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

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. l324c Proceeding Case No. 94C00192
KADAY MUSU THORONKA, Respondent.	)	

AFFIRMATION BY THE CHIEF ADMINISTRATIVE HEARING OFFICER OF THE ADMINISTRATIVE LAW JUDGE'S ORDER AND CERTIFICATION

On July 13, 1995, the Honorable Marvin H. Morse, the Administrative Law Judge (ALJ) assigned to United States v. Thoronka, a document fraud proceeding arising under 8 U.S.C. § 1324c(a)(1), issued an Order and Certification to the Chief Administrative Hearing Officer (CAHO). Pursuant to 28 C.F.R. § 68.53(d)(1)(i), which permits the ALJ to certify an interlocutory order for administrative review, I am exercising the administrative review authority provided in 8 U.S.C. § 1324c(d)(4), and delegated to the CAHO in 28 C.F.R. § 68.53(a).[1]

The respondent, alleged to having forged, counterfeited, altered and/or falsely made one employment verification eligibility Form I-9, asserted as an affirmative defense that a false claim to citizenship on a Form I-9 is not a violation of section 1324c, and thus the complaint fails to state a claim upon which relief can be granted. See ALJ order

[1] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. pt. 68 (1994), as amended by 59 Fed. Reg. 41,243 (1994) (to be codified at 28 C.F.R. § 68.2(i), (k)).

at 1. Although the ALJ extensively discussed the holding in United States v. Remileh, 5 OCAHO 724 (1995), and INS' position on the issue in that case, he concluded (correctly I think) that the issue in Remileh is immaterial to the specific procedural issue presented here. See ALJ order at 6. The narrow holding of the Order and Certification, that is the subject of this review, was that a "specification of a violation of § 1324c(a)(1) which alleges forgery, counterfeiting or altering of documents for the purpose of satisfying a requirement of the INA, is sufficient to state a cause of action under § 1324c." ALJ order at 6-7.

Because it is a well established principle that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief," Conley v. Gibson, 355 U.S. 41, 45-46 (1957)(emphasis added); Udala v. New York State Dept. of Educ., 4 OCAHO 633 (1994), the complainant should be allowed to go forward at this juncture in the case to attempt to prove a set of facts which would sufficiently establish a section 1324c violation in light of the CAHO's modification in Remileh. See Remileh at 3-4. As the ALJ noted in his order, "today's Order does not anticipate whether the proof will comport with the specification of the charge in this case." ALJ order at 7.

ACCORDINGLY, the CAHO hereby affirms the ALJ Order and Certification as to its narrow holding that effectively strikes the affirmative defense of failure to state a claim upon which relief can be granted.

It is **SO ORDERED**, this 19th day of July, 1995.

JACK E. PERKINS
Chief Administrative Hearing Officer

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ORDER AND CERTIFICATION
TO THE CHIEF ADMINISTRATIVE HEARING OFFICER
(July 13, 1995)

I. *Procedural History and Introduction*

On October 31, 1994, the Immigration and Naturalization Service (INS or Complainant) filed a Complaint against Kaday Musu Thoronka (Thoronka or Respondent) in the Office of the Chief Administrative Hearing Officer (OCAHO). The Complaint is accompanied by an underlying Notice of Intent to Fine dated July 29, 1994.

Count I of the Complaint, the only count, alleges that Respondent forged, counterfeited, altered and/or falsely made one employment verification eligibility Form I-9 dated March 3, 1994 in violation of section 274C(a)(1) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324c(a). INS assesses a civil money penalty in the amount of $900.

On November 7, 1994, OCAHO issued a Notice of Hearing transmitting a copy of the Complaint to Respondent.

On December 5, 1994, Respondent timely filed an Answer to the Complaint in which she admitted she signed her name, Kaday Musu Thoronka, on the Form I-9 and falsely claimed on the I-9 to be a

"United States citizen." Respondent asserted as affirmative defenses: (1) failure to state a claim upon which relief can be granted because Respondent's false claim to citizenship on a Form I-9 is not a violation of § 1324c; (2) lack of standing because the same issue in this case is also before an Immigration Judge, and (3) a case of her adjustment of status is pending before an Immigration Judge.

