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

June 8, 2021

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. § 1324c Proceeding
v.	)	OCAHO Case No. 2020C00011
SAMUEL TOMINIYI FASAKIN, Respondent.	)	

ORDER BY THE CHIEF ADMINISTRATIVE HEARING OFFICER VACATING THE ADMINISTRATIVE LAW JUDGE'S FINAL DECISION AND ORDER AND REMANDING FOR FURTHER PROCEEDINGS

I. INTRODUCTION AND PROCEDURAL HISTORY

This case arises under the immigration-related document fraud provisions of the Immigration and Nationality Act (INA or Act), as amended, 8 U.S.C. § 1324c. On November 4, 2019, the United States Department of Homeland Security, Immigration and Customs Enforcement (DHS, ICE, or Complainant), filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) within the Executive Office for Immigration Review (EOIR) against Samuel Tominiyi Fasakin (Respondent). The complaint alleged that Respondent committed two[1] violations of 8 U.S.C. § 1324c(a)(2) by knowingly using, attempting to use, possessing, obtaining, accepting, receiving, or providing a counterfeit Nigerian divorce decree[2]

[1] The original Notice of Intent to Fine issued by DHS contained only one alleged violation, occurring on November 4, 2014. Ex. C-1, 5. Although the complaint filed with OCAHO added a second alleged violation occurring on April 9, 2015, both alleged violations pertain to the same document. Because the statute assesses a civil money penalty for "each document that is the subject of a violation," 8 U.S.C. § 1324c(d)(3), the addition of the second alleged violation does not potentially subject Respondent to an additional civil money penalty. *Cf. United States v. Rubio-Reyes*, 14 OCAHO no. 1349a, 7 (2020) (OCAHO "does not have discretion to set a penalty for only one document when the [decision] finds a violation involving two documents," even if the proposed penalty is set based on only one document).

[2] The issuance of a divorce decree in Nigeria is a two-step process and involves the issuance of two separate documents, a Decree Nisi and a subsequent Decree Absolute:

> Where the divorce is granted, the order is temporary and is called a Decree Nisi. There is a three month period allowed in the event of reconciliation between the couple. At the end of the three months, if the parties have not reconciled, then the divorce decree will automatically become absolute and a Decree Absolute is issued.

U.S. Visa Reciprocity and Civil Documents by Country: Nigeria, U.S. Dep't of State, https://travel.state.gov/content/travel/en/us-visas/Visa-Reciprocity-and-Civil-Documents-by-Country/Nigeria.html

"in order to satisfy a requirement of the Act and/or to obtain the benefit of adjustment of status to that of a lawful permanent resident under Section 245 and/or Section 216 of the Act." Compl. 2-3. More specifically, in conjunction with an application for adjustment of status based on marriage to a United States citizen, Respondent submitted to United States Citizenship and Immigration Services (USCIS) a divorce decree purportedly issued by the Ikeja Judicial Division of the High Court of Lagos State in Nigeria (first divorce decree) reflecting a divorce from his wife in Nigeria.[3] Ex. C-6. That decree was subsequently determined by DHS to be false, and Respondent later obtained a second divorce decree purportedly issued by the Lagos Judicial Division of the High Court of Lagos State in Nigeria (second divorce decree).[4] Exs. C-23, R-17. The complaint requested an order requiring the Respondent to cease and desist from the alleged violations and requested $473 in civil money penalties. The case was assigned to Chief Administrative Law Judge (ALJ) Jean C. King.

Respondent, through counsel, filed an answer denying the allegations in the complaint. The parties subsequently submitted prehearing statements and engaged in discovery. On September 3, 2020, Respondent filed a motion to dismiss the complaint, arguing that Complainant had failed to provide evidence that the first divorce decree provided by the Respondent was forged and failed to provide evidence of the Respondent's knowledge of the validity of the allegedly-fraudulent decree. On September 9, 2020, Complainant filed an opposition to Respondent's motion to dismiss, asserting that there were genuine issues of fact in dispute—specifically, whether the divorce decree Respondent submitted was fraudulent and whether Respondent knew it was fraudulent.

On September 24, 2020, Chief ALJ King issued an order denying the Respondent's motion to dismiss. *United States v. Fasakin*, 14 OCAHO no. 1375 (2020). The Chief ALJ found that Complainant sufficiently pled the elements of an 8 U.S.C. § 1324c(a)(2) violation and produced evidence establishing that there were genuine issues of material fact which required a hearing. *Id.* at 4. In advance of the hearing, the parties filed final witness and exhibit lists, written objections, joint proposed stipulations of fact, and joint proposed stipulations of admissibility and authenticity.

On January 11-12, 2021, Chief ALJ King conducted a hearing with the parties appearing through the Webex video teleconferencing platform.[5] Complainant presented testimony from four witnesses during its case-in-chief: Ion Stefan, Pamela Hogan, and Jonathan Casper, three immigration officers with USCIS who work on matters of immigration fraud detection and investigation, and Daniel Carney, a Special Agent with ICE's Homeland Security Investigations.

(then click to expand "Marriage, Divorce Certificates") (last visited June 8, 2021). To avoid confusion, the undersigned refers to both documents collectively as a "divorce decree."

[3] The undersigned takes administrative notice that Ikeja and Lagos are separate cities in Nigeria, though both are located within Lagos State and are separated by approximately 10 to 15 miles. Unless otherwise specified, all references to Lagos in this decision refer to the city, rather than the state.

