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

September 6, 1995

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| UNITED STATES OF AMERICA, | ) |
| Complainant, | ) |
| | ) |
| v. | ) 8 U.S.C. 1324c Proceeding |
| | ) OCAHO Case No. 95C00024 |
| MARTINA LIMON-PEREZ, | ) |
| Respondent. | ) |
| _____ | ) |

# ORDER GRANTING COMPLAINANT'S MOTIONS TO STRIKE AFFIRMATIVE DEFENSES AND FOR SUMMARY DECISION

On June 8, 1994, complainant, acting by and through the Immigration and Naturalization Service (INS), issued and served upon Martina Limon-Perez (respondent) Notice of Intent to Fine (NIF) FRS-274C-94-0131. That single-count citation alleged two (2) violations of the document fraud provisions of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324c, for which civil penalties totaling $500 were proposed.

In Count I, complainant alleged that respondent knowingly used and possessed the forged, counterfeit, altered and falsely made documents described therein, namely a Social Security Card SSN1 and a Form 151 Alien Registration Card (A34-590-721), and did so after November 29, 1990, for the purpose of satisfying a requirement of the INA, 8 U.S.C. § 1324c(a)(2). Complainant levied civil money penalties of $250 for each of those two (2) alleged violations, or a total of $500.

Respondent was advised in the NIF of her right to request a hearing before an administrative law judge assigned to this Office if she filed such a request within 60 days of her receipt of that NIF. On July 29, 1994, Robert W. Yarra, Esquire, filed a written request for a hearing on behalf of respondent, and also filed a fully executed United States Department of Justice Form G-28, in which he formally entered his appearance as respondent's counsel of record.

On February 9, 1995, complainant filed the single-count Complaint at issue, reasserting the two (2) alleged violations contained in the NIF, as well as the requested civil money penalties totaling $500.

On February 10, 1995, a Notice of Hearing on Complaint Regarding Civil Document Fraud, along with a copy of the Complaint at issue, were served upon respondent and also upon respondent's

counsel of record, Robert W. Yarra, Esquire.

On March 10, 1995, Ralph J. Leardo, Esquire, filed Motions for Substitution of Attorneys and for Extension of Time to File Answer, in which he requested leave to enter his appearance as successor counsel of record for respondent, in place of Mr. Yarra, and also requested an extension of 30 days in which to file an answer.

On March 17, 1995, both motions were granted.

On May 2, 1995, respondent's successor counsel filed a Motion for Leave to File a Late Answer, stating that his request was based on his heavy work load and an incorrect calender entry that led him to believe that respondent's Answer was due on May 19.

On May 2, 1995, also respondent's Answer was filed, in which she denied all allegations set forth in the Complaint and also asserted five (5) affirmative defenses.

For her first affirmative defense, respondent asserted that "[t]he complaint fails to state a claim upon which relief can be granted, in that it fails to allege any act which constitutes a violation of the statute."

As her second affirmative defense, respondent argued that "[t]he conduct which allegedly gave rise to the complaint does not constitute a violation of the statute because it was not done knowingly."

In her third affirmative defense, respondent contended that "[t]he conduct which allegedly gave rise to the complaint does not constitute a violation of the statute because it was not done for a purpose which is prohibited by the statute."

As her fourth affirmative defense, respondent asserted that "[t]he complaint fails for indefiniteness, in that it fails to allege specific acts, and does not allege in what manner the alleged acts violated the terms of the statute, or for what requirement of the INA they were allegedly committed in order to satisfy."

For her fifth and final affirmative defense, respondent argued that "[t]he allegations of the complaint are so vague and indefinite that any judgment or order based upon the allegations as stated would violate respondent's due process rights to notice and a meaningful opportunity to respond and be heard, in that she would be unable to adequately prepare a defense or otherwise answer the charges."

On May 30, 1995, complainant filed a pleading captioned Motion to Strike "Affirmative Defenses" Pursuant to 28 CFR 68.11 and Motion For Summary Decision Pursuant to 28 CFR 68.38. Complainant requested that its Motion to Strike Affirmative Defenses be granted because respondent

advanced no viable legal theories nor factual bases to support any of the asserted theories, and also requested that its Motion for Summary Decision be granted because "[t]here are no issues of material fact as to liability."

