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

October 16, 1996

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| UNITED STATES OF AMERICA, Complainant, | ) |
| v. | ) 8 U.S.C. §1324c Proceeding<br>) OCAHO Case No.96C00039 |
| MARTIN PALOMINOS-TALAVERA, Respondent. | ) |

**ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION**

I. *Background*

On April 19, 1996, complainant, acting by and through the Immigration and Naturalization Service (INS), commenced this action, which arises under Section 274C of the Immigration and Nationality Act (INA), 8 U.S.C. §1324c, enacted by the Immigration Act of 1990, Pub. L. No. 101–649 (1990), by having filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that Martin Palominos-Talavera (respondent), a citizen of Mexico, committed document fraud in violation of §1324c. The underlying Notice of Intent to Fine, issued by INS on January 19, 1995, was attached to the Complaint as Exhibit A.

On April 24, 1996, a Notice of Hearing on Complaint Regarding Civil Document Fraud, together with a copy of the Complaint, were served by certified mail upon respondent, advising him that a written answer was required to have been filed within 30 days after his receipt of that Notice.

The Complaint consists of a single Count alleging one (1) violation of §1324c(a)(2), that the respondent knowingly used, attempted to use, and possessed the allegedly forged, counterfeited, altered and falsely made document described therein, namely an Alien Registration Card (A097685940), Form I–551, and did so after November 29, 1990, for the purpose of satisfying a requirement of the INA. For that single violation, complainant requested a civil money penalty of $250.

On May 24, 1996, respondent timely filed his answer, in which he denied all of complainant's allegations and moved to dismiss the Complaint on the grounds that it failed to provide a clear and concise statement of the facts of violation as required under 28 C.F.R. §68.8(a)(3).

On June 3, 1996, complainant filed a pleading captioned Motion to Strike and For Summary Decision and Opposition to Motion to Dismiss.

During a prehearing telephonic conference conducted on June 21, 1996, the undersigned denied respondent's motion to dismiss, as well as his request that he be granted access to published OCAHO decisions. Respondent was granted additional time to file a supplemental answer to complainant's dispositive motion.

On July 12, 1996, respondent filed a pleading captioned Respondent's Supplemental Answer to Complaint, Motion to Suppress, and Renewed Motion to Dismiss. On that date, also, respondent filed a pleading captioned Respondent's Opposition to INS' Motion to Strike and For Summary Decision.

On July 22, 1996, complainant filed a pleading captioned Motion to Strike and For Protective Order and Opposition to Motion to Suppress and To Dismiss.

On August 5, 1996, respondent filed a pleading captioned Respondent's Opposition to INS' Motion to Strike and For Protective Order.

On August 23, 1996, complainant filed a pleading captioned Motion for Leave to File Supplemental Authority and Clarification.

On September 11, 1996, respondent filed a pleading captioned Respondent's Opposition to INS' Motion for Leave to File Supplemental Authority.

II. *Complainant's Motion to Strike*

On June 3, 1996 and July 22, 1996, complainant moved to strike the affirmative defenses raised by the respondent in his answer and supplemental answer.

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, in addressing complainant's motion, and because the pertinent 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 as a guideline. *United States v. Makilan*, 4 OCAHO 610, at 3 (1994); *United States v. Chavez-Ramirez*, 5 OCAHO 774, at 2 (1995). That rule provides in pertinent part that "the court may order stricken from any pleading any insufficient defense."

There is a great reluctance in the law to strike affirmative defenses, and motions to strike are only granted when the asserted affirmative defenses lack any legal or factual grounds. *United States v. Task Force Security, Inc.*, 3 OCAHO 563, at 4 (1993). Therefore, 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. *Id.; Makilan*, 4 OCAHO 610, at 4.

An examination of respondent's initial answer, filed on May 24, 1996, fails to disclose the assertion of any affirmative defenses. In that responsive pleading, respondent denied the material allegations of the Complaint and moved to dismiss by alleging that the Complaint was vague, overbroad, and failed to provide a clear and precise statement of facts of violation as required under 28 C.F.R. §68.8(a)(3). Although that motion was denied, respondent was granted leave to file a supplemental answer and raise additional defenses.

An examination of respondent's supplemental answer, filed on July 12, 1996, discloses the assertion of the following defenses: 1) the allegations in the Complaint are too vague to permit a proper answer; 2) due process requires that he be granted access to published OCAHO decisions; 3) a Final Order under 274C violates the Eighth Amendment and is a deprivation of his rights under the First, Fifth, and Ninth Amendments; and 4) selective prosecution in violation of the equal protection component of the Due Process Clause of the Fifth Amendment.