[4] As discussed, *infra* Part IV.A n.22, the provenance and authenticity of the second divorce decree are somewhat unsettled based on the existing record. The parties stipulated that submissions including a copy of that decree, *e.g.* Exs. C-23 and R-17, were authentic; however, they did not necessarily stipulate that the second divorce decree itself was authentic, and the inability of the High Court of Lagos State to locate the relevant case file at the request of the United States Government, Ex. C-16, clouds the issue of the source of that decree. If necessary, the ALJ may clarify any issues related to the second divorce decree on remand.

[5] Throughout this order, citations to "Tr. A" refer to the transcript of testimony on January 11, 2021, and citations to "Tr. B" refer to the transcript of testimony on January 12, 2021.

Respondent presented testimony from three witnesses: Adebowale Adenigbabe, an attorney in Nigeria Respondent retained to assist in obtaining the second divorce decree and who had previously assisted the attorney who originally handled Respondent's divorce action; Adegoke Olatunde, Respondent's nephew, who purportedly obtained the first divorce decree; and, Respondent himself. The parties also proposed sixty-one evidentiary exhibits.[6] Pursuant to 28 C.F.R. § 68.48(a), a verbatim transcript of the hearing was generated. On January 29, 2021, the case was reassigned from Chief ALJ King to ALJ Andrea Carroll-Tipton.[7]

After the hearing, both parties submitted proposed findings of fact and conclusions of law, as well as briefs in support of their proposed findings. Both parties also submitted replies to the other party's proposed findings and briefs.

On May 10, 2021, ALJ Carroll-Tipton issued a Final Decision and Order (Order). As summarized more fully below, *see infra* Part III.A, the ALJ concluded that the first divorce decree Respondent provided was indeed fraudulent, but also concluded that the Complainant failed to meet its burden to establish that the Respondent knew the decree was fraudulent when he submitted it. Therefore, the ALJ found that Respondent did not violate 8 U.S.C. § 1324c(a)(2) because Complainant failed to establish that Respondent knowingly used, attempted to use, possessed, obtained, accepted, received, or submitted the fraudulent decree.

On May 14, 2021, the Complainant filed a request for administrative review of the ALJ's Final Decision and Order with the Chief Administrative Hearing Officer (CAHO), pursuant to 28 C.F.R. § 68.54(a)(1). Also on May 14, 2021, the undersigned issued a Notification of Administrative Review, pursuant to 8 U.S.C. § 1324c(d)(4) and 28 C.F.R. § 68.54(a)(2).[8] For the reasons stated below, the ALJ's Final Decision and Order will be VACATED, and the case will be REMANDED for further proceedings consistent with this order.

II. JURISDICTION AND STANDARD OF REVIEW

The Chief Administrative Hearing Officer (CAHO) has discretionary authority to review a final order of an ALJ in a case brought under 8 U.S.C. § 1324c. *See* 8 U.S.C. § 1324c(d)(4); 28 C.F.R. § 68.54(a). Under OCAHO's rules of practice and procedure, a party may file a written request for administrative review within ten days of the date of entry of the ALJ's final order, 28 C.F.R. § 68.54(a)(1), or the CAHO may review an ALJ's final order on his or her own initiative by issuing a notification of administrative review within ten days of the date of entry of the ALJ's final order, 28 C.F.R. § 68.54(a)(2). Within thirty days of the date of entry of the ALJ's final order, the CAHO may enter an order that modifies or vacates the ALJ's order or remands the case for further proceedings. 8 U.S.C. § 1324c(d)(4); 28 C.F.R. § 68.54(d)(1).

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[6] Although most proposed exhibits were admitted into evidence, at least two of Respondent's proposed exhibits, Ex. R-11, a divorce certificate from Respondent's wife in Nigeria, and Ex. R-12, a letter from Respondent's wife in Nigeria, were not, though the record is unclear as to whether their lack of admission was intentional or an oversight. *See* Tr. B at 61-62. If necessary, the ALJ may clarify the status of any proposed-but-not-admitted exhibits on remand.

[7] The case was reassigned due to the pending appointment of Chief ALJ King as the Acting Director of EOIR, which became effective January 31, 2021.

[8] Because the issues identified by the Complainant in its request for administrative review were subsumed within the issues the undersigned identified in the Notification of Administrative Review, the Complainant's request for administrative review was denied as moot. *See United States v. Fasakin*, 14 OCAHO no. 1375a, 1 n.1 (2021).

For cases arising under 8 U.S.C. § 1324c, an ALJ's final order "shall be based upon the whole record." 28 C.F.R. § 68.52(b). Thus, an ALJ's final order should consider "all the facts and circumstances surrounding the case." *United States v. Ortiz*, 6 OCAHO no. 889, 713, 719 (1996). The ALJ's final order must also "be supported by reliable and probative evidence." 28 C.F.R. § 68.52(b). An ALJ's factual findings, including credibility findings, should be sufficiently detailed to allow administrative review and should be well-reasoned. *See United States v. ABC Roofing & Waterproofing*, 2 OCAHO no. 358, 435, 442 (1991) (CAHO affirmance of a portion of an ALJ's order where "[t]he ALJ's conclusions are based on a well-reasoned and detailed analysis of the credibility of witnesses and corroborating evidence"). Further, under the Administrative Procedure Act (APA), 5 U.S.C. § 551 *et seq*., which governs OCAHO cases, an ALJ's decision—including an ALJ's credibility findings—that constitutes an "order"[9] or imposes a "sanction"[10] must consider "the whole record or those parts thereof cited by a party" and must be "supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d).

