September 15, 2007, and that Arreola was paid only \$162. The company says Joseph Cuevas worked for only three days, December 10, 2007, December 12, 2007, and December 14, 2007, and he was paid only \$199.75. SGC says Martin De La Hoya worked for three days, April 23, 2007 to April 26, 2008 (sic) and was paid \$422.50; Jorge Delgado worked two days and was paid \$170; Javier Leyva Arceta worked for three days and was paid \$265; Ricardo Marin worked for three days and was paid \$260; Jose Robledo worked for one day and was paid \$91; Felipe Varela worked for three days

and was paid \$517; Samuel Vega worked three days and was paid \$243; Sergio Catzin worked one day and was paid \$140; and Gregorio Medina worked for three days and was paid \$332. SGC contends that it should not be liable for the alleged violations involving these individuals.

The company says that although no I-9 form was presented for Gerardo Chacon Arroyas, an I-9 form was prepared for him on his date of hire, July 23, 2008 and his information was run through the E-Verify system on July 24, 2008. SGC says the E-Verify report evidences that the company examined his documents and is “equivalent to the examination certification” in section 2 and shows good faith compliance. Similarly, for Julio Garcia Lopez, SGC contends that an I-9 form was prepared on his date of hire, July 19, 2008, he was run through E-Verify and was found eligible for work. The company says it “made good faith compliance by auditing the employee’s documents through the E-Verify system.”

With respect to Richard Silva, SGC contends that an I-9 form was prepared on his hire date of November 24, 2008, he was run through the E-Verify system that same day and terminated twelve days later. For Zacarias Martinez Ceballos and Ali Torres, SGC says the forms were prepared for those individuals on their respective hire dates of August 18, 2008 and August 28, 2008; both individuals were run through E-verify, and both were terminated, the former thirteen days after his hire date and the latter twelve days after his hire date. The company again argues that the examination of the documents and use of E-Verify constitute good faith compliance with the requirements of the statute, and the company should not be liable for those violations.

The company’s exhibits, which accompanied its prehearing statement, include R-1) E-Verify report from September 1, 2006 through September 30, 2009; R-2) E-Verify report from February 27, 2008 through September 30, 2009; R-3) E-verify report from September 1, 2009 through September 30, 2010; R-4) E-Verify report for December 2009; R-5) E-Verify report from July 1, 2011 through October 31, 2012; R-6) E-Verify Report for June 2013; R-7) SGC’s Employee Handbook (70 pp.); and R-8) Affidavit of Salvador Gonzalez (2 pp.).

V. DISCUSSION AND ANALYSIS

For the reason more fully set forth herein, the government’s motion for summary decision will be granted in part and denied in part.

A. Employees who allegedly worked for three or fewer days

An I-9 form is timely completed when the individual completes Section 1 at the time of hire, and the employer attests within three business days of hire that the employee’s documents were physically examined and that they appear to be genuine and to relate to the individual. 8 C.F.R. §

274a.2(b)(1)(ii). Thus even if an employee works for only three days, section 2 should have been completed on the third day. An employer who hires an individual for employment expected to last fewer than three business days is required to complete the form and sign the attestation at the time of hire. *See United States v. A&J Kyoto Japanese Rest.*, 10 OCAHO no. 1186, 5 (2013).⁵ However, where an individual is hired with the expectation of continued employment, but promptly quits or fails to return, thereby frustrating the employer's efforts to complete the I-9 form, an employer may be able to avoid liability for failure to complete the section 2 attestation. *Id.* (citing *United States v. ABC Roofing and Waterproofing*, 2 OCAHO no. 358, 447, 464 (1991), *aff'd in pertinent part*, 2 OCAHO no. 358, 435, 441 (1991) (modification by Chief Administrative Hearing Officer). In determining whether the failure to complete the form is excusable based on an employee's failure to continue in employment, the expectations of the parties with respect to the duration of employment, as well as the specific facts and circumstances surrounding the hire, must be evaluated on a case by case basis. *United States v. Two for Seven, LLC*, 10 OCAHO no. 1208, 6 (2013).