On December 5, 1994, Respondent filed a Motion to Abate or Conditionally Terminate the Complaint until the case before the Immigration Judge is resolved. Respondent's Motion relied on a 1994 memo of Acting INS Executive Associate Commissioner, James Puleo, (Puleo Memo) which advised INS personnel to defer § 1324c cases when the alleged fraud is also the subject of a pending § 8 U.S.C. 1251 adjustment of status proceeding.

By response filed December 14, 1995, INS argued that it has "prosecutorial discretion to initiate proceedings under 8 U.S.C. § 1324c, as well as under 8 U.S.C. § 1251 . . . [and] [t]here are reasons why the INS may want to bring 1324c proceedings against someone for whom 1251 proceedings have already been initiated." For instance, under "8 U.S.C. 1251(a)(3)(C), an alien who is the subject of a final order for violation of section 1324c, becomes subject to deportation."

On December 20, 1994, Respondent filed a Response, renewing her argument that policy considerations set out in the Puleo Memo dictate that this case should be abated or conditionally terminated.

By Order dated January 11, 1995, 5 OCAHO 725, I held that the Puleo Letter does not bar INS from proceeding on a case by case basis in seeking to develop jurisprudence under the still-new and barely tested § 1324c. Moreover, "I do not detect in the four corners of the … [Puleo memo] a rule of practice so much as a caveat against foolish action." Id. at 4.

In response to the January 11 Order, the parties each submitted statements of fact and legal issues.

On February 7, 1995, the Chief Administrative Hearing Officer (CAHO) issued a Modification of the ALJ's Order in United States v. Remileh, 5 OCAHO 724 (1995), which held that "the attestation of an employee to false information on a Form I-9 does not constitute the creation of a "falsely made" document in violation of 8 U.S.C. § 1324c." Id. at 2-3. In light of the CAHO decision, by Order dated March 2, 1995, I invited the parties to brief the impact of Remileh on the sole

charge in this case, i.e., the false attestation by Respondent on the Form I-9 that she was a United States citizen. Complainant's Response was filed April 28, 1995; Respondent's, May 15, 1995.

A. Complainant's Response

Complainant argues that Remileh should be reconsidered because the CAHO misinterpreted Moskal v. United States, 498 U.S. 103 (1990), the pertinent Supreme Court case defining the term "falsely made." Complainant contends that Moskal held that "falsely made" "encompasses 'genuine' documents that are false in content." Cplt. Brief at 5 (quoting Moskal, 498 U.S. at 117). According to INS, the CAHO ignores the majority holding in Moskal, relying instead on the dissenting opinion subsequently espoused by a lower court opinion, Merklinger v. United States, 16 F.3d 670 (6th Cir. 1994). Cplt. Brief at 5. In Merklinger, the court held that "Moskal is not applicable 'where to depart from the term's [i.e., "falsely made"] common law interest would not serve any overriding Congressional purpose.'" Cplt. Brief at 6 (quoting Merklinger, 16 F.3d at 674). It is inappropriate, says INS, to rely on Merklinger, however, because doing so directly conflicts with the statement in Moskal that the Supreme Court "has never required that every permissible application of a statute be expressly referred to in its legislative history.'" Cplt. Brief at 7 (quoting Moskal, 498 U.S. at 111). Furthermore, INS submits that congressional intent to reach a broad class of fraud including genuine Forms I-9 containing false information, is evidenced by the broad language, "forged, counterfeit, altered or falsely made documents," rather than "counterfeit documents" to describe violations of § 1324c. Cplt. Brief at 7.

INS also argues that the CAHO erred in relying on a parallel criminal statute, 18 U.S.C. § 1546, purposely more narrowly constructed than § 1324c. INS in effect argues that while § 1324c prohibits use of any fraudulent documents to satisfy any requirement of the Act, § 1546 contains disparate provisions only some of which criminalize employer sanctions violations. Cplt. Brief at 11.

INS adds that the CAHO ruling ignores the controlling regulation to the effect that the term "document" is defined to include "an application required to be filed under the Act and any other accompanying document or material," 8 C.F.R. § 270.1. According to INS, the CAHO decision renders this provision meaningless. Cplt. Brief at 12.

Finally, Complainant argues that, under the CAHO's own reasoning, the facts in Remileh support a Form I-9 § 1324c violation. "Under the

CAHO's reasoning, the terms forge and 'falsely make' are to be given the same meaning." Cplt. Brief at 13. Since Remileh signed another person's name to the Form I-9, he forged that document and, by the CAHO's own reasoning, also falsely made that document.

