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

June 6, 1996

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

**ERRATA**

The Order Granting in Part and Taking Under Advisement in Part Complainant's Motion to Strike and Requesting Further Comment, issued on May 30, 1996, on page 3, under the subheading *Waiver and Estoppel*, line 2 of the first paragraph currently gives the date of INS' approval of Respondent's Application to Register Permanent Residence or Adjust Status as July 21, 1995. It is hereby corrected to read July 21, 1994.

**SO ORDERED:**

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

ELLEN K. THOMAS
Administrative Law Judge

UNITED STATES DEPARTMENT OF JUSTICE
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May 30, 1996

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| v. | ) | 8 U.S.C. §1324c Proceeding |
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**ORDER GRANTING IN PART AND TAKING UNDER ADVISEMENT IN PART COMPLAINANT'S MOTION TO STRIKE, AND REQUESTING FURTHER COMMENT**

The complaint in this action alleges that Respondent knowingly used, attempted to use, and possessed a forged, counterfeited, or falsely made Alien Registration Receipt Card bearing the name of Felipe De Leon, after November 29, 1990, for the purposes of satisfying a requirement of the Immigration and Nationality Act, as amended 8 U.S.C. §1324c (INA), and that in so doing, he violated the provisions of 8 U.S.C. §1324c (a)(2).

Respondent's Answer denied the material allegations in the complaint, and asserted two affirmative defenses. On March 8, 1996, I issued an order striking the affirmative defenses for failure to comply with OCAHO rules of practice and procedure[1] because the defenses as stated were wholly conclusory, and stated no facts. I also granted leave to amend to replead the defenses in conformity with 28 C.F.R. §68.9(c)(2), and noted in my order that any amended defenses must contain both a statement of facts and a viable legal theory.

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

On March 28, 1996, Respondent filed an amended answer which denies the material allegations of the complaint and sets forth as defenses: 1) violation of due process and equal protection, 2) waiver and estoppel, and 3) violation of INS' own policies. On April 10, 1996, Complainant again moved to strike the amended defenses. Respondent has filed a response and the motion is ripe for ruling.

I. *Violation of Due Process and Equal Protection*

In support of the first defense based on violations of his rights to due process and equal protection of the laws, Respondent asserts that he speaks only Spanish, and that the Notice of Intent to Fine (NIF) was served in English and failed to apprise him of his rights. He states that at the time he was served he did not understand the NIF form, and he did not know the consequences of failing to demand a hearing. The only reason he was able to request a hearing is because he was assisted by an organization which helped him secure legal representation. He also states that similarly situated English-speaking people are apprised of their rights, but he was not.

Complainant argues that Respondent has not factually supported the first defense, that Respondent did not sign any waiver of his right to a hearing, he exercised his rights and was not deprived of them, and that therefore no viable legal theory was articulated for the defense.

Although not specifically referred to in Respondent's pleading of this defense, the due process theory he articulates is clearly the same as is set forth by the court in *Walters v. Reno,* ___F. Supp. ___, W.D. Wash. (March 13, 1996). In *Walters,* the court held that INS' standard procedures in document fraud cases were violative of due process rights in that the NIF forms, in English only and utilizing highly technical legal terminology, did not provide the class members with fair notice of the consequences of a final order under 8 U.S.C. §1324c.

The class certified in *Walters* consisted of:

> All non-citizens who have or will become subject to a final order under Section 274C of the Immigration and Nationality Act because they received forms that did not adequately advise them of their rights, of the consequences of waiving their rights, or of the consequences of failing to request a hearing.

For purposes of ruling on the motion to strike, I take as true all the factual assertions in Respondent's asserted defense: that he did not understand the forms, that he does not speak, read, or write English, that he had no notice of the consequences of failing to request a hearing, and that the only reason he was able to request a hearing was because of the assistance of an organization, not because he understood the forms.

Respondent's asserted defense does not bring him within the class of persons certified in *Walters* absent some claim of prejudice caused by any failure to advise him of his rights.. Although he is a person who may become subject to a final order under Section 274C, and arguably a person who received forms which failed to adequately advise him of his rights, he is nevertheless *not* a person who would become subject to an order *because* he received the flawed forms. The *Walters* class consists of persons who failed to request a hearing or who signed waivers of the right to hearing and were thereby susceptible to an automatic finding without an opportunity for the particularized inquiry provided by a hearing.

Even if he were a class member, it must be emphasized that the remedy provided to the *Walters* class was not immunity from document fraud proceedings, but rather the opportunity to seek reopening of their cases in order to have a hearing. This is a remedy for which Respondent has no need because he suffered no prejudice resulting from any denial of his rights. He concedes as much in his response to the motion, but argues that the absence of prejudice "was a fortuitous circumstance not a result of being informed or aware of what was happening to him."