Here the company contends that the following individuals were hired, but quit or were terminated within three days, or that they never worked for the company at all: Garcia Arturo, Christopher Nelson, Jose Pena, Manuel Rodriguez, Victor Arreola, Joseph Cuevas, Martin De La Hoya, Jorge Delgado, Javier Leyva Arceta, Ricardo Marin, Jose Robledo, Felipe Varela, Samuel Vega, Sergio Catzin, and Gregorio Medina. The company cites to Exhibit A, the affidavit of Cristian Diaz, in support of its assertions as to the number of days worked respectively by Victor Arreola, Joseph Cuevas, Martin De La Hoya, Jorge Delgado, Javier Leyva Arceta, Ricardo Marin, Jose Robledo, Felipe Varela, Samuel Vega, Sergio Catzin, and Gregorio Medina, but the Diaz affidavit is wholly silent as to the length of any specific employee's tenure. Rather, the affidavit says in pertinent part only that SGC does not hire day laborers, that every employee is hired with the intention of full-time employment, and that the information provided in the company's response to the government's motion "is correct to the best of my knowledge."

Although the company's response provides dates after which it says specific employees never returned to work, the company offered no actual evidence to show when the individuals were

⁵ 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>.

terminated. Instead, SGC's motion is replete with factual allegations that are unsupported by adequate evidence. Factual assertions made only in a brief or memorandum are not evidence and may not be treated as such. *See United States v. Ronning Landscaping, Inc.*, 10 OCAHO no. 1149, 14-15 (2012). OCAHO rules⁶ provide, moreover, that affidavits must set forth such facts as would be admissible in a proceeding subject to 5 U.S.C. §§ 556 and 557, and must show affirmatively that the affiant is competent to testify to the matters stated. 28 C.F.R. § 68.38(b). The Diaz affidavit does not satisfy this standard, and his testimony "to the best of my knowledge" is properly disregarded. *See, e.g., Stubbs v. DeSoto Hilton Hotel*, 8 OCAHO no. 1005, 148, 154 (1998).

That said, apart from the I-9 forms themselves, ICE failed to point to any evidence that Garcia Arturo (count I), Christopher Nelson (count II), Jose Pena (count II) or Manuel Rodriguez (count III) were employees of the company within the meaning of 8 C.F.R. § 274a.1(f). An employee is an individual who provides services or labor for an employer for wages or other remuneration. *Id.* Examination of ICE's exhibit G-7, Arizona Unemployment Tax and Wage Reports, does not reflect any wages that were paid to these individuals. *See United States v. DuBois Farms, Inc.*, 2 OCAHO 376, 599, 614-15 (1991). Apart from the fact that the company completed I-9 forms for them, there is no evidence that Garcia Arturo, Christopher Nelson, Jose Pena, or Manuel Rodriguez actually were employees of SGC within the statutory definition, and the company cannot be found liable for alleged violations pertaining to those individuals.

The Tax and Wage Reports do, on the other hand, show that wages were paid to Victor Arreola (Count V), Joseph Cuevas (count V), Martin De La Hoya (count V), Jorge Delgado (count V), Javier Leyva Arceta (count V), Ricardo Marin (count V), Jose Robledo (count V), Felipe Varela (count V), Samuel Vega (count V), Sergio Catzin (count VI), and Gregorio Medina (count VI). ICE made a *prima facie* showing that these individuals were employees within the meaning of the statute, and the company's assertion that the individuals quit within three days of hire is unsupported by evidence. Any inferences that might be drawn from the amount of money an individual was paid are limited where no information is provided about the hourly rates at which any of the individuals was paid.

The actual number of hours worked, moreover, is not dispositive. When an employee is hired on September 10, 2007, a Monday, and terminated on September 15, 2007, a Saturday, as SGC says Victor Arreola was, that individual was presumptively an employee for more than three business days regardless of the amount he was paid or the actual number of hours he worked. SGC did not show evidence of specific facts and circumstances that would defeat a *prima facie* showing that Arreola, Cuevas, De La Hoya, Delgado, Arceta, Marin, Robledo, Varela, Vega, Catzin, and Medina were employees.

⁶ See Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2013).

B. Whether use of the E-Verify system satisfies the section 2 attestation requirement

While SGC argues that its use of E-Verify is “equivalent to the exam certification” in section 2 of the I-9 form, 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 (2013). An employer’s first responsibility in the E-Verify program is, in fact, to properly complete an I-9 form for every new employee. The E-Verify Memorandum of Understanding itself, which employers must sign as a condition of participation in the program, expressly provides that “[t]he Employer understands that participation in E-Verify does not exempt the employer from the responsibility to complete, retain, and make available for inspection Forms I-9 that relate to its employees.” *See USCIS, E-Verify Program for Employment Verification Memorandum of Understanding*, at 4 (last revised Sept. 1, 2009).

