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

November 6, 1996

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324c Proceeding
	)	OCAHO Case No. 95C00153
FELIPE DE LEON-VALENZUELA, Respondent.	)	

ORDER GRANTING COMPLAINANT'S MOTION TO STRIKE RESPONDENT'S AFFIRMATIVE DEFENSES

Procedural History

This case arises under the Immigration and Nationality Act, as amended, 8 U.S.C. §1324c (a)(2) (INA). The United States, through the Immigration and Naturalization Service (INS or complainant), filed a complaint alleging that the respondent knowingly used, attempted to use, and possessed a forged, counterfeited, or falsely made Alien Registration Receipt Card number A34 786 904 after November 29, 1990, for the purposes of satisfying a requirement of the INA.

Respondent filed a timely answer raising certain affirmative defenses. On March 8, 1996, I issued an order striking those defenses for failure to comply with OCAHO rules,[1] because the answer failed to state facts in support of the defenses as required by §68.9(c)(2). The order granted respondent leave to file an amended answer in conformity with the rule and to provide factual statements. Respondent amended his answer, denied the material allegations of

[1] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. Pt. 68 (1995).

the complaint, set forth three affirmative defenses and provided a factual statement for each articulated defense: 1) violation of due process and equal protection, 2) waiver and estoppel, and 3) violation of INS' own policies. The first defense was based upon an alleged lack of notice of legal rights. The second defense asserted that because respondent's application to register permanent residence or to adjust status was approved on July 21, 1994, after the issuance of the NIF on June 24, 1994, INS should be estopped from filing the complaint because it had waived the right to deport him. Respondent's third defense was premised upon the argument that INS has a policy that adjustment of status and waiver of exclusion proceedings should be resolved before document fraud proceedings are initiated, and that the policy was not followed.

On April 10, 1996, complainant again moved to strike the affirmative defenses. On May 30, 1996, I issued an order granting the motion to strike as to the first defense, but taking the motion under advisement as to the second and third defenses. Respondent was invited to provide any further explanation of his waiver and estoppel defenses in light of the applicable standards and the elements required to articulate a legally viable estoppel defense against the government, and these standards were set out in my order. Further comment was also solicited from both parties respecting the third defense. Specifically, I requested a statement from INS as to its views of the purpose, meaning, and effect of an opinion letter written by James A. Puleo, Acting Executive Associate Commissioner for Operations of the INS, and addressed to David N. Ilchert, District Director, San Francisco (hereinafter "Puleo letter"or "letter"),[2] upon which respondent relied in claiming his third defense. The letter, dated March 26, 1993, was evidently written in response to an inquiry about a case involving the intersection of a document fraud proceeding pursuant to §1324c with an application for a waiver of a document fraud ground of exclusion, and declared that, "in the case under consideration, this office is of the opinion that the I–601[3] and I–485[4] should be adjudicated before the §274C proceedings are pursued." 71 Interpreter Releases 226 (February 7, 1994).

[2] The letter is reproduced at 71 Interpreter Releases 226 (February 7, 1994).

[3] I–601 was at that time the form used for application for waiver of ground of excludability. No such application has been filed in this case, thus no I–601 is pending.

[4] I–485 is the form used for application to register permanent residence or to adjust status. Conditional approval was granted in this case after an interview on July 21, 1994. Notice of intent to rescind was thereafter issued on September 30, 1994.

My previous order questioned whether the Puleo letter even rose to the level of a policy, but I was nevertheless reluctant to rule on the issue without further comment from the INS regarding its views as to the meaning and purpose of the letter. Respondent's views were solicited as well, and ruling on this defense was also reserved pending receipt of the further submissions.

The Submissions of the Parties

After appropriate extensions of time, both parties filed timely submissions in response to the order.

Complainant's Submission

Complainant's submission, captioned "Complainant's Views on Meaning and Purpose of Puleo Letter," states that the INS considers the Puleo letter to be an operational memorandum, a case-specific response to the particular question posed, not a policy applicable to this case, not a regulation or an Operating Instruction, and not therefore binding, citing *United States v. Thoronka*, 5 OCAHO 725 at 3 (1995)[5]. Even if the letter were binding, INS further suggests that the factual situation in this case differs so substantially from the facts underlying the recommendation in the Puleo letter that the letter simply has no application to this case.