Under the APA, the reviewing authority in administrative adjudications "has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule." 5 U.S.C. § 557(b). This authorizes the CAHO to apply a de novo standard of review to final orders of an ALJ. *See Maka v. INS*, 904 F.2d 1351, 1356 (9th Cir. 1990); *Mester Mfg. Co. v. INS*, 900 F.2d 201, 203-04 (9th Cir. 1990); *United States v. Bhattacharya*, 14 OCAHO no. 1380b, 3 (2021). The de novo standard of review applies to all issues in the case, including questions of both fact and law. *See Maka*, 904 F.2d at 1356 ("The statute authorizes the agency to decide all issues de novo.").[11]

Although the CAHO reviews de novo an ALJ's factual findings, including any credibility findings, the CAHO should not dismiss those findings cavalierly and should accord some degree of consideration of them depending on the particular circumstances of the case under review.[12] For

[9] An "order" is "the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing." 5 U.S.C. § 551(6). A final order by an ALJ or a decision by the CAHO vacating or modifying—and not remanding—an ALJ's final decision constitutes an "order" under the APA.

[10] A "sanction" includes "the whole or a part of an agency . . . imposition of penalty or fine." 5 U.S.C. § 551(10)(C). Thus, a final order by an ALJ imposing a civil money penalty under 8 U.S.C. § 1324c or a decision by the CAHO imposing a civil money penalty under 8 U.S.C. § 1324c constitutes a "sanction" under the APA.

[11] Because the undersigned is remanding this case to the ALJ for further proceedings, this decision is neither an "order"—because it is not a final disposition—nor a "sanction"—because it does not impose a penalty or fine—under the APA. In cases in which the CAHO modifies or vacates an ALJ's decision without remanding, however, the CAHO's decision becomes the final agency order unless referred for further review by the Attorney General. *See* 28 C.F.R. § 68.2 (definition of final agency order). In such cases, the CAHO's decision does constitute an "order" or a "sanction" and, accordingly, must also be "supported by and in accordance with the reliable, probative, and substantial evidence." 5 U.S.C. § 556(d); *see also Maka*, 904 F.2d at 1356 (when the CAHO issues an order or imposes a sanction under the APA, the CAHO does not have "standardless" discretion to reverse the findings of an ALJ and must base the decision on reliable, probative, and substantial evidence).

[12] The undersigned notes that prior to 2002, EOIR's Board of Immigration Appeals (Board) reviewed de novo findings of fact by immigration judges, including credibility determinations. *See* Board of Immigration Appeals: Procedural Reforms to Improve Case Management, 67 Fed. Reg. 54,878, 54,888-90 (Aug. 26, 2002) (modifying applicable regulations to change the Board's standard of review of immigration judge factual findings from de novo to clear error). Even with a de novo standard of review prior to 2002, however, the Board ordinarily gave significant weight or consideration to an immigration judge's findings of fact, including credibility determinations, though it did not accord deference to findings that were not supported by the record. *See, e.g*., *Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994) ("For example, the Board ordinarily gives significant weight to the determinations of the immigration

instance, credibility findings by an ALJ who presided over a hearing, "observed the witnesses[,] and lived with the case" should warrant stronger consideration on review than findings by an ALJ who did not. *See Maka*, 904 F.2d at 1355 (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951)). Similarly, the findings of an experienced ALJ may warrant strong consideration, particularly if being reviewed by a comparatively inexperienced CAHO. *Cf. id*. (CAHO's conclusion may not be supported by substantial evidence when an "experienced examiner [like the ALJ] has . . . drawn [different] conclusions. . . ." (quoting *Universal Camera*, 340 U.S. at 496) (brackets in the original)).[13] However, factual findings, including credibility findings, which are not detailed, well-reasoned, or supported by or in accordance with reliable, probative, and substantial evidence are not entitled to any deference or special consideration on review by the CAHO.

In short, the CAHO reviews de novo issues of both law and fact in the ALJ's decision. In doing so, the CAHO must ensure that the ALJ's overall decision is well-reasoned, based on the whole record—including a consideration of all of the facts and circumstances of the case—free from errors of law, and supported by or in accordance with reliable, probative, and substantial evidence contained in the record. An ALJ's final order which does not meet these criteria, in whole or in part, is potentially subject to vacatur, modification, or remand by the CAHO upon administrative review. *See* 28 C.F.R. § 68.54.

III. SUMMARY OF THE FINAL DECISION AND ORDER, THE NOTIFICATION OF ADMINISTRATIVE REVIEW, AND THE PARTIES' BRIEFS ON REVIEW

A. The ALJ's Final Decision and Order

The ALJ entered her Final Decision and Order in this case on May 10, 2021. The basic facts of the case as found by the ALJ (and largely stipulated to by the parties) are as follows: Respondent is a citizen and national of Nigeria. Order at 5 (citing Joint Fact. Stip. 2). In November 2012, Respondent filed for divorce in Nigeria from his then-wife. *Id.* (citing Joint Fact. Stip. 2-3; Tr. B, 135). In September 2013, Respondent applied for a nonimmigrant visa to enter the United States from Nigeria. *Id.* (citing Joint Fact. Stip. 2). On Respondent's September 2013 application for the nonimmigrant visa and his associated interview at the U.S. Consulate, Respondent stated that he was married to his then-wife and had two children. *Id.* (citing Joint. Fact. Stip. 2-3). In October 2013, Respondent entered the United States with inspection and admission as a

judge regarding the credibility of witnesses at the hearing. . . . Similarly, we also may give significant consideration to other findings of an immigration judge that are based upon his or her observance of witnesses when the basis for those findings are articulated in the immigration judge's decision."); *see also* 67 Fed. Reg. at 54,889 ("Thus, for example, it is well established that, because the immigration judge has the advantage of observing the respondent as the respondent testifies, the Board already accords deference to the Immigration Judge's findings concerning credibility and credibility-related issues. . . . Under certain circumstances, the Board may not accord deference to an immigration judge's credibility finding where that finding is not supported by the record."). Although Board review of immigration judge decisions is conducted under different procedures than CAHO review of ALJ decisions and proceedings before immigration judges are not governed by the APA, *see Ardestani v. INS*, 502 U.S. 129, 133-35 (1991), I nevertheless find the Board's pre-2002 approach to de novo review of immigration judge factual determinations to be, at the least, an analogically useful guide for reviewing ALJ factual determinations.