SGC’s use of the E-Verify program accordingly does not excuse its failure to properly complete section 2 of the I-9 forms and present the forms for inspection. The company cites no authority to support the proposition that participation in E-Verify excuses I-9 violations, and the company is accordingly liable for the violations involving the I-9s for Miguel Franco (count II), Amber Wallace (count II), Jose Lopez Sandoval (count III), Juan Calderon (count III), Gerardo Chacon Arroyos (count V), Julio Garcia Lopez (count V), Richard Silva (count V), Zacarias Martinez Ceballos (count VI), and Ali Torres (count VI).

C. Other individuals who may not be employees

OCAHO case law has recognized that, as a general rule, an individual is not an employee of an enterprise if he or she has an ownership interest in, and control over, all or part of the enterprise. *Two for Seven*, 10 OCAHO no. 1208 at 7. Salvador Gonzales is the company’s president and owns forty-nine percent of the shares. Mary Gonzalez is the vice-president and owns fifty-one percent. As the only two shareholders in this closely held corporation, each appears to have substantial ownership interests and substantial control over the enterprise. *See United States v. Jalisco’s Bar and Grill, Inc.*, 11 OCAHO no. 1224, 9 (2014) (applying standards articulated in *Clackamas Gastroenterology Assocs. v. Wells*, 538 U.S. 440, 445 (2003)). For purposes of the statute these individuals should not be treated as employees, and the company is not liable for failing to complete forms for Mary Gonzalez or Salvador Gonzalez.

D. Whether the I-9 Form for Rodolfo De La Torre was backdated

SGC contends that the I-9 for Rodolfo De La Torre was timely completed on his date of hire, and is not backdated. Both sections of De La Torre’s I-9 are dated January 19, 2009, and the form indicates that it was signed by both the employee and the employer representative that day. But

as the government points out, the version of form used to prepare De La Torre's I-9 was the version dated February 2, 2009. Because this version was not released until February 2, 2009, De La Torre's I-9 could not have been prepared on January 19, 2009, his purported date of hire. The employer must complete the I-9 form within three days of a new employee's date of hire. 28 C.F.R. 274a.2(b)(1)(ii)(B), and it does not appear that De La Torre's I-9 could have been prepared prior to February 2, 2009.

E. Forms that were allegedly recreated

The company's answer admitted that it failed to present I-9 forms for fifty-six individuals named in count V, and thirty-nine individuals in count VI, but contended that some of the forms were "recreated" after the NOI, when the originals were found to be missing. That some forms were allegedly recreated can be afforded no weight when there is not a scintilla of evidence that the original forms ever actually existed in the first place.⁷ The affidavit of Cristian Diaz speaks vaguely in the passive voice about steps that were allegedly taken after the fact by unidentified actors, but no evidence was offered as to the reasons the forms were missing, and SGC acknowledges that it does not know what happened to them.

VI. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Findings of Fact

1. Speedy Gonzalez Construction, Inc. is a construction business located in Glendale, Arizona.
2. The Department of Homeland Security, Immigration and Customs Enforcement, served Speedy Gonzalez Construction, Inc. with a Notice of Inspection (NOI) on November 19, 2009.
3. The Department of Homeland Security, Immigration and Customs Enforcement, served Speedy Gonzalez Construction, Inc. with a Notice of Suspect Documents (NSD) and a Notice of Discrepancies on March 10, 2010.

⁷ OCAHO case law recognizes an affirmative defense of impossibility under appropriate circumstances. *See, e.g., United States v. Barnett Taylor, LLC*, 10 OCAHO no. 1155, 8 (2012). Because impossibility is a matter of affirmative defense, however, the burden is on the party claiming it first, to plead it, and second to produce competent evidence that the forms were lost or destroyed through external causes and not through the fault of the employer. *Id.*