Respondent's Submission

In support of his second defense, respondent submitted a statement alleging that INS should be estopped from filing the complaint because:

> (1) The INS knew or should have known the true facts of this case since all of the information regarding Mr. DeLeon-Valenzuela was contained in his file;
>
> (2) The INS' conduct during Mr. DeLeon-Valenzuela's interview demonstrated that they intended to grant him legal permanent residency status; (3) Mr. DeLeon-Valenzuela answered truthfully all the questions that they asked him as he knew them at the time; (4) Mr. DeLeon-Valenzuela relied on the

[5] Citations to OCAHO precedents reprinted in the bound Volume 1, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States*, reflect consecutive pagination within that bound volume; pinpoint citations to Volume 1 are to the specific pages, seriatim, of the *entire* volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 1, however, are to pages within the original issuances.

> INS's conduct with regard to his approval for legal permanent residency to build a life for himself and for his wife, which is now being taken away from them. (5) The INS will cause a serious injustice for the reasons stated above. In addition, the continued presence of Mr. Felipe DeLeon-Valenzuela will not unduly burden the public interest. Mr. DeLeon-Valenzuela is a hardworking, honest person with many fine qualities, who will enrich and not detract from his community. The INS possessed all the facts before them and proceeded to adjudicate and approve his adjustment of status application. Mr. DeLeon-Valenzuela should not suffer the unjust consequences nor suffer the substantial prejudice placed upon him as a result of the INS' negligence or misconduct in failing to investigate his file thoroughly beforehand. The INS should be held to have waived any right to deportation of Respondent.

In support of his third defense, respondent also addressed the issue of the meaning and effect of the Puleo letter, arguing that the letter should be accorded the binding force of law for three reasons. First, because agency decisions should be consistent, thus, if a delay were granted in one such proceeding, respondent argues, applicable principles implemented in such a proceeding should apply in a subsequent, similar proceeding. Under this line of argument, the Puleo letter should be given the same effect in the instant proceeding as it was in the former. Second, respondent maintains that the letter sets out a provision which has a significant effect on individuals and which confers procedural benefits on the public, not just on the agency. Finally, respondent argues that internal policies can have the force of law, and notes that even rules which are procedural in nature may be binding, regardless of whether they are published in the Federal Register. The key determination to make, according to respondent, is whether the agency procedural rule is intended to be mandatory.

Both parties having made their submissions, the motion to strike respondent's affirmative defenses is ripe for ruling.

Applicable Law

The OCAHO rules 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 (1995). Because OCAHO rules are silent regarding motions to strike, it is appropriate to look to Rule 12(f) of the Federal Rules of Civil Procedure for guidance in considering such a motion in OCAHO proceedings. *United States v. Irani*, 6 OCAHO 860, at 3 (1996), *United States v. Chi Ling, Inc.*, 5 OCAHO

723, at 3. The standards for pleading a viable affirmative defense are set forth in my prior order; I do not repeat them here.

Discussion

1. *Waiver and Estoppel*

For the reasons stated in my previous order of May 30, 1996, the second claimed defense must again be stricken. I previously struck the claimed defense of waiver and estoppel because respondent's statement had failed to set forth facts which would give rise to an estoppel even against a private party. In granting leave to replead, I noted that the essential components of an estoppel defense against the government include not only the four traditional elements of estoppel (which were set forth in the order), but also some allegation of facts which would show affirmative misconduct on the part of government agents going beyond mere negligence, and facts which would show that the public interest would not be unduly burdened if the estoppel were granted. *Watkins v. U.S. Army*, 875 F.2d 699, 707 (9th Cir. 1989). Respondent has again failed to identify facts raising any issue of affirmative misconduct of the character required to estop the government.

OCAHO rules require a pleader to recite adequate factual underpinnings for any claimed affirmative defenses. 28 C.F.R. §68.9(c)(2). The prior order observed that respondent's submission was lacking facts raising issues of misconduct, reliance, detriment based on a change of position, or injustice. In response to the order, respondent has simply recited legal conclusions cast in the terms set forth in the prior order, but again without adequate factual allegations to satisfy §68.9(c)(2). Respondent's submission alleges not facts but bald legal conclusions.

Respondent's related suggestion, moreover, that INS waived the right to deport him by finding him admissible as a lawful permanent resident, is wholly inapposite. This is a proceeding for document fraud, not a deportation hearing. Whether or not INS waived a right to deport him is irrelevant to this case. INS did not waive the right to file a document fraud complaint by a conditional grant of permanent residency—not only was the grant *conditional*, it is also without significance in this proceeding because lawful permanent resident aliens and even United States citizens may be subject to document fraud proceedings.