On June 12, 1995, respondent's counsel filed a Motion for Extension of Time to File Response to Complainant's Motion to Strike and for Summary Decision, in which he requested an additional 30 days, or until July 12, 1995, to file a response to complainant's motions.

On June 19, 1995, the undersigned granted respondent's Motion for Extension.

On July 20, 1995, respondent filed a pleading captioned Respondent's Opposition to Complainant's Motion to Strike and for Summary Decision, and Cross-Motion for Judgment on the Pleadings. In that motion, respondent argued that the motion to strike must be denied because the affirmative defenses asserted by respondent "are proper defenses raising issues of law," and that the motion for summary decision must be denied because there is a genuine issue of fact regarding liability.

Respondent also argued that she is entitled to judgment on the pleadings, "on the grounds that using documents in the manner alleged does not, as a matter of law, constitute using documents 'for the purpose of satisfying a requirement of the Act.'"

The procedural rules applicable to cases involving allegations of document fraud are those codified at 28 C.F.R. Part 68, which provide that "[t]he Rules of Civil Procedure for the District Courts of the United States may be used as a general guideline in any situation not provided for or controlled by these rules. . . ."28 C.F.R. § 68.1.

Accordingly, because the OCAHO procedural rules do not provide for motions to strike, it is appropriate to use Rule 12(f) of the Federal Rules of Civil Procedure (FRCP) as a guideline in considering motions to strike affirmative defenses. United States v. Chi Ling, Inc., 5 OCAHO 723, at 3 (1995); United States v. Makilan, 4 OCAHO 610, at 3 (1994). That rule provides in pertinent part that "the court may order stricken from any pleading any insufficient defense." Fed. R. Civ. P. 12(f).

It is well settled that motions to strike affirmative defenses are disfavored in the law, and should be granted only when the asserted affirmative defenses lack any legal or factual grounds. United States v. Chavez-Ramirez, 5 OCAHO 774, at 2 (1995); Makilan, 4 OCAHO 610, at 4; United States v. Task Force Security, Inc., 3 OCAHO 563, at 4 (1993). Thus, an affirmative defense will be ordered to be stricken only if there is no prima facie viability of the legal theory upon which the defense is asserted, or if the supporting statement of facts is wholly conclusory. United States v. Chi Ling, Inc., 5 OCAHO 723, at 3 (1995); Makilan, 4 OCAHO 610, at 4; Task Force, 3 OCAHO 563, at 4.

For her first affirmative defense, respondent asserted that complainant failed to state a claim upon which relief can be granted. To the contrary, a claim has been stated upon which relief can be granted. Complainant has asserted that respondent knowingly used and possessed the forged, counterfeit, altered and falsely made documents described therein, namely a Social Security Card SSN1 and a Form 151 Alien Registration Card (A34-590-721), and did so after November 29, 1990, for the purpose of satisfying a requirement of the INA, in violation of 8 U.S.C. Section 1324c(a)(2).

In enacting Section 1324c(a)(2) of the Immigration and Nationality Act, Congress expressly rendered it unlawful for any person "to use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of this Act."

After examining the charge and the underlying statute, it is quite clear that complainant has pleaded, with sufficient specificity, a claim upon which relief can be granted. See 8 U.S.C. § 1324c(a)(2); see also United States v. Villatoro-Guzman, 3 OCAHO 540, at 17-21 (1993). Accordingly, respondent's first affirmative defense must be stricken.

Respondent's second and third affirmative defenses each consist of one (1) sentence conclusory statements that respondent did not knowingly violate the statute and that she had engaged in the alleged conduct for a purpose which is prohibited by the statute.

The procedural regulation governing answers to complaints in document abuse cases provides that the answer shall include "[a] statement of the facts supporting each affirmative defense." 28 C.F.R. § 68.9(c)(2). Complainant is quite correct in noting that respondent has failed in her May 2, 1995 Answer, to provide a statement of the facts necessary to support these affirmative defenses. OCAHO case law has consistently held that affirmative defenses will be ordered stricken when not supported by the required statement of facts. E.g., Chi Ling, Inc., 5 OCAHO 723, at 4; Makilan, 4 OCAHO 610, at 4.

Accordingly, respondent's second and third affirmative defenses must also be stricken.