4. The Department of Homeland Security, Immigration and Customs Enforcement, served Speedy Gonzalez Construction, Inc. with a Notice of Suspect Documents (NSD) and a Notice of Technical or Procedural Failures (NTPF) on August 11, 2011.
5. The Department of Homeland Security, Immigration and Customs Enforcement, served Speedy Gonzalez Construction, Inc. with a Notice of Intent to Fine (NIF) on November 23, 2011.
6. Speedy Gonzalez Construction, Inc. made a request for hearing on December 27, 2011.
7. The Department of Homeland Security, Immigration and Customs Enforcement, filed a complaint with the Office of the Chief Administrative Hearing Officer on December 3, 2013.
8. Salvador Gonzalez is the President of Speedy Gonzalez Construction, Inc., and owns forty-nine percent of the shares in the company.
9. Mary Gonzalez is the Vice-President of Speedy Gonzalez Construction, Inc., and owns fifty-one percent of the shares in the company.
10. Salvador and Mary Gonzalez are Speedy Gonzalez Construction, Inc.'s only owners or shareholders.
11. Arizona Unemployment Tax and Wage Reports for the period examined do not reflect that Speedy Gonzalez paid wages to Garcia Arturo, Christopher Nelson, Jose Pena, or Manuel Rodriguez within the period examined.
12. Speedy Gonzalez Construction, Inc. hired the following individuals and failed to ensure that their I-9 forms were properly completed: Agustin Delamora, Velia Gonzalez, Agapito Resendez, Julio Rodas, Alilando Anaya, Samuel Bustos, Jose Cuevas, Ernesto Franco, Miguel Franco, Wyatt Goodwin, Jose Jauregui, Francisco Jimenez, Daniel Orozco, Sergio Pelayo Martinez, Juan Reyes, Jesus Rocha, Amber Wallace, Francisco Garcia Vargas, Pedro Villela, Scott Caray, Antonio De La Torre, Rodolfo De La Torre, Daniel Diaz, David Diaz, Manuel Esquivias Gomez, Maria Flores Castro, Raul Gomez Villalobos, Gerardo Gonzalez, Ramon Gonzalez, Rodolfo Gonzalez Gomez, Francisco Limon Becerra, Jose Lopez Sandoval, Jose Lopez Soliz, Jorge Marquez, Hector Orozco Torres, Jose Piquero Jr., Melesio Sarmiento, Sergio Alvarado, Andy Ray Aros, Juan Calderon, Ascencion Felix Higuera, Edmundo Vasquez, Juan Vargas Velasquez, Carlos Cazarez, Jose De Jesus Garcia, Pedro Hernandez Flores, Martin Nunez, Enrique Ponce, Jesus Valencia, Saul Ambriz, Deonicio Arredondo, Antonio Avelar Gutierrez, Angel Carranza, Luis De Loa Franco, Juan Carlos Encinas, Francisco Ruentes Ramos, Jose Franco, Rodolfo Garcia Vargas, Juan Pablo Gomez Gallardo, Francisco Gomez, Rafael Gomez, Aldo Gonzalez, Frederico Gonzalez, Jose de Jesus Gonzalez, Alfonso Hernandez, Manuel Hernandez Navarro,

Miguel Hernandez, Alejandro Jaramillo, Antonio Miranda, Catarino Moreno, Sergio Padilla, Baldimar Rodriguez, Miguel Rodriguez, Miguel Soto, Genaro Franco Valencia, Rosalia Valtierra, and Martin Zuniga.