B. Respondent's Response

Respondent argues that "[r]ather than disregard Remileh, this court should follow the [CAHO] precedent . . ." Resp. Brief at 1. Respondent asserts that issues raised by Remileh in the case at hand should be resolved upon judicial review. Id. at 2. Respondent emphasizes the view that Moskal rests on "the questionable legal rationale," that "false making" lacked "accepted common law meaning," instead preferring the Moskal dissent's analysis to the effect that "'false making was a central element of, not a crime separate and distinct from, forgery.'" Resp. Brief at 2.

II. *Discussion*

A. Remileh Distinguished

Remileh holds that § 1324c fails to reach the false making of a Form I-9. It is instructive, however, to compare the conduct alleged to violate § 1324c in Remileh with Thoronka's alleged misconduct. Upon analysis, the underlying specification in Remileh contrasts with the specification of the count against Thoronka. The question arises whether the Remileh result needs to apply in every case which implicates false making of an I-9. If Remileh can be understood to apply only to specifications of § 1324c violations which mirror the rejected I-9 specification in that case, it may be appropriate and just to distinguish it from cases which are not in pari materia so as not to expand its scope unwittingly.

At the outset, it should be clear that I decline the invitation in Complainant's response to the March 2, 1995 Order to "reconsider" Remileh; I lack power to do so. In no respect does the inquiry in the present case revisit Remileh, which in a case on all fours I am obliged to follow. In contrast, Respondent's suggestion that Remileh issues can be considered upon judicial review concedes nothing to INS. This is so because of the opinion of the Office of Legal Counsel, Department of Justice, that INS lacks authority to seek judicial review of a CAHO order, and that so far as INS is concerned, a CAHO order is the final and unreviewable agency action. 13 U.S. Op. OLC 446 (1989 WL 418338 (O.L.C.)).

In Remileh, the respondent alien was charged with two counts in violation of § 1324c. Count I charged that in violation of § 1324c(a)(1) the I-9 reflected false information contained in a birth certificate which Respondent presented to the employer for the purpose of fulfilling a requirement of the INA, i.e., in satisfaction of the employment eligibility verification regimen; Count II charged that in violation of § 1324c(a)(2) Respondent altered another person's birth certificate by changing the date of birth to his own, and presented the falsely altered birth certificate to the employer for the purpose of fulfilling a requirement of the INA. The order of the administrative law judge (ALJ) granting summary decision, finding liability on both counts, was modified by the CAHO who held that

> the attestation of an employee to false information on a Form I-9 does not constitute the creation of a 'falsely made' document in violation of 8 U.S.C. § 1324c. It is the underlying fraudulent document, submitted to an employer to establish identity and/or work authorization, which is the proper basis of a section 1324c violation against an employee in the context of the employment eligibility verification system of 8 U.S.C. § 1324.

Remileh, 5 OCAHO 724 at 2-3 (footnote omitted).

The Remileh Count I alleged as follows:

> A. The Respondent **falsely made** the following document:
>
> 1. Employment Eligibility Verification (Form I-9), executed on July 22, 1993 at Valley Fair.
>
> B. The Respondent **falsely made** the document listed in paragraph A after November 29, 1990.
>
> C. The Respondent **falsely made** the document listed in paragraph A knowing that such document was falsely made.
>
> D. The Respondent **falsely made** the document listed in paragraph A for the purpose of satisfying a requirement of the Immigration and Nationality Act.

In contrast, the sole count against Thoronka alleges that:

> A. The Respondent **forged, counterfeited, altered and/or** falsely made the following document(s):
>
> 1. One Employment Eligibility Verification Form I-9 dated March 3, 1994 in the name of Kaday Musu Thoronka.
>
> B. The Respondent **forged, counterfeited, altered and/or** falsely made the document(s) listed in paragraph A after November 29, 1990.

C. The Respondent **forged, counterfeited, altered and/or** falsely made the document(s) knowing that such document(s) were forged, counterfeited, altered and/or falsely made.

D. The Respondent knowingly **forged, counterfeited, altered, and/or** falsely made the document(s) listed in paragraph A for the purpose of satisfying a requirement of the Immigration and Nationality Act.