[13] In the instant case, the ALJ who issued the Order did not preside over the hearing, and there is not a divergence of experience between the ALJ and the CAHO, who is a former ALJ within OCAHO. Thus, neither of these factors warrants any special, significant consideration of the ALJ's factual findings upon review.

nonimmigrant visitor. *Id.* (citing Joint Fact. Stip. 3). In February 2014, Respondent's divorce from his former wife in Nigeria became final, *id.* (citing Ex. C-23, Tr. B, 136-37), and sometime shortly thereafter, Respondent contacted his nephew in Nigeria and asked the nephew to retrieve his divorce documents from Respondent's divorce attorney in Nigeria, Adeoye Joseph,[14] *id.* (citing Tr. B, 89, 92, 106, 137). Respondent's nephew subsequently sent Respondent divorce documents with suit number ID/252HD/13. *Id.* at 6 (citing Tr. B, 92, 123-24, 138).

In July 2014, Respondent married his current wife in the United States. *Id.* (citing Joint Fact. Stip. 3). In November 2014, Respondent and his wife concurrently filed Forms I-130, I-485, and G-325A (and supporting documentation) with USCIS seeking adjustment of status to that of lawful permanent resident for Respondent. *Id.* (citing Joint Fact. Stip. 3). The supporting documentation for these applications included two Nigerian divorce documents (a Certificate of Decree Absolute and a Decree Nisi of Dissolution) with suit number ID/252HD/13. *Id.* (citing Joint Fact. Stip. 4). Those divorce documents with suit number ID/252HD/13 were forged, counterfeit, altered, or falsely made documents. *Id.* (citing Tr. A, 108-10, Ex. C-8, Ex. C-30, R's Br. 2).

In 2015, USCIS granted Respondent employment authorization pending the adjudication of his Form I-485, conducted an interview of Respondent wherein Respondent used the fraudulent Nigerian divorce documents to corroborate his oral testimony that he was legally divorced from his former wife, and granted Respondent the benefit of adjustment of status to that of conditional permanent resident. *Id.* at 6-7 (citing Joint Fact. Stip. 4, 5). In January 2018, Respondent filed Form I-751 seeking to remove the conditions on his status. *Id.* at 7 (citing Joint Fact. Stip. 5). In March 2019, Respondent was interviewed by DHS regarding his Form I-751. *Id.* (citing Joint Fact. Stip. 5). At this interview, Respondent was informed by DHS that the divorce documents he presented were false, and he was served with a Request for Evidence for a final divorce decree. *Id.* (citing Tr. B, 184, Joint Fact. Stip. 6).

Respondent subsequently contacted his nephew, attempted to contact Attorney Joseph, and succeeded in contacting Attorney Adebowale, who had been an associate of Attorney Joseph, in order to obtain a genuine copy of his divorce decree. *Id.* (citing Tr. B, 97, 184; Tr. B, 156; Tr. B, 17-23, 156). Attorney Adebowale later sent divorce documents with suit number HD/421/2012 to Respondent. *Id.* at 8 (citing Joint Fact. Stip. 10). In April 2019, Respondent submitted the divorce documents with suit number HD/421/2012 to USCIS in response to the Request for Evidence. *Id.* (citing Joint Fact. Stip. 7, 10).

In the Final Decision and Order, although the ALJ raised significant questions regarding the credibility of Respondent and his nephew, she nevertheless largely adopted Respondent's version of events—due principally to the testimony of Attorney Adebowale—related to how Respondent obtained the first and second divorce decrees. According to this account as reflected in the ALJ's findings of fact, in early 2014, Respondent contacted his nephew in Nigeria and asked him to retrieve his divorce documents from Attorney Joseph. *Id*. at 5 (citing Tr. B, 89, 92, 106, 137). Respondent's nephew then met Attorney Joseph, who stated that Respondent owed Attorney

[14] The attorney's letterhead lists his firm name as "Adeoye Joseph & Co.," though Attorney Adebowale referred to him as "Joseph Adeoye." *Compare* Ex. R-18 *with* Tr. B, 18. To avoid confusion, the undersigned will refer to Respondent's original attorney for his divorce action as Attorney Joseph, which is how Respondent's counsel and witnesses referenced him at the hearing. *See, e.g*., Tr. B, 19-20.

Joseph a remaining balance of 150,000 naira based on their original agreement for Attorney Joseph to handle Respondent's divorce proceedings. *Id.* (citing Tr. B, 92, 132-33, 138). Respondent then sent his nephew 170,000 naira to obtain the documents, but the nephew did not schedule another meeting with Attorney Joseph. *Id.* (citing Tr. B, 92, 110, 138). Instead, after having been told by a friend that he could obtain the divorce decree from another attorney—a "Mr. Kunle"—for only 30,000 naira, the nephew met with Mr. Kunle outside the court, provided the attorney with the name of Respondent and Respondent's wife, and waited outside the court while the attorney went inside. *Id.* at 6 (citing Tr. B, 93-96; Ex. R-21). The attorney returned from the court with what appeared to be the Respondent's divorce paperwork and gave it to Respondent's nephew; Respondent's nephew then provided the attorney with 30,000 naira and kept the remaining 140,000 naira. *Id.* (citing Tr. B, 94, 96, 113); *but see* Ex. R-21 (a statement by Respondent's nephew in which he indicates that he received the first divorce decree from Mr. Kunle a week after meeting him at the court and paying him, rather than receiving it the day he met Mr. Kunle at the court). Respondent's nephew then sent Respondent these divorce documents, with suit number ID/252HD/13, and represented that he obtained the documents from Attorney Joseph. Order at 6 (citing Tr. B, 92, 123-24, 138; Ex. R-2). According to this account, Respondent's nephew did not inform the Respondent of the true manner in which he obtained the divorce documents.