The Ninth Circuit has repeatedly held that an alien is entitled to redress for violations of constitutional rights only where he or she can show prejudice. *See, e.g., Barraza Rivera v. INS*, 913 F.2d 1443, 1447–48 (9th Cir. 1990). Prejudice is found where an alien's rights are violated "in a manner so as potentially to affect the outcome of the proceedings." *Id.* at 1448 (quoting *United States v. Cerda-Pena*, 799 F.2d 1374, 1379 (9th Cir. 1986)).

Here there is no prospect that the alleged deprivation of rights described will affect the outcome of the proceedings because Respondent did not waive his right to a hearing, he timely requested a hearing, he is represented by counsel, and he has notice of the consequences of this action. Fortuitous or not, the absence of prejudice

means he is legally entitled to no defense based on the facts and theory alleged.

The first defense will be stricken in the absence of prejudice as legally insufficient to state a defense.

II. *Waiver and Estoppel*

In support of the second defense, Respondent asserts that because INS approved his Application to Register Permanent Residence or Adjust Status on July 21, 1995, after the issuance of the NIF on June 24, 1994, it should be estopped from filing the complaint because it waived the right to deport him by finding him admissible as a lawful permanent resident.

Complainant asserts that Respondent's statement of facts is deficient and inadequate and the legal theory is not sustainable, stating further that on September 30, 1994, it issued a Notice of Intent to Rescind his adjusted status as having been granted based on Respondent's misrepresentations as to his eligibility, a copy of which notice was furnished with the motion.

It is well settled that the government may not be estopped on the same terms as other litigants. *Heckler v. Community Health Serv. of Crawford County, Inc.,* 467 U.S. 51 (1984). The history of modern decisions under this principle is set forth in *Office of Personnel Manage ment v. Richmond,* 496 U.S. 414, 419–423 (1990), in which the Court observed that while it had left open the question of whether affirmative misconduct could ever estop the government, it had also reversed every finding to come before it in which a lower court had found estoppel against the government, in some instances summarily, citing *INS v. Hibi*, 414 U.S. 5 (1973) (per curiam), *Schweiker v. Hansen,* 450 U.S. 785 (1981) (per curiam), and *INS v. Miranda*, 459 U.S. 14 (1982) (per curiam).

In *Miranda,* the Court observed:

> This case does not require us to reach the question we reserved in *Hibi,* whether affirmative misconduct in a particular case would estop the government from enforcing the immigration laws.

459 U.S. at 19.

Assuming arguendo that there are circumstances which could give rise to an estoppel against a government agency, [2] such a defense has not been set forth here. The leading case in the Ninth Circuit is *Watkins v. U.S. Army,* 875 F.2d 699 (9th Cir. 1989)(en banc), *cert. denied*, 498 U.S. 957 (1990) in which it was held that a party seeking to invoke estoppel against an agency of government must satisfy two requirements in addition to the four elements needed for a traditional estoppel against a private party. First, the party must establish affirmative misconduct on the part of government agents going beyond mere negligence. A party seeking to state a claim for estoppel against the government must allege more than mere negligence, delay, inaction, or failure to follow an internal agency guideline. *Id.,* at 707. Second, it must show that the government's act will cause a serious injustice, and the imposition of estoppel will not unduly burden the public interest. As an initial threshold matter, the Ninth Circuit applies this two-prong test before even reaching the question of whether the four traditional elements of estoppel are met. *Id., United States v. Hemmen*, 51 F.3d 883, 892 (9th Cir. 1994).

The traditional estoppel doctrine is based on a combination of a misrepresentation of fact coupled with detrimental reliance thereon. It prevents a party from showing a truth contrary to its own misrepresentation of facts after another has relied upon the representation. *United States v. Hall*, 974 F. 2d 1201, 1205 (9th Cir. 1992). The four elements are generally set forth as:

> 1) the party to be estopped must know the true facts;
>
> 2) he must intend that his conduct or representation shall be acted on, or act in a manner which would cause the other party to believe he so intends;
>
> 3) the party seeking estoppel must be ignorant of the true facts; and
>
> 4) must rely on the former's conduct to his injury.

*Johnson v. Williford,* 682 F.2d 868, 872 (9th Cir. 1982).

OCAHO rules put the pleader to the burden of reciting adequate factual underpinnings for considering the applicability of any defense sought to be raised. 28 C.F.R. §68.9(c)(2). Respondent's plead-

[2] Although the Supreme Court has left the question open, at least eight Circuits have said there are circumstances under which the government may be estopped. The cases are collected in *Hansen v. Harris*, 619 F.2d 942, 959 (Newman, J., concurring) (collecting cases), (2d Cir. 1980), rev'd sub nom. *Schweiker v. Hansen,* 450 U.S. 785 (1981).

ing here identifies no facts which raise issues of affirmative misconduct or concealment, no misrepresentation, no reliance interest, no detriment based on change of position because of actions of INS, no claim of serious injustice, and no representations as to the public interest.