Respondent's assertion that he relied on the granting of his application for permanent residency to build a life as a permanent resident is puzzling in light of documents in the record attached to complainant's motion to strike, which indicate that a Notice of Intent to Rescind was issued on September 30, 1994, on the grounds that respondent willfully misrepresented and concealed material facts in the interview by which he gained conditional residency status, grounds wholly separate from the allegations of document fraud in the instant proceeding.[6]. What change of position could have taken place between July 21, 1994 and September 30, 1994 in reliance on the conditional granting of the application is, moreover, unexplained.

Given the standards governing motions to strike, respondent's first remaining defense should be dismissed outright because it fails to meet the threshold standard as outlined in my order of May 30, 1996. The legal standard set forth in *Heckler v. Community Health Services*, 467 U.S. 51 (1984) is a stringent one. It has not been satisfied.

2. *Violation of INS's Own Policies*

The parties differ sharply as to the meaning, significance, and effect of the Puleo letter.

It is well settled that not all agency pronouncements have the "force and effect of law": "Generally speaking, it seems to be established that 'regulations,' substantive rules,' or 'legislative rules' are those which create law." *Brown Express, Inc. v. United States*, 607 F.2d 695, 700 (5th Cir. 1979). By contrast, other types of agency pronouncements are generally not accorded the weight of binding authority. *See Professionals and Patients for Customized Care v. Shalala*, 56 F.3d 592, 595 (5th Cir. 1995). Substantive administrative rules are those that grant rights, impose obligations or produce other significant effects on private interests. *American Hosp. Ass'n v. Bowen*, 834 F.3d 1037, 1045 (D.C. Cir. 1987). Substantive adminis-

[6] Respondent's reliance on *res judicata* is also misplaced for a related reason. The principle of res judicata applies only to *final* decisions—not those that are subject to revision, such as the INS' decision to *conditionally* grant respondent permanent residence. *See, e.g., Astoria Fed. Sav. and Loan Ass'n. v. Solmino*, 501 U.S. 104, 107 (1991). Respondent's submission nowhere acknowledges or disputes INS' contention that he failed at his interview to inform them he had used two different A numbers (A# 72–818–596, under which this proceeding was brought, and A# 93–086–340), or that he had already been placed in immigration proceedings.

trative rules are distinguished at law from interpretative rules, statements of policy, and other forms of agency pronouncements. *Customized Care*, 56 F.3d at 595.[7] While substantive rules have the binding force of law, interpretative rules, policy statements, and rules of agency organization, procedure, or practice ordinarily do not. *Shalala v. Guernsey Memorial Hosp.*, ___ U.S. ___, ___, 115 S. Ct. 1232, 1236–37 (1995) (interpretative rules "do not have the force and effect of law"), *Professionals and Patients for Customized Care v. Shalala*, 56 F.3d 592, 596 (5th Cir. 1995) ("[a] general statement of policy . . . does not establish a 'binding norm'"), *Rank v. Nimmo*, 677 F.2d 692, 698 (9th Cir.), *cert. denied*, 459 U.S. 907 (1982) (rules of agency organization, practice, or procedure do not have force of law). Because substantive rules have greater impact on individual interests than other types of rules, the Administrative Procedure Act, 5 U.S.C. §553 (1996) (hereinafter "APA"), prescribes formal requisites for promulgating substantive rules.[8] Specifically, the APA requires that an agency give advance notice of the terms or substance of a proposed rule and an opportunity for interested persons to comment on the proposed rule through submission of written data, views or argument. 5 U.S.C. §553(b)—(c). Substantive rules made without the formalities of the APA are invalid. *Phillips Petroleum Co. v. Johnson*, 22 F.3d 616, 621 (5th Cir. 1994), *cert. denied sub nom. Babbitt v. Phillips Petroleum Co.*, ____ U.S. ____, 115 S.Ct. 1816 (1995).

Respondent cites generally the law construing the significance of rules, regulations, and policies in order to support his contention that the Puleo letter is "binding" on the agency, but does not definitively categorize the Puleo letter as any one of these. Respondent is essentially contending that the Puleo letter should be given the significance of a substantive rule. INS, on the other hand, contends that the Puleo letter is case-specific guidance that simply does not apply to the facts of the instant case. This interpretation is consistent with the language of the letter itself: "In the case under consideration, this office is of the opinion that the I–601 and I–485 should be adjudicated before the §274C proceedings are pursued." Thus, the lan-

[7] *See also Rank v. Nimmo*, 677 F.2d 692, 698 (9th Cir.), *cert. denied*, 459 U.S. 907 (1982) (requiring that internal documents must "prescribe substantive rules—not interpretive rules, general statements of policy or rules of agency organization, procedure or practice" in order to have the force and effect of law).