After Respondent was informed in 2019 by DHS that the first set of divorce documents he presented were false, Respondent allegedly contacted his nephew several times to discuss the documents. *Id.* at 7 (citing Tr. B, 97, 184). According to the Respondent's nephew's testimony, the nephew lied to the Respondent, telling him that he went to Attorney Joseph when, in fact, he had used a different attorney. *Id.* (citing Tr. B, 97-98, 185). After speaking to his nephew, Respondent tried to contact Attorney Joseph and also contacted Attorney Adebowale to obtain another copy of his divorce decree. *Id.* (citing Tr. B, 17-23, 156). Attorney Adebowale also informed the Respondent that he could not release the documents until Respondent paid the remaining balance of 150,000 naira, which Respondent believed he had already paid. *Id.* at 8 (citing Tr. B, 23-24, 28-29, 157-58). Respondent testified that upon learning of this, he became suspicious of his nephew's actions and contacted his father and sister in Nigeria to relay his suspicions. *Id.* (citing Tr. B, 158). Respondent's extended family then had a meeting at which Respondent's nephew confessed that he had obtained the divorce documents from a different attorney. *Id.* (citing Tr. B, 97, 117, 201). As a result, the family agreed to pay the remaining balance of 150,000 naira to Attorney Adebowale in order to obtain the actual divorce documents. *Id.* (citing Tr. B, 121-23). This second set of divorce documents were the ones with suit number HD/421/2012 that Respondent submitted to USCIS in response to the Request for Evidence. *Id.* (citing Joint Fact. Stip. 7, 10).

In its post-hearing brief, Complainant argued that the first set of divorce documents provided by Respondent (with suit number ID/252HD/13) were "patently fraudulent based on . . . numerous discrepancies." *Id.* at 3 (citing C's Br. 10). Specifically, Complainant noted the following discrepancies in the first set of divorce documents: (1) the documents emanated from a different division of the Nigerian court than the one which ostensibly adjudicated Respondent's divorce proceedings; (2) the listed reason for the divorce was not recognized under Nigerian law; (3) the documents contained a typographical error in Respondent's child's birthdate; and (4) the document stated that Respondent provided testimony at a hearing on a date on which he was already physically present in the United States. *Id.* (citing C's Br. 10-14). Complainant also argued that the testimony of Respondent and his nephew should be given minimal (if any) weight because

it was "biased, evasive, and inconsistent with other record documents, including their own statements. . . ." C's Br. 5. Complainant therefore argued that the ALJ "should find that Complainant has shown by a preponderance of the evidence that the respondent was willfully blind to the possibility that the documents were forged, counterfeit, altered or falsely made and as such find him liable as charged in the complaint." *Id.* at 6.

In its post-hearing brief, Respondent conceded that the documents were fraudulent and were submitted after November 29, 1990, in order to obtain a benefit under the INA; however, the Respondent's brief argued that the Respondent "did not know the documents were fraudulent at the time he presented them to receive a benefit under the INA." Order at 3 (citing R's Br. 2-3). Respondent asserts that he thought the first set of divorce documents his nephew sent were genuine, *see* R's Br. 10, and only learned that the documents were false after he had presented them to USCIS, *id.* at 14.

The ALJ's Final Decision and Order noted that Complainant must prove four elements in order to establish a violation of 8 U.S.C. § 1324c(a)(2): "(1) the respondent used . . . 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 obtaining a benefit under the INA." Order at 8. The ALJ found that the first, third, and fourth elements had been established—that is, the Respondent used forged, counterfeit, altered or falsely made divorce documents after November 29, 1990 in order to obtain adjustment of status, which is a benefit under the INA. *Id.* at 9. Therefore, the ALJ found that "the sole issue remaining for decision is whether Complainant can meet its burden as to the second element, that Respondent provided these documents knowing the documents to be forged, counterfeit, altered or falsely made." *Id.* (internal quotation marks omitted).

As framed by the ALJ, the question at issue was whether Respondent had knowledge that the first divorce documents were fraudulent before providing them to DHS (which occurred in 2014 and 2015), or whether he did not obtain knowledge of that fact until after DHS informed him the documents were fraudulent. *Id.* The ALJ then discussed the various ways in which knowledge can be shown, citing to prior OCAHO case law and Supreme Court precedent. The ALJ noted that "[k]nowledge may be established through direct evidence or circumstantial evidence," *id.* (citing *United States v. Carpio-Lingan*, 6 OCAHO no. 914, 11 (1997)), that "one may infer knowledge if a party deliberately avoids acquiring full or exact knowledge of the nature and extent of suspicious dealings," *id.* (quoting *Ortiz*, 6 OCAHO no. 889, at 719), and that constructive knowledge may be imputed "to a person who fails to learn something that a reasonably diligent person would have learned," *id.* (quoting *Intel Corp. Inv. Policy Comm. v. Sulyma*¸ 140 S. Ct. 768, 776 (2020)).

