

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

March 27, 2020

UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. § 1324c Proceeding
	)	OCAHO Case No. 19C00033
	)	
ALMA DELIA RUBIO-REYES	)	
Respondent.	)	
_____	)	

ORDER ON SUMMARY DECISION

This case arises under the document fraud provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324c (2018). On June 10, 2019, the United States Department of Homeland Security, Immigration and Customs Enforcement (Complainant or the government) filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against Respondent, Alma Rubio-Reyes (Respondent). The complaint reflects that on January 22, 2019, the government served a Notice of Intent to Fine Under Section 274C of the Immigration and Nationality Act and Respondent requested a hearing that same day. Respondent filed an answer to the complaint on July 18, 2019.

Pending before the Court is a motion for summary decision filed by the Complainant on February 27, 2020, to which Respondent responded on March 16, 2020.

I. BACKGROUND

Complainant asserts in its complaint that Respondent, a native and citizen of Mexico, is undocumented, that she purchased a fraudulent lawful permanent resident card and a social security card, and used the cards to gain employment at a hotel. Compl. at 2–3. Attached to the Complaint is the Notice of Intent to Fine (NIF) which, in turn, includes a photocopy which has a black rectangle and numbers under it as well as the name Miriam Martinez, and a social security card with the name Miriam Martinez. Compl. Appx. A. The Complaint charges Respondent with violating Section 274C(a)(2) of the INA which renders it unlawful, 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 or obtain a benefit under the INA. Complainant seeks \$461.00 in penalties.

Respondent denies all allegations in her answer and asserts that she was subject to an unreasonable search and seizure and that she is not liable because working for a private company is not a benefit under the Act.

## II. THE PARTIES' POSITIONS

### A. Complainant's Motion

Complainant contends that it is entitled to summary decision because no genuine issue of material fact exists. Complainant argues that Respondent has not provided any evidence to demonstrate that she did not commit the violations alleged in the Complaint. Complainant included a recitation of the procedural history of the case, but did not submit any exhibits.

### B. Respondent's Response

Respondent's Response in Opposition to the Motion for Summary Decision indicates that the Respondent will establish by testimony that the documents must be excluded because she was subject to an unreasonable search and seizure in violation of her Fourth Amendment rights, and argues again that obtaining employment with a private company is not a benefit under the Act. Respondent likewise did not provide any evidence.

## III. LEGAL STANDARDS

Under the OCAHO rules, the Administrative Law Judge (ALJ) "shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . 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).<sup>1</sup> Section 68.38(c) is similar to and based on Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in federal cases. Accordingly, OCAHO jurisprudence looks to federal case law interpreting that rule for guidance in determining when summary decision is appropriate. *See United States v. Candlelight Inn*, 4 OCAHO no. 611, 212, 222 (1994).

"An issue of fact is genuine only if it has a real basis in the record" and "[a] genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit." *Sepahpour v. Unisys, Inc.*, 3 OCAHO no. 500, 1012, 1014 (1993) (citing *Matsushita Elec. Indus. Co. v. Zenith*

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<sup>1</sup> *See* Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2016).

*Radio Corp.*, 475 U.S. 574, 586–87 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).<sup>2</sup> The party seeking summary decision assumes the initial burden of demonstrating the absence of a genuine issue of material fact. *United State v. Sihombing*, 7 OCAHO no. 944, 361, 363 (1997). In determining whether the moving party has met its burden of proof, all evidence and reasonable inferences are drawn in favor of the nonmoving party. *Id.* Once the moving party has met its burden, the opposing party must come forward with specific facts showing there is a genuine issue of material fact. *Id.*; see 28 C.F.R. § 68.38(b) (“a party opposing the motion may not rest upon the mere allegations or denials of such pleading . . . [s]uch response must set forth specific facts showing that there is a genuine issue for trial.”).