Respondent has asserted that the allegations in the Complaint are vague and indefinite, precluding him from defending this action. A careful reading of the Complaint does not support that contention since the Complaint identifies the respondent, Martin Palominos-Talavera, and clearly describes the allegedly forged, counterfeit, altered and falsely made document, namely an Alien Registration Card (A097685940), Form I–551, and further sets forth that respondent knowingly used and possessed that document, and did so after November 29, 1990, for the purpose of satisfying a requirement of the Immigration and Nationality Act.

Therefore, because the Complaint is found to be neither vague nor indefinite, and alleges sufficient facts which have put respondent on fair notice of the charges against him, that defense is stricken.

Respondent has also alleged that due process requires access to published OCAHO decisions. That motion was previously denied during the prehearing telephonic conference held on June 21, 1996.

Due process requires, at a minimum, an opportunity to be heard "at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976); *Cuadras v. INS*, 910 F.2d 567, 573 (9th Cir.1990). Even though not constitutionally required, OCAHO regulations grant respondent a right to counsel of his own choice at no expense to the government. 28 C.F.R. §68.33(b); *United States v. Carpio–Lingan*, 6 OCAHO 871, at 3 (1996). It is noted that respondent is represented by counsel, and while access to OCAHO opinions may be helpful, it is not necessary to a meaningful preparation and defense of this case.

Moreover, the Ninth Circuit has repeatedly held that an alien is not entitled to redress for violations of constitutional rights unless prejudice is demonstrated in a "manner so as potentially to affect

the outcome of the proceedings." *Barraza Rivera v. INS*, 913 F.2d 1443, 1447–48 (9th Cir. 1990); *Nicholas v. INS*, 590 F.2d 802, 809 (9th Cir.1979). Respondent has failed to provide a statement of facts to support a finding of prejudice. Accordingly, the facts as stated do not constitute a defense and is hereby stricken.

Respondent next argues that an order under 274C inevitably results in deportation and permanent exclusion from the United States and thus violates his First Amendment right not to be separated from his family and constitutes cruel and unusual punishment in violation of the Eighth Amendment. It is noted that the sanction imposed for a violation of 274C is a civil money penalty, and not deportation. On that basis alone, those defenses are insufficient and are hereby stricken.[1]

Respondent has failed to provide a statement of facts to support his defense that a Final Order under 274C is a deprivation of his rights under the Ninth Amendment. Accordingly, that defense is stricken as well.

Finally, respondent has raised an affirmative defense of selective prosecution and seeks discovery of information for the purpose of building that defense. Complainant has moved for a protective order to foreclose discovery on that issue.

Impermissible selective prosecution or enforcement is available as an affirmative defense in Section 274A (employer sanction) cases. *See United States v. Law Office of Manulkin*, 1 OCAHO 100 (1989); *United States v. ABC Roofing and Waterproofing, Inc.*, 2 OCAHO 247 (1990); *United States v. Alvand, Inc.*, 2 OCAHO 296 (1991); *United States v. McDougal*, 4 OCAHO 687 (1994). This case appears to be the first time a selective prosecution defense has been raised in a Section 274C document fraud case.[2]

[1] Since the Supreme Court has consistently held that deportation is not punishment, the many constitutional safeguards applicable in criminal proceedings do not apply, including Eighth Amendment protections. *See Fong Yue Ting v. United States*, 149 U.S. 698 (1893); *INS v. Lopez-Mendoza*, 468 U.S. 1032 (1984). Furthermore, it is doubtful whether a substantive due process challenge to Congress' power to separate a person from a family unit would succeed in view of its plenary power over immigration matters. *See, e.g., Fiallo v. Bell*, 430 U.S. 787 (1977).

[2] In *Manulkin,* the ALJ allowed discovery on the issue of selective prosecution principally because of the presentation of an important issue of first impression.

During its last term, the United States Supreme Court addressed the quantum of proof necessary to justify looking behind a prosecutor's charging decision via discovery.[3] *United States v. Armstrong*, 116 S.Ct. 1480 (1996) (reversing the United States Court of Appeals for the Ninth Circuit, 48 F.3d 1508 (1995)). As the Court noted, a selective prosecution claim is not a defense on the merits to the charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution. The Court also noted that while a selective prosecution claim is not impossible to prove, the standard the claimant must meet is a "demanding one." *Id*. at 1486.