[8] "[P]ublic participation . . . in the rulemaking process is essential in order to permit administrative agencies to inform themselves, and to afford safeguards to private interests." S.Doc. No. 248, 79th Cong., 2d Sess. 19–20 (1946).

guage of the letter itself is neither prospective, beyond the case it seeks to address, nor mandatory. *Customized Care*, 56 F.3d at 597–98.

Respondent sets out three alternative theories for finding the Puleo letter binding. His first assertion is that agency decisions bind the agency, which appears to assume that the Puleo letter creates a rule. But in a recent Fifth Circuit decision, controlling law for the purposes of this case, the court noted that a starting point for assessing whether an agency pronouncement rises to the level of binding law is the agency's own characterization of the pronouncement. *Customized Care*, 56 F.3d at 596. In *Customized Care*, the court set out that the plain language of a pronouncement and the manner in which it is implemented by the agency concerned, are the determining factors in ascertaining whether the pronouncement creates binding norms. *Customized Care*, 56 F.3d at 597. Where the agency's position is supported by the text and structure of the pronouncement at issue, the courts defer to the agency position, so long as it is a reasonable interpretation. *Shalala v. Guernsey Memorial Hospital*, ___U.S. at ___, 115 S. Ct. at 1236. The Service's position in the instant case is reasonable given the express language of the Puleo letter, and it is therefore more persuasive than the interpretation offered by respondent.

Respondent's second assertion is that the Puleo letter has "a significant effect upon individuals." Respondent argues that the Puleo letter was intended to confer benefits on the public and that internal procedures are to be given the force of law where failure to do so creates substantial prejudice to members of the public. Respondent quotes *French v. Edwards*[9] to advance the argument that the public therefore has the right to rely on the provision[10]. Accordingly, respondent contends that agency actions in violation of procedures intended for the protection or benefit of citizens are invalid.[11]

[9] 80 U.S. 506, 511 (1871).

[10] Respondent also relies on *Arizona Grocery Co. v. Atchinson, Topeka and Santa Fe Ry.*, 284 U.S. 370, 389 (1932) for a similar proposition. Respondent cites language purportedly quoted from this case to advance the theory that internal agency rules conferring procedural benefits on private individuals are binding on the agency. *See Respondent's Response To Order Granting In Part And Taking Under Advisement In Part Complainant's Motion To Strike, And Requesting Further Comment* (hereinafter "*Response*") at 2. However, a reading of *Arizona Grocery* did not disclose the quoted language.

[11] To support this proposition, respondent relies on a quotation which is cited to *Triangle Candy Co. v. United States*, 144 F.2d 195, 199 (9th Cir. 1944). *See Response* at 3. However, the quoted language does not appear in *Triangle Candy Co.*.

Respondent has not articulated any reasonable basis upon which to infer that the purpose of the Puleo letter was to be a source of substantive rights for aliens with fraudulent documents. *See United States v. Educated Car Wash*, 1 OCAHO 98, at 662 (1989) (INS Field Manual does not constitute source of substantive rights). If anything, the letter serves to "'educate and provide direction to those agency personnel . . . who are required to implement its policies and exercise its discretionary power in specific cases.'" *Id.* at 6 (citations omitted). Such rules serve as "functional in-house '*tools*' which 'aid' an agency in 'exercising its discretion to meet an immediate and urgent need'" as opposed to "'*rules*' which confer important procedural benefits upon *individuals*." *Id.* at 4 (quoting *American Farm Line v. Black Ball Freight Serv.,* 397 U.S. 532, 538 (1970) (emphasis added)). Moreover, "the Supreme Court, in arguably analogous contexts, has concluded that Department of Justice policies governing its internal operations do not create rights which may be enforced by defendants against the Department." *Educated Car Wash*, 1 OCAHO 98, at 664 n.3, citing *United States v. Caceres*, 440 U.S. 741 (1979), *Sullivan v. United States*, 348 U.S. 170 (1954). The letter at issue states clearly that the reason for its recommendation is to avoid "hold[ing] the Service up to ridicule." Puleo letter at 1. The recommendation outlined in the Puleo letter was therefore evidently not formulated to confer benefits on individuals, but, rather, to advise an INS official to consider the agency's public relations interest in appearing consistent when making discretionary determinations. This is an interest which has a more compelling rationale in the context of a factual pattern, like that addressed in the Puleo letter, where the same conduct is at issue in both proceedings. It has proportionately less weight in a case where, as here, the conduct differs.