13. Speedy Gonzalez Construction, Inc. hired the following individuals and failed to prepare and/or present their I-9 forms for inspection: 1) Jose Reyes; 2) Leopoldo Barba; 3) Rosendo De Loa; 4) Salvador De Alba; 5) Jorge Acedo Castro; 6) Manuel Alvarez; 7) Ubaldo Apodaca Cuen; 8) Victor Arreola; 9) Pedro Balladares; 10) Sergio Belin, Jr.; 11) Gerardo Chacon Arroyos; 12) Antonio Chavez; 13) Santiago Coronado Gomez; 14) Sergio Cruz; 15) Joseph Cuevas; 16) Martin De La Hoya; 17) Jorge Delgado; 18) Sergio Dominguez; 19) John Driver; 20) Alvaro Franco Aldana; 21) Jesus Fuentes Ramos; 22) Julio Garcia Lopez; 23) Rodolfo Gomez; 24) Oscar Gonzalez; 25) Holly Gutierrez; 26) Gilbert Hernandez; 27) Juan Herrera, Jr.; 28) Pedro Ibarra; 29) Alfonso Jauregui; 30) Russell Jenkins; 31) Eric Jimenez; 32) Javier Leyva Arceta; 33) Ricardo Marin; 34) Claudio Mata; 35) Rick McDonald; 36) Victoriano Miranda; 37) Felipe Montiel Lopez; 38) Benjamin Murrieta Ayala; 39) Oscar Ortiz; 40) Julian Pedroza; 41) Sergio Pelayo; 42) Manuel Pena; 43) Pedro Pena; 44) Marion Perry; 45) Jose Ramirez; 46) Juliana Resendes; 47) Luis Reyes; 48) Juan Rios Miranda; 49) Jose Robledo; 50) Juan Ruiz Moreno; 51) Richard Silva; 52) Froilan Solis Garcia; 53) Rodolfo Trevizo; 54) Felipe Varela; 55) Alfonso Vargas; 56) Samuel Vega; 57) Leonel Vidal Gamez; 58) Jason Widlesworth; 59) Robert Wooters; 60) Roberto Zamora Burboa; 61) Miguel Gomez; 62) Josue Alcala; 63) Jose Anguiano; 64) Jesus Ayala Herrera; 65) Maximillian Ayco; 66) Domingo Bernabe; 67) Eric Buchanan; 68) Alfonso Camacho Guitimea; 69) Jorge Castillo; 70) Segio Catzin; 71) Ernesto De La Torre Ramirez; 72) Jose Diaz Gonzalez; 73) Urbano Franco Gutierrez; 74) Jesus Garcia; 75) Jorge Garcia; 76) Guillermo Gomez Martinez; 77) Ramon Gonzalez; 78) Carlos Gonzalez Acala; 79) Andres Gonzalez Ambriz; 80) Fidel Gonzalez Cisernos; 81) Hector Gonzalez Gonzalez; 82) Rodolfo Gutierrez; 83) Jorge Hernandez Castro; 84) Jorge Hernandez Lopez; 85) Juan Madrid Lopez; 86) Guadalupe Maldonado; 87) Zacarias Martinez Ceballos; 88) Gregorio Medina; 89) Efren Mejia Castro; 90) Jorge Morales; 91) Henrii Navejar; 92) Arnulfo Ponce; 93) Hector Reyes; 94) Juan Rufino; 95) Jairo Sarabia; 96) Ali Torres; 97) Armando Valdez Solis; 98) Jorge Valenzuela Rojas; 99) Nestor Velez Rodriguez; 100) Nolberto Villalpando; 101) Alfredo Zavala.

B. Conclusions of Law

1. Speedy Gonzalez Construction, 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. An employer must comply with the requirements of employment eligibility verification

system by ensuring that an employee properly completes section 1 of the Form I-9, and by properly completing section 2 itself. 8 C.F.R. § 274a.2(b)(1)(i)(A), (ii)(B).

4. An I-9 form is timely prepared when the employee completes section 1 on the day the employee is hired, and the employer completes section 2 within three business days of hire. 8 C.F.R. § 274a.2(b)(1)(i)(A), (ii)(B).

5. 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).

6. An employer's use of E-Verify does not entitle the employer to a presumption that it has not violated the law. *See United States v. Golf Int'l*, 10 OCAHO no. 1214, 6 (2013).

7. An individual is not an employee of an enterprise if he or she has an ownership interest in, and control over, all or part of the enterprise. *United States v. Two for Seven, LLC*, 10 OCAHO no. 1208, 7 (2013).

8. Speedy Gonzalez Construction, Inc. is liable for seventy-eight violations consisting of failure to ensure that employees properly completed section 1 of Form I-9, and/or failure to properly complete section 2 of their forms itself.

9. Speedy Gonzalez Construction, Inc. is liable for 101 violations consisting of failure to prepare and/or present I-9 forms for employees after being requested by the government to do so.

10. The allegations involving the I-9 forms for Garcia Arturo, Christopher Nelson, Jose Pena, Manuel Rodriguez, Salvador Gonzalez, and Mary Gonzalez were not proved and must be dismissed.

11. Speedy Gonzales Construction, Inc. is liable for a total of 179 violations of 8 U.S.C. § 1324a(a)(1)(B).

ORDER

ICE's motion for summary decision is granted in part and denied in part. Speedy Gonzalez Construction, Inc. is liable for 179 of the 185 violations alleged in the complaint. The allegations respecting the I-9 forms for Garcia Arturo, Christopher Nelson, Jose Pena, Manuel Rodriguez, Salvador Gonzalez, and Mary Gonzalez are dismissed.

In the event either party disputes one or more of the factual findings and is prepared to present competent evidence in support of its assertions, motions for reconsideration may be filed on or before October 10, 2014 and responses may be filed on or before November 7, 2014.

ICE will have until October 10, 2014 to file its penalty request and Speedy Gonzalez Construction, Inc. will have until November 7, 2014 to respond.

SO ORDERED.

Dated and entered this 19th day of September, 2014.

Ellen K. Thomas
Administrative Law Judge