Courts within the jurisdiction of the Fifth Circuit Court of Appeals, the jurisdiction where the events in this case occurred, have found that if the dispositive issue is one on which the moving party will bear the burden of proof at trial, the moving party “must come forward with evidence that would ‘entitle it to a [partial] directed verdict if the evidence went uncontroverted at trial.’” *United States ex rel. Branch Consultants, L.L.C. v. Allstate Ins. Co.*, 782 F. Supp. 2d 248, 256 (E.D. La. 2011) (quoting *Int’l Shortstop, Inc. v. Rally’s, Inc.*, 939 F.2d 1257, 1263–64 (5th Cir.1991)). The nonmoving party can then defeat the motion by either countering with sufficient evidence of its own, or “showing that the moving party’s evidence is so sheer that it may not persuade the reasonable fact-finder to return a verdict in favor of the moving party.” *Id.* All reasonable inferences are drawn in favor of the nonmoving party, but “unsupported allegations or affidavits setting forth ‘ultimate or conclusory facts and conclusions of law’ are insufficient to either support or defeat a motion for summary judgment.” *Id.* (quoting *Galindo v. Precision Am. Corp.*, 754 F.2d 1212, 1216 (5th Cir.1985)); *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).

OCAHO rules also provide that evidence to support or resist a summary decision must be presented through means designed to ensure its reliability. *Parker. v. Wild Goose Storage*, 9 OCAHO no. 1081, 3 (2002). Affidavits must set forth such facts as would be admissible in a proceeding subject to 5 U.S.C. §§ 556 and 557 and should show affirmatively that the affiant is competent to testify as to the matters stated therein. *Id.*; 28 C.F.R. § 68.38(b).

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<sup>2</sup> Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet reprinted in a bound volume, are to pages within the original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database “FIM-OCAHO,” or in the LexisNexis database “OCAHO,” or on the website at <http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders>.

## IV. DISCUSSION

In order to prove a violation of Section 274C(a)(2) of the Act, 8 U.S.C. § 1324c(a)(2), complainant must demonstrate that: (1) the respondent used, attempted to use, possessed, obtained, accepted, or received or provided the forged, counterfeit, altered or falsely made documents described in the complaint; (2) knowing the documents to be forged, counterfeit, altered or falsely made; (3) after November 29, 1990; and (4) for the purpose of satisfying any requirement of the INA. *United States v. Zapata-Cosio*, 5 OCAHO no. 822, 774, 782 (1995). The government did not submit supporting evidence with the motion. Neither the motion, the complaint, nor the NIF contains affidavits, investigative reports, or a Record of Deportable/Inadmissible Alien (Form I-213). The only documents attached to the Complaint are a photocopy of a social security card and an unidentifiable document. Compl., Appx. A. The record contains Respondent's interrogatory responses, which admit only that Respondent is present in the United States without permission and does not have documents to legally work in the United States. Also in the record is Respondent's Answer, in which Respondent denied the facts as alleged. Answer at 2. In the section entitled Affirmative Defense, Respondent admits, however, that she used documents that were in her residence to obtain employment. Answer at 2-3. Respondent does not name the documents, or admit that these were the documents recovered by the government. While an inference could be drawn that Respondent knew the documents she used were fraudulent, in a motion for summary decision, any inference must be in favor of the nonmoving party. *Allstate Ins. Co.*, 782 F. Supp. 2d at 256.

As the Complainant's motion does not support its claim with evidence that Respondent attempted to use the documents named in the complaint, knowing that the documents were false, the motion is DENIED.

Respondent did not file a cross-motion for summary decision, but merely reasserts its defenses. Its assertions are not supported by evidence or legal arguments, and the Court will not consider the arguments at this time. The Court notes only that OCAHO precedent has found that "respondent's act of presenting the 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. Chavez-Ramirez*, 5 OCAHO no. 774, 6 (1995) (citing *United States v. Morales-Vargas*, 5 OCAHO 732, at 2-3, 5 (1995) (modifying Final Decision and Order dated February 14, 1995)).

As the case is still within the schedule set for dispositive motions, the Court will permit refiling of the motion with supplemental filings in support of or in opposition to the motion for summary decision accompanied by reliable evidence. The government may refile its motion with any supplemental evidence by April 14, 2020, and Respondent may file any supplement to its opposition by April 28, 2020.

SO ORDERED.

Dated and entered on March 27, 2020.

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Jean C. King  
Chief Administrative Law Judge