Respondent's final two (2) affirmative defenses assert that the allegations in the Complaint are vague and indefinite. A careful reading of the Complaint does not support that contention since the Complaint identifies the respondent, Martina Limon-Perez, and clearly describes the alleged forged, counterfeit, altered and falsely made documents, namely a Social Security Card SSN1 and a Form 151 Alien Registration Card (A34-590-721), and further sets forth that respondent knowingly used and possessed those documents after November 29, 1990, for the purpose of satisfying a requirement of the Immigration and Nationality Act.

Therefore, because this Complaint is found to be neither vague nor indefinite, and also because these two affirmative defenses were not supported by statements of facts, respondent's fourth and fifth affirmative defenses must also be stricken.

Having granted complainant's motion to strike the five (5) affirmative defenses, we will now review complainant's Motion for Summary Decision. The pertinent procedural rule governing motions for summary decision in document fraud cases provides that "[t]he Administrative Law Judge may enter a summary decision for either party if the pleadings, affidavits, and material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. §68.38(c).

Section 68.38(c) is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in federal court cases. For this reason, federal case law interpreting Rule 56(c) is instructive in determining whether summary decision under Section 68.38 is appropriate in proceedings before this Office. Mackentire v. Ricoh Corp., 5 OCAHO 746, at 3 (1995); Alvarez v. Interstate Highway Constr., 3 OCAHO 430, at 7 (1992).

The purpose of summary adjudication is to avoid an unnecessary hearing when there is no genuine issue as to any material fact, as shown by the pleadings, affidavits, discovery, and any other judicially noticed matters. United States v. Anchor Seafood Distribs., Inc., 5 OCAHO 742, at 4 (1995); United States v. Goldenfield Corp., 2 OCAHO 321, at 3 (1991). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (quoting Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 467 (1984)).

An issue of material fact is genuine only if it has a real basis in the record. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586-87 (1986). A genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); United States v. Primera Enters., Inc., 4 OCAHO 615, at 2 (1994). In determining whether there is a genuine issue as to a material fact, all facts and reasonable inferences to be derived therefrom are to be viewed in the light most favorable to the non-moving party. Matsushita, 475 U.S. at 587; Primera, 4 OCAHO 615, at 2.

The party seeking summary decision assumes the burden of demonstrating to the trier of fact the absence of a genuine issue of material fact. See Celotex Corp., 477 U.S. at 323. Once the movant has carried this burden, the opposing party must then come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); Matsushita, 475 U.S. at 587.

The procedural rule governing motions for summary decision in OCAHO proceedings explicitly provides that "a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing." 28 C.F.R. § 68.38(b).

Rule 56(c) of the Federal Rules of Civil Procedure permits, as the basis for summary

judgment, the consideration of any admissions on file. Similarly, summary decision issued pursuant to 28 C.F.R. Section 68.38 may be based on matters deemed admitted. Primera, 4 OCAHO 615, at 3; United States v. Goldenfield Corp., 2 OCAHO 321, at 3-4
(1991).

In Count I, complainant alleged that respondent knowingly used and possessed the forged, counterfeit, altered and falsely made documents described therein, namely a Social Security Card SSN1 and a Form 151 Alien Registration Card (A34-590-721), and did so after November 29, 1990, for the purpose of satisfying a requirement of the INA, 8 U.S.C. § 1324c(a)(2).

In order to prove the violation alleged in Count I, complainant must show that:

(1) respondent knowingly used and possessed the forged, counterfeit, altered or falsely made documents described therein;

(2) after November 29, 1990; and

(3) for the purpose of satisfying a requirement of the INA.

IRCA provides for an employment verification system which mandates that in order to gain lawful employment in the United States, an individual must establish both employment authorization and identity. 8 U.S.C. § 1324a(b)(1). It is well documented that the INA created civil money penalties for both employers who knowingly accept fraudulent documents and for aliens who knowingly use fraudulent documents. See 8 U.S.C. § 1324c; see also United States v. Villatoro-Guzman, 3 OCAHO 540 (1993).

Attached to complainant's May 30, 1995 Motion to Strike "Affirmative Defenses" Pursuant to 28 CFR 68.11 and Motion For Summary Decision Pursuant to 28 CFR 68.38, is the first of two (2) affidavits submitted by INS Senior Boarder Patrol Agent Steven Borup. On June 19, 1995, complainant submitted the second affidavit.