Respondent's third argument, somewhat related to the second, is that internal policies can have the force of law, so long as they are intended to be mandatory.[12] There is no indication, however, that the advice in the Puleo letter was intended by its author to be mandatory. The letter, on its face, creates no binding obligation, but rather confines itself to "the case under consideration" and notes that it is providing only an "opinion." Puleo letter at 1. Its words connote a

[12] To support this proposition, respondent relies on *Lucas v. Hodges*, 730 F.2d 1493 (D.C. Cir. 1984). *See Response* at 4. However, the judgment in that case was subsequently vacated by *Lucas v. Hodges*, 738 F.2d 1392 (D.C. Cir. 1984). Respondent also cites *Lucas* as having been decided by the Ninth Circuit; in fact it was decided in the District of Columbia Circuit.

recommendation, not a mandatory obligation; even in that specific case, the Puleo letter appears to be addressed to the exercise of the prosecutorial discretion of the District Director.

The law is clear in any event that opinion letters do not have binding effect. *See, e.g., Taylor-Callahan-Coleman Counties Dist. Adult Probation Dep't v. Dole*, 948 F.2d 953, 957 (5th Cir. 1991) (finding opinion letters nonbinding on employees of Department of Labor and noting that letters were "expressly limited to the factual situation presented by the requesting party"), *Charles v. Krauss Co.,* 572 F.2d 544, 547 (5th Cir. 1978) ("[t]his court is, of course, not bound by staff opinion letters. . . ."), *New York Stock Exch., Inc. v. Bloom*, 562 F.2d 736 (D.C. Cir. 1977) (opinion letter signed by agency head found to be informal and without force of law). To have the force and effect of law, moreover, regulations must be within the contemplation of some congressionally delegated authority. *United States v. Mississippi Power & Light Co.*, 638 F.2d 899, 905 (5th Cir.), *cert. denied*, 454 U.S. 892 (1981). The Puleo letter does not appear to be within any such delegation of authority. The powers and duties of INS officers at the time the letter was written were codified at 8 C.F.R. §103.1 (1993). Under those regulations, the Executive Associate Commissioner for Operations, while authorized to implement policies and provide general direction to regional directors, was not invested with rule-making authority. 8 C.F.R. §103.1(g)(1) (1993).

In summary, respondent's argument that the Puleo letter should be given binding effect is unconvincing. The letter does not create a legislative rule, and it was not intended to confer benefits on individuals. The author of the letter was not vested with any rule-making authority. The language of the letter is non-mandatory and nothing about the letter suggests that it was intended to do anything more than guide internal INS procedures in a given case.

Neither party has brought to my attention the Legal Opinion of the General Counsel dated May 18, 1993, dealing with subject matter related to the Puleo letter, and characterizing the contents of the Puleo letter as a "policy decision." General Counsel Opinion[13] at 3. Like the Puleo letter, the Opinion observes:

[13] A copy of the Opinion is attached to this order.

> Situations will arise where the same fraudulent conduct could subject a person both to a charge of inadmissibility under §212(a)(6)(C) and to civil fine proceedings under §274C. An alien charged with inadmissibility under 212 (a)(6)(C) may be eligible to apply for a waiver of that fraudulent conduct under §212(i) of the Act and be allowed to enter the United States.
>
> Where a waiver under §212(i) is pending, any contemplated proceedings pursuant to 274C should be delayed until a decision on the §212(i) waiver application is made. If the waiver application is approved, no further proceedings *involving the same conduct* should be instituted under §274C. If the application for a §212(i) waiver is denied proceedings under §274C may be instituted where appropriate. (Emphasis supplied).

In any event, the facts in this case do not bring it within the advice of the Puleo letter. The Puleo letter and the General Counsel Opinion both conclude that pending I–601 (and I–485) matters should be adjudicated before the 274C proceedings are pursued where the same conduct is at issue in both proceedings. First, it should be pointed out in this case that no I–601 application was filed for waiver of ground of excludability and thus there *is* no §212 waiver proceeding pending; the 274C proceedings are not "contemplated," they are ongoing. Second, and more importantly, the conduct at issue in this proceeding is not the same conduct which would be at issue in any waiver proceedings. Finally, there is no I–485 pending as the conditional lawful permanent resident status previously granted is in the process of rescission.

Conclusion

Complainant's Motion to Strike Respondent's Affirmative Defenses in the Amended Answer is granted. The affirmative defenses are stricken.

SO ORDERED:

Dated and entered this 6th day of November, 1996.

ELLEN K. THOMAS
Administrative Law Judge