B. Relevant Case Law Discussed

In Merklinger, the Sixth Circuit reversed the district court for failing on a criminal charge of falsely making a guarantee, to instruct the jury that forgery was an element of the crime alleged. In a footnote, the Merklinger court, not so much distinguishing Moskal as limiting its applicability, preferred the analysis of the Moskal dissent, as later emphasized and relied on by the CAHO. See Merklinger, 16 F.3d 670 at 674 n.4.

Apparently relying on Merklinger, the CAHO characterized Moskal to the effect that:

> the majority opinion in Moskal held that 'falsely-made' as used in 18 U.S.C. § 2314 . . . applies to genuinely executed securities containing false information 'because, Congress' general purpose in enacting a law may prevail over' the common law meaning of a term. (Footnote omitted).

Remileh, 5 OCAHO 724 at 5 (emphasis added).

But, as noted by INS in its response to my Order, 5 OCAHO 725, the Supreme Court concluded in somewhat different fashion that,

> [t]he position of those common-law courts that defined "falsely made" to exclude documents that are false only in content does not accord with Congress' broad purpose. . . . We conclude, then, that it is far more likely that Congress adopted the common-law view of "falsely made" that encompasses "genuine" documents that are false in content.

Moskal, 498 U.S. at 117-18 (emphasis added).

In contrast, the Sixth Circuit and the CAHO rejected "the government's implication--that the term 'falsely makes,' applies to false statements in a genuinely executed document" because of allegedly erroneous understanding of the historic use of the term "false making." Merklinger, 16 F.3d 670 at 673. It does not matter for purposes of the case at hand that the Merklinger court may in respect of that conclusion have disingenuously sidestepped Moskal. It does matter, however, that Moskal is the law. But, no matter how instructive with

respect to the charge in Remileh the tension may be among various judicial interpretations over common law understanding as to whether false making implicates forgery, and whether false making encompasses documents which are otherwise genuine but false in content, that tempest is immaterial here. This is so because unlike the crime specified in Merklinger, and the § 1324c violation alleged in Remileh, Thoronka is charged with having forged, counterfeited, altered and/or falsely made the Form I-9.

To the extent that the logic of Merklinger informs Remileh it is no less pertinent to support the difference occasioned by the distinction between the Remileh and Thoronka charges. For example, "[i]n the present case, no one accuses Defendant of altering, forging, or counterfeiting." Merklinger, 16 F.3d at 673. And again, "Defendant was not accused of forgery, but only of making false statements in documents that Defendant genuinely executed." Id. at 676.

III. *Conclusion*

Accordingly, following Moskal, and recognizing Congress' broad purpose in enacting civil penalties for document fraud by amending the INA,[1] this Order holds that a specification of a violation of § 1324c(a)(1) which alleges forgery, counterfeiting or altering of documents for the purpose of satisfying a requirement of the INA, is sufficient to state a cause of action under § 1324c. I do not understand Remileh to compel a contrary result. This Order effectively strikes the affirmative defense that the Complaint fails to state a § 1324c cause of action upon which relief can be granted. The remaining affirmative defenses turning on Respondent's immigration status were effectively rejected by the Order of January 11, 1995, 5 OCAHO 725. Of course, today's Order does not anticipate whether the proof will comport with the specification of the charge in this case.

Section 1324c cases which contain specifications similar to those in this case are pending. The result reached by this Order is not irreconcilable with Remileh. It may be understood, however, to be a sufficient departure as to warrant the determination that it "contains an important question of law or policy" on which there may be substantial ground for difference of opinion, "and where an immediate appeal will advance the ultimate termination of the proceeding. . . ." 28

[1] INA § 274C added by Sec. 544 of the Immigration Act of 1990, Act of Nov. 29, 1990, Pub. L. 101-649, 104 Stat. 4978.

C.F.R. § 68.53(d)(1)(i).[2] I so determine, and by doing so certify this Order to the Chief Administrative Hearing Officer (CAHO). See 28 C.F.R. § 68.53(d)(1)(i).

The parties are advised that this proceeding is stayed pending action by the CAHO, 28 C.F.R. § 68.53(2), following which an appropriate order will issue by the judge as to further procedures.

SO ORDERED.

Dated and entered this 13th day of July, 1995.

MARVIN H. MORSE
Administrative Law Judge

[2] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. pt. 68 (1994), as amended by 59 Fed. Reg. 41,243 (1994) (to be codified at 28 C.F.R. § 68.2(i), (k)) [hereinafter cited as 28 C.F.R. pt. 68].