Examining Respondent's pleading in light of applicable standards, it fails to set forth facts that would state the requisite elements of estoppel, even against a private party. *A fortiori* it has not pleaded adequately the elements required to assert a *prima facie* case of estoppel against INS.

III. *Violation of INS' Own Policies*

In support of the third defense, Respondent asserts that INS policy requires that because he married an American citizen on May 14, 1993, the adjustment of his status must be fully adjudicated before initiation of this action. Respondent relies on what it described as "a Memorandum dated March 25, 1993," which it characterizes as stating a "policy" that INS will treat marriage to a United States citizen as calling for adjudication of an Application for Adjustment of Status (I–485) and an Application for Waiver of Ground of Excludability (I–601) prior to the initiation of a document fraud proceeding. The memorandum was not made part of the record, and Complainant did not specifically respond to the question of whether there is any such policy.

Respondent appears to be referring to the opinion letter from James A. Puleo, Acting Executive Associate Commissioner, INS, to David N. Ilchert, INS District Director, San Francisco, in response to a specific inquiry about the intersection of a 1324c case with applications for adjustment of status and for waiver of ground of excludability.[3] It states, in pertinent part:

> Your memorandum focuses on the quandary which results from the fact that document fraud and wilful misrepresentation in the procurement of documents under 212(a)(6)(C) has a specific waiver authorized under §212(a)(6)(C)(ii), whereas document fraud pursuant to §274C has no specific waiver authorized. Although there is no specific waiver authorized for document fraud pursuant to 274C, it is possible that a waiver under §212(c) or 212(d)(3) might be applicable.
>
> 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. If the waiver is granted and the subject is otherwise eligible, his status should be adjusted. In such a scenario, it would be inappropriate to pursue the §274C

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

> proceedings, since such a course of action could hold the Service up to ridicule for attempting to deport the subject for the very offense which has been waived.

71 Interpreter Releases at 226.

In a case of first impression before OCAHO, the impact of this opinion letter was previously raised by plea in abatement in *United States v. Thoronka*, 5 OCAHO 725 (1995), where respondent sought to delay proceedings in a case where the question of document fraud was pending contemporaneously in a §1324c proceeding and a 8 U.S.C. §1251 proceeding. The administrative law judge (ALJ) in *Thoronka* observed

> . . . I do not, however, credit the Puleo letter as barring INS from proceeding on a case by case basis in seeking to develop the jurisprudence under the still-new and barely tested §1324c. I do not detect in the four corners of the letter a rule of practice so much as a caveat against foolish action. . . . Absent a bar to moving ahead, I will not stay the orderly course of this proceeding.
>
> . . .
>
> Indeed, the reach of the letter is not pervasive or else INS would either have withheld this cause of action, or withdrawn it in the face of Respondent's unambiguous challenge before both the IJ and the ALJ.

5 OCAHO 725, at 4.

I concur with the view that the Puleo opinion letter does not appear to rise to the level of a policy statement. By its own terms, it is addressed to "the case under consideration." It does not seek to create rights for aliens, but rather to avoid embarrassment to the INS. It was a response to a specific inquiry, not a regulation or rule. It was evidently never published in the Federal Register or codified in the Code of Federal Regulations as is ordinarily the practice for rule making. 5 U.S.C. §553(c). It is doubtful that the Puleo letter even approaches the status of the Operations Instruction at issue in *Fano v. O'Neill*, 806 F.2d 1262, 1263–64 (5th Cir. 1987), which was held not binding on the INS because internal guidelines for INS personnel confer neither substantive nor procedural rights on aliens.[4]

Nevertheless, I am reluctant to act upon my impression without some further indication from INS with respect to its position as to the effect of this letter. While its memorandum in support of the mo-

[4] *See generally* P. Raven-Hansen, Regulatory Estoppel: When Agencies Break Their Own "Laws", 64 Tex. L. Rev. 1, 21–27 (1985) and cases cited at nn. 115–143.

tion to strike cites *Thoronka* for the proposition that it is not barred or estopped from pursuing this proceeding, it is otherwise silent as to INS' views on the meaning and purpose of the Puleo letter.

Accordingly, I solicit its views on this issue, and welcome as well any elaboration Respondent may be able to make of its second defense in light of the legal standard and the elements required to state an estoppel defense against a government agency.

Respondent's first defense is stricken; the second and third are taken under advisement pending further submissions.

Submissions will be timely if received by June 15, 1996.

**SO ORDERED:**

Dated and entered this 30th day of May, 1996.

ELLEN K. THOMAS
Administrative Law Judge