Agent Borup stated in those affidavits that upon having been interviewed by him respondent freely admitted that she was an illegal alien with no right to remain in the United States, and that she purchased the counterfeit documents described in the Complaint namely, a Social Security Card SSN1 and a Form 151 Alien Registration Card (A34-590-721), from a Los Angeles street vendor. Agent Borup also stated that respondent admitted that she presented those two (2) fraudulent documents to her prospective employer, the Travelers Inn Motel, Fresno, California, on June 30, 1991, in order to obtain employment in the United States.

Also attached to complainant's May 30, 1995 Motion for Summary Decision is a copy of respondent's Employment Eligibility Verification Form (Form I-9). That Form I-9 was filled out and signed by respondent on June 30, 1991, and illustrates that respondent presented the Travelers Inn Motel with the fraudulent Resident Alien Card (A34-590-721) as proof of identity and employment

eligibility, and also presented the fraudulent Social Security Card SSN1as proof of employment eligibility. See Form I-9, Complainant's May 30, 1995 Motion for Summary Decision, Exhibit C.

Virginia Hensley, Manager for the Travelers Inn Motel, examined the two (2) documents presented by respondent and attested to the fact that they appeared to be genuine and that to the best of her knowledge, respondent was eligible to work in the United States. Id.

The Chief Administrative Hearing Officer (CAHO) recently ruled in his Modification of United States v. Morales-Vargas, that a respondent's act of presenting fraudulent documents to prove identity and employment eligibility in order to gain employment is sufficient to satisfy the last element of a Section 1324c(a)(2) violation, specifically that the documents were presented in order to satisfy any requirement of the INA. United States v. Morales-Vargas, 5 OCAHO 732, at 5-6 (1995); see also United States v. Chavez-Ramirez, 5 OCAHO 774, at 6 (1995).

In order to show that the documents named in the Complaint were fraudulent, complainant has submitted a copy of the Immigration and Naturalization Service Central Index System (CIS) printout for alien registration number A34-590-721. The CIS illustrates that alien registration number A34-590-721 belongs to one Rogelio Octavio Molina-Leon. See CIS Printout, Complainant's May 30, 1995 Motion for Summary Decision, Exhibit D. Complainant also asserts that the Social Security Card numbered SSN1 is nonexistent, apparently having been fabricated by the maker of the fraudulent documents.

Hence, complainant has shown that respondent knowingly used and possessed the forged, counterfeit, altered and falsely made documents described therein, namely a Social Security Card SSN1 and a Form 151 Alien Registration Card (A34-590-721), and did so after November 29, 1990, for the purpose of satisfying a requirement of the INA, and in doing so, has violated the provisions of 8 U.S.C. § 1324c(a)(2).

Because complainant has established that there is no genuine issue of material fact regarding the violations alleged in Count I of the Complaint, and has also shown that it is entitled to decision as a matter of law with respect to those violations, and because respondent has failed to offer specific facts showing that there is a genuine issue of material fact with regard to her liability for the two (2) violations set forth in Count I, complainant's May 30, 1995 Motion for Summary Decision is hereby granted.

Accordingly, it is being found that respondent has violated the pertinent provisions of the INA in the manners alleged in Count I of complainant's February 9, 1995 Complaint.

All that remains at issue, therefore, is a determination of the appropriate civil money penalties to be assessed for those two (2) violations.

The INA provides for civil money penalties for individuals who violate the document fraud

provisions of 8 U.S.C. Section 1324c, and for firsttime offenders those fines range from a statutorily mandated minimum of $250 to a maximum of $2,000 for each instance of use, acceptance, or creation. 8 U.S.C. § 1324c(d)(3)(a).

Complainant has requested the statutory minimum amount of $250 for each of the two (2) violations, and after carefully reviewing the record, it is found that complainant has appropriately recommended those penalty amounts.

## Order

It is ordered that the appropriate civil money penalty assessment for the two (2) violations is $500, or $250 for each of the two (2) violations alleged in Count I.

It is further ordered that respondent cease and desist from further violations of 8 U.S.C. § 1324c(a)(2).

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JOSEPH E. MCGUIRE
Administrative Law Judge

## Appeal Information

This Order shall become the final order of the Attorney General unless, within 30 days from the date of this Order, the Chief Administrative Hearing Officer shall have modified or vacated it. Both administrative and judicial review are available to respondent, in accordance with the provisions of 8 U.S.C. §§ 1324c(d)(4); 1324c(d)(5), and 28 C.F.R. § 68.53.