Drawing upon ordinary equal protection standards, the Court held that in order to prove a selective prosecution claim the defendant must demonstrate by clear and convincing evidence that the federal prosecutorial policy has a "discriminatory effect" and that it was motivated by a "discriminatory purpose" such as race, religion, citizenship status or the exercise of constitutional rights. *Id.* at 1487 (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)). Furthermore, to establish a discriminatory effect, the claimant must show that similarly situated individuals were not prosecuted.

Having identified the elements to prove a selective prosecution claim, the *Armstrong* Court then turned to the threshold showing necessary to obtain discovery on the issue. In this regard, the Court reasoned that "[t]he justifications for a rigorous standard for the elements of a selective-prosecution claim thus require a correspondingly rigorous standard for discovery in aid of such a claim." *Id*. at 1488. As a result, the Court held that a defendant seeking discovery on a selective prosecution claim must produce "some evidence" to show that similarly situated individuals could have been prosecuted but were not. *Id*. at 1499.

It is quite clear that frivolous and conclusory allegations, without more, do not meet the "some evidence" standard.

Respondent has alleged that he has been selectively prosecuted based upon two (2) impermissible criteria: 1) his choice of counsel;

[3] The *Armstrong* Court held that a portion of Federal Rule of Criminal Procedure 16 did not authorize discovery to support a selective prosecution defense in criminal proceedings.

and 2) his status as a non-citizen, since only non-citizens are allegedly charged for violations of section 274C.

As *Armstrong* demonstrates, respondent is not entitled to conduct discovery unless he produces "some evidence" to show that similarly situated individuals could have been prosecuted but were not. Because respondent has failed to provide anything other than conclusory allegations, he is not entitled to discovery on that claim. Accordingly, respondent's affirmative defense of selective prosecution is hereby stricken.

III. *Respondent's Motion to Suppress*

On July 12, 1996, respondent moved to suppress the introduction of certain material as evidence against him on the ground that those materials, including the Record of Sworn Statement taken from him by the INS on January 19, 1995, had been acquired through unconstitutional means. In particular, respondent argues that he was not warned of his right to remain silent or to have assistance of counsel.

It is well-settled that constitutional claims such as respondent asserts, including Miranda-type[4] warnings against self-incrimination and the right to an attorney, are applicable to criminal, but not civil proceedings. *See, e.g., INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984) ("[a] deportation proceeding is a purely civil action [and] [c]onsistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply"); *Flores v. Meese,* 934 F.2d 991, 1012–12 (9th Cir. 1990) ("[e]xamples of criminal trial protections that do not apply in deportation proceedings include the quantum of proof, the need of Miranda warnings before a voluntary statement is given by the respondent, the ex post facto clause; and the inadmissibility of involuntary confessions"); *see also United States v. Villegas-Valenzuela*, 5 OCAHO 784, at 8 (1995).

Based on the foregoing principles, the statement taken from the respondent and, as well, the documents obtained while he was in the custody of INS are admissible. Accordingly, respondent's Motion to Suppress is hereby denied.

[4] *See Miranda v. Arizona*, 384 U.S. 435 (1966).

IV. *Complainant's Motion for Summary Decision*

Having granted complainant's Motion to Strike Affirmative Defenses, and having denied respondent's Motion to Suppress, a consideration of complainant's Motion for Summary Decision is now in order. 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), *United States v. Limon-Perez*, 5 OCAHO 796, at 5 (1995).

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*, 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).

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.

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 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 the single Count complaint, complainant alleged that respondent knowingly used, attempted to use, and possessed the allegedly forged, counterfeited, altered and falsely made document described therein, namely an Alien Registration Card (A097685940), Form I–551, and did so after November 29, 1990, for the purpose of satisfying a requirement of the INA.

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

(1) respondent knowingly used, attempted to use, and possessed the allegedly forged, counterfeited, altered and falsely made document described therein;

(2) after November 29, 1990; and

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

The INA 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). The INA also created civil money penalties for both employers who knowingly accept fraudulent documents and for aliens who knowingly use fraudulent documents. §1324c; *see also United States v. Villatoro-Guzman*, 3 OCAHO 540 (1993).