Before proceeding to an analysis of the evidence as it pertained to Respondent's knowledge of the fraudulent nature of the first divorce decree, the ALJ analyzed the credibility of the witnesses presented by both parties. The ALJ found that all of the Complainant's witnesses "testified credibly and consistently with each other and the documentary evidence in the record," and that "[t]he weight of their testimony was not diminished in any fashion." *Id.* at 11. On the other hand, the ALJ found that there were valid concerns as to the credibility of Respondent and Respondent's nephew, and accordingly "assign[ed] diminished weight to the testimony of both." *Id.* at 10. The ALJ did find, however, that Attorney Adebowale testified credibly and that his testimony "bolster[ed] and confirm[ed] key components of Respondent's testimony and the nephew's testimony." *Id.* at 10-

11. The ALJ additionally found that Attorney Adebowale's testimony "permit[ted] the Court to make factual findings and legal conclusions related to circumstantial knowledge." *Id.* at 11.[15]

Analyzing the evidence presented, the ALJ found that there was no direct evidence that the Respondent requested fraudulent documents from his nephew or instructed his nephew to fabricate the divorce documents. *Id.* Turning to the question of circumstantial evidence of knowledge, the ALJ found that the circumstantial evidence in the record and as developed at the hearing "ultimately does not permit a factfinder to conclude Respondent had knowledge that the documents were fraudulent at the time he provided them to DHS." *Id.* In reaching this conclusion, the ALJ credited Respondent's testimony at the hearing that "he believed the fraudulent documents were genuine because he did not see anything that would strike him as odd and his nephew told him the documents came from Respondent's lawyer." *Id.* (citing Tr. B, 28, 138, 140). Despite acknowledging "concerns about how forthcoming Respondent was during the hearing process," the ALJ also credited Respondent's testimony that "he did not learn that the documents were fraudulent until March 2019," finding that "the additional evidence and testimony corroborates Respondent's assertions as to the timing of when he learned the documents were fraudulent." *Id.* at 11-12 (citing Tr. B, 181).

The ALJ also addressed Complainant's argument that "even if Respondent did not expressly ask for fraudulent documents from the nephew, upon receipt and visual inspection, he should have been instantly aware of their fraudulent nature due to the contents," which Complainant asserted contained "glaring and obvious discrepancies." *Id.* at 12 (quoting C's Br. 10). After discussing the testimony of Complainant's witnesses as to the facial errors on the document and the analysis in a recent Board decision relating to visual inspection of fraudulent documents, *id.* at 12-13, the ALJ found that the divorce documents at issue here did not contain "hallmarks of fraud which no reasonable person could overlook," *id.* at 13.

Addressing each of the facial errors on the first divorce documents, the ALJ found that (1) it was reasonable that Respondent would be unaware of the distinction between different divisions of the Nigerian court, and "Complainant did not prove that Respondent actually knew the difference between the divisions," *id.* at 13-14; (2) it was reasonable for Respondent to be "unaware of the legal theories asserted by his attorneys on his behalf" as to the reason for his divorce, *id.* at 14; (3) the typographical or punctuation error related to Respondent's child's birthdate on the document "does not affect the final decree of divorce or child custody and is thus not material," *id.*; and, (4) "the divorce document does not undoubtedly place Respondent in Nigeria testifying on a date he was in the United States as Complainant alleges," and, thus, could not be labeled "an 'obvious' error which imputes knowledge of the fraudulent nature" of the document, *id.* The ALJ ultimately held that "the fraudulent documents here were not so obvious as to justify imputing knowledge upon Respondent." *Id.* Therefore, the ALJ held that Complainant failed to meet its burden to establish that the Respondent knowingly submitted the fraudulent divorce decree at issue.

[15] As discussed, *infra* Part IV.B, "constructive knowledge" and "circumstantial evidence" are distinct concepts, as the latter is a type of evidentiary proof of the former. Thus, it is unclear whether the ALJ's reference to "circumstantial knowledge" intended to refer to the mens rea of constructive knowledge or to the submission of circumstantial evidence.

B. Issues for Review

On May 14, 2021, the undersigned issued a Notification of Administrative Review, pursuant to 8 U.S.C. § 1324c(d)(4) and 28 C.F.R. § 68.54(a)(2). The Notification identified three issues to be reviewed: (1) "whether the ALJ correctly assessed the credibility of the parties' witnesses in determining that Complainant did not meet its burden of proof," (2) "whether the ALJ's determinations regarding the errors in the first divorce decree are supported by or consistent with the record," and (3) "whether the ALJ applied the correct legal standard of knowledge required to find a violation of 8 U.S.C. § 1324c(a)(2) and whether a preponderance of the evidence meets that standard." *Fasakin*, 14 OCAHO no. 1375a, 2 (2021). The Notification also stated that the ALJ's conclusions regarding the other three elements required to establish a violation of 8 U.S.C. § 1324c(a)(2)—namely, that Respondent used a fraudulent document to obtain an immigration benefit, and did so after November 29, 1990—were not being reviewed. *Id.* at 1.

C. The Parties' Briefs

Both parties timely submitted briefs in response to the Notification of Administrative Review. Complainant's Brief on Administrative Review argues first that all of Respondent's witnesses lacked credibility. Specifically, Complainant argues that the ALJ erred in giving any weight to the testimony of Respondent and Respondent's nephew, as they were not credible witnesses, and the ALJ erred in giving Attorney Adebowale's testimony "full weight despite evidence in the record undermining his credibility." C's Br. on Review, 6. Regarding Respondent's credibility, Complainant points to numerous discrepancies between Respondent's testimony, his February 2020 declaration, and his second statement, *see id.* at 6-10, asserts that Respondent's credibility is further undermined by shifting statements given by the individual to whom Respondent allegedly subleased his apartment, *see id.* at 9, and argues that Respondent's testimony as to why he overstayed his initial visa was "internally inconsistent," *id.* at 10. As to Respondent's nephew's testimony, Complainant argues that the ALJ should have given the nephew's testimony "no weight because he was evasive on multiple issues," *id.*, that his testimony regarding how he obtained the first set of divorce documents conflicted with his previous statement, *id.* at 11, and that his credibility issues were further compounded by his "willingness to engage in fraud and theft against the respondent," *id.* at 12. Finally, as to Attorney Adebowale's testimony, Complainant argues that the ALJ should have given his testimony only "limited weight because documents submitted by the respondent, but that were in the possession of Attorney Adebowale, are inconsistent." *Id.* Complainant also argues that even if Attorney Adebowale's testimony were credible, "it does not exonerate the respondent" because the corroborative elements of his testimony "have nothing to do with whether the respondent knew the first set of documents was not genuine." *Id.* at 13.

Addressing the other issues under review, the Complainant asserts that "[t]he ALJ erred in finding that the facial deficiencies on the documents were not so glaring as to justify imputing knowledge on the respondent." *Id.* at 14. Complainant argues that

> [n]o person, having lived the respondent's life, could review [the first set of divorce documents] and not be put on notice of the deficiencies. Even if the facial deficiencies alone were not enough to impute knowledge, the facial deficiencies coupled with the circumstances in which the documents were obtained, and the respondent's contradictory statements support imputation of knowledge.

Id. Complainant presents arguments as to why the ALJ erred in analyzing each of the facial errors identified on Respondent's first divorce decree, *id.* at 15-17, and asserts that "[t]he only person who would not be compelled to question the documents' authenticity is someone who either knows they are not authentic or someone who does not want to know," *id.* at 18 (also arguing that "either knowing these documents are not authentic or not wanting to know, given the indicia of fraud, is enough to find knowledge"). Finally, on the issue of knowledge, Complainant argues that the ALJ's reliance on a recent Board decision was misplaced, *id.* at 18-19, that the ALJ erred by not considering all available circumstantial evidence of knowledge, *id.* at 20-21, and that the ALJ applied the incorrect standard of knowledge to the case at hand, *id.* at 21-25. Complainant asserts that OCAHO case law and relevant precedent from the Third Circuit supports finding knowledge based on "willful blindness." *Id.* at 23-25. Ultimately, the Complainant argues that the facts of this case support a finding that "the respondent deliberately avoided or ignored evidence of unlawful circumstances and is liable for the violations charged." *Id.* at 27.

Respondent's Brief in Response to Notification of Administrative Review[16] argues that the ALJ correctly assessed the credibility of the parties' witnesses, and specifically argues that "Attorney Adebowale's testimony was credible and supported by the record." R's Br. on Review, 8. Respondent asserts that Attorney Adebowale's statement (Ex. R-26) was consistent with the testimony he provided at the hearing, *id.* at 9, and provided a list of the statements in Attorney Adebowale's testimony that allegedly corroborated the testimony of Respondent and his nephew, *see id.* at 9-10.[17] The Respondent argues further that the ALJ's determinations regarding the facial errors on the first divorce decree were supported by and consistent with the record, *id.* at 11-13, and that the ALJ applied the correct standard of knowledge, *id.* at 13-17. On the issue of knowledge, Respondent argued that the ALJ "applied and discussed the appropriate standards of willful blindness and constructive knowledge," *id.* at 15, and asserted that the ALJ was correct in finding that "when considering the totality of the circumstances, knowledge that the first set of documents [were] fraudulent could not be imputed to the Respondent," *id.* at 17. Therefore, the Respondent argues that the record supports "the ALJ's finding that the Complainant did not meet its burden of proof by a preponderance of the evidence" to show "that the Respondent had knowledge of the fraudulent nature of the divorce documents at the time he submitted them to USCIS," and thus that Complainant had not shown a violation of 8 U.S.C. § 1324c(a)(2). *Id.* at 19.[18]

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[16] Respondent also filed Respondent's Request for Additional Filing on June 7, 2021. In this additional filing, Respondent reiterates some of the arguments in his Brief in Response to Notification of Administrative Review and challenges various arguments made by Complainant regarding Attorney Adebowale's credibility. R's Req. for Additional Filing, 5-7. Notwithstanding the somewhat last-minute nature of this filing, the undersigned grants the Request as a matter of discretion, accepts the filing, and has considered it fully. *See* 28 C.F.R. § 68.54(b)(2) (CAHO has discretion to permit additional filings at the request of a party during an administrative review). As discussed in more detail, *infra* Part IV.A, the credibility of Attorney Adebowale remains very much at issue, and the parties are free to address it further on remand. Further, although "Attorney Adebowale and his credentials" are entitled to professional courtesy and respect, R's Req. for Additional Filing, 6, the ALJ is not required to defer to his testimony regarding Nigerian law. *See infra* Part IV.A n.22 (ALJ is not bound by representations of the parties on questions of foreign law).

[17] Notably, Respondent's Brief on Review does not appear to contest any of the credibility concerns the ALJ found with respect to the testimony of Respondent and his nephew, which led the ALJ to give diminished weight to the testimony of both. *See* Order at 10-11.

[18] In addition to presenting his arguments, Respondent also requested an award of attorney's fees. R's Br. on Review, 3. At the hearing, the presiding ALJ inadvertently stated that an award of attorney's fees is not available in cases

IV. DISCUSSION

After a thorough review of the ALJ's Final Decision and Order, the administrative record in the case, the parties' briefs on administrative review, and the Respondent's additional filing on June 7, 2021, for the following reasons, the undersigned will vacate the Final Decision and Order and remand the case to the ALJ for further proceedings consistent with this order.

A. Credibility of the Witnesses

In her Final Decision and Order, the ALJ determined that all of the Complainant's witnesses testified credibly. Order at 11. Respondent did not challenge the credibility of Complainant's witnesses, and the record supports the ALJ's determination. Consequently, I find no basis to disturb the ALJ's credibility determination regarding the Complainant's witnesses.

By contrast, the ALJ identified multiple credibility concerns with the testimony of both Respondent and his nephew. *Id.* at 10-11. But the ALJ also found that Respondent's other witness, Attorney Adebowale, testified credibly, concluded that his testimony corroborated that of Respondent and Respondent's nephew, and "permit[ted] the Court to make factual findings and legal conclusions related to circumstantial knowledge." *Id.* at 11. However, as noted in the Notification of Administrative Review, the ALJ's finding regarding Attorney Adebowale's testimony was conclusory, lacked citations to the record,[19] and does not account for several issues related to Attorney Adebowale's credibility that were reflected in the record and raised or alluded to by Complainant, *see, e.g.*, C's Br. 28; Tr. B, 79-81.

OCAHO case law illustrates some of the factors relevant to assessing the credibility of witnesses in OCAHO proceedings. *See, e.g.*, *United States v. Kurzon,* 3 OCAHO no. 583, 1829, 1842-43 (1993) ("However, as to Respondent's testimony, I have found the record to be rife with examples of Respondent's incredulous testimony, inconsistencies, suspicious memory lapses and blame shifting, leading me to find that Respondent's testimony was not credible."). In finding witnesses not credible, OCAHO ALJs have cited shifting and inconsistent answers, *see United States v. DeLeon Valenzuela*, 8 OCAHO no. 1004, 10 (1998); repeatedly responding to questions by testifying that the witness does not know, does not remember, or does not understand, *see id.* at 11; testifying in a vague and evasive manner, *see id.*; demonstrably false statements, *see id.* at 12; discrepancies between hearing testimony and other record documents, *see Kurzon,* 3 OCAHO no. 583, at 1858-60; a variety of excuses or justifications for inconsistent information, *see id.*; and incorrect or inconsistent information provided by a witness in forms or proceedings unrelated to the central claims in the case, *see id.*

Bearing this case law in mind, Attorney Adebowale's testimony reflects several issues that raise unresolved questions about the credibility of his testimony. First, Attorney Adebowale was

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brought under 8 U.S.C. § 1324c. Tr. B, 220. Subject to meeting certain conditions, however, attorney's fees may be awarded pursuant to 5 U.S.C. § 504 in cases brought under 8 U.S.C. § 1324c. 28 C.F.R. § 68.52(e)(4). Because Respondent is not a prevailing party in the present posture of the case, any discussion of an award of attorney's fees is premature, and the ALJ may address that issue in the first instance, if warranted, on remand.

[19] Although the ALJ's discussion of the concerns related to the credibility of the Respondent and Respondent's nephew contains numerous citations to the transcript of the hearing and relevant exhibits in the record, *see* Order at 10-11, the ALJ's discussion of the credibility of Attorney Adebowale contains no such citations, making it more difficult to conclude that the ALJ's determination was based on substantial evidence in the record, *see id.* at 11.

not the original or primary attorney on Respondent's divorce case, *see* Tr. B, 17-19, 38, and it was not clear from his testimony how much he was involved in the Respondent's case. He claimed, for instance, that he did not draft or file any documents in Respondent's original divorce proceedings, *see* Tr. B, 79, but represented that he accompanied respondent and Attorney Joseph to court for two or three hearings in those proceedings, *see* Tr. B, 18-19. However, when Respondent was asked whether anyone else accompanied him to court when he went to the hearings with Attorney Joseph, Respondent contradicted Attorney Adebowale's testimony and stated only that "It was attorney Joseph Adeoye and myself." Tr. B, 133.[20] Thus, Respondent's testimony both is inconsistent with Attorney Adebowale's testimony and suggests that Attorney Adebowale was not closely involved in Respondent's original divorce proceedings, which, in turn, raises questions as to Attorney Adebowale's overall knowledge of Respondent's divorce.

Furthermore, Attorney Adebowale claims that he received a copy of Respondent's second divorce decree from the court by writing directly to the court and then forwarding the documents he received to the Respondent. *See* Tr. B, 29; Ex. R-17. However, Attorney Adebowale was unable to explain—and the record provides no explanation—how he was able to get Respondent's divorce documents from the court with no apparent difficulty when the United States Government was unable to obtain them due to the inability of the court to locate the case file. DHS, through the United States Consulate General in Nigeria, sent a records verification request to the High Court of Lagos State seeking records related to Respondent's divorce proceedings, using the suit number of the second set of divorce documents Respondent submitted to USCIS (HD/421/2012). On January 16, 2020, the court first responded that a search of the records showed that a divorce petition under that suit number was instituted in November 2012, but the court was unable to report on the determination of the petition because a search was still ongoing to locate the case file. Ex. C-15. On March 4, 2020, the court responded again, stating that "having exhaustively conducted further search," the Respondent's case file "could not be found in the archives." Ex. C-16. When Attorney Adebowale was asked to try to explain why the court could not find the case file in response to DHS's verification request, he tried to explain it, in part, by referencing