In support of its motion for summary decision, complainant has submitted the following evidence: Record of Deportable Alien, Form I–213, dated January 23, 1995 (Exhibit A)[5]; Record of Sworn

[5] The Ninth Circuit has held that such a document is admissible in deportation proceedings, in which the burden of proof is by clear and convincing evidence rather than, as here, a mere preponderance of the evidence. *See, e.g., Espinosa v. INS*, 45 F.3d 308 (9th Cir. 1995). It appears to have been prepared in accordance with normal record keeping requirements and demonstrates substantial indicia of reliability. Accordingly, substantial weight is accorded to this evidence.

Statement, Form I–263B, given by respondent under oath on January 19, 1995 (Exhibit B); and Employment Eligibility Verification, Form I–9, with attachment, dated December 21, 1992 (Exhibit C).

From these sources, the following facts have been made available. Respondent was apprehended at his place of employment on January 19, 1995, by agents of the INS. While in custody, respondent admitted having obtained and used a fraudulent Alien Registration Card, Form I–551, and a Social Security Card to obtain employment, Exhibit A.

In the Record of Sworn Statement, Form I–263B, respondent admitted that he illegally entered the United States and purchased a counterfeit Alien Registration Card for $100 in Caldwell, Idaho in 1992. Respondent also admitted that he presented that document, which he knew to be fraudulent, to his prospective employer on December 21, 1992, in order to obtain employment in the United States.

In addition, a copy of the pertinent Form I–9, which was filled out and signed by respondent on December 21, 1992, discloses that respondent presented his prospective employer, Woodgrain Millwork, with the fraudulent Alien Registration Card, bearing the number A097685940, as proof of identity. Lynn Walker, of Woodgrain Millwork's human resources department, examined the card presented by respondent and attested to the fact that it appeared to be genuine and that to the best of her knowledge, respondent was eligible to work in the United states.

It is well-settled that a respondent's act of presenting fraudulent documents to prove identity or employment eligibility in order to obtain 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*, 5 OCAHO 732, at 5–6 (1995)(Modification by the Chief Administrative Hearing Officer); *see also United States v. Chavez-Ramirez*, 5 OCAHO 774, at 6 (1995); *United States v. Villegas-Valenzuela*, 5 OCAHO 784, at 7(1995).

As previously noted, summary decision may be based, as under these facts, on matters deemed admitted. Complainant has thereby established, as alleged in Count I, that respondent knowingly used,

possessed and obtained the forged, counterfeited, altered and falsely made documents described therein, namely an Alien Registration Card (A097685940), Form I–551, and did so after November 29, 1990, for the purpose of satisfying a requirement of the INA, and thus violated the provisions of 8 U.S.C. §1324c(a)(2). The burden has thus been shifted to respondent to put forth some competent evidence, by way of affidavit or other evidentiary material, which would indicate that an issue of fact remains.

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 [and that a] 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).

The only relevant evidence offered by respondent is that of his sworn declaration. That declaration, however, quite clearly fails to provide specific facts that would permit a reasonable fact finder to draw some inference in his favor. For example, respondent has stated in his declaration that the INS "asked about my 'green card' [and] I told them that I did not use it anymore, but had only used it once to get the job." From those statements, it may reasonably be inferred that respondent used a counterfeit Alien Registration Card to obtain employment, which are facts supporting complainant's allegations.

Accordingly, complainant's Motion for Summary Decision is being granted since there is no genuine issue for trial with regard to respondent's liability for the single violation set forth in the Complaint. In view of this ruling, the only remaining issue is that of determining the appropriate civil money penalty to be assessed for that single violation.

The INA provides for civil money penalties for individuals who violate the document fraud provisions of 8 U.S.C. §1324c, and for first-time 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 the single violation, and after carefully reviewing the

record, it is found that complainant has acted most reasonably in having done so.

Accordingly, respondent is ordered to pay a civil money penalty in the amount of $250 for the single violation alleged in Count I. Respondent is further ordered to cease and desist from further violations of 8 U.S.C. §1324c(a)(2).

All motions and requests not previously disposed of are hereby denied.

JOSEPH E. MCGUIRE
Administrative Law Judge

*Appeal Information*

This Decision and Order shall become the final order of the Attorney General unless, within 30 days from the date of this Decision and Order, the Chief Administrative Hearing Officer shall have modified or vacated it. Both administrative and judicial review are available to respondents, in accordance with the provisions of 8 U.S.C. §§1324a(e)(7)–(8) and 28 C.F.R. §68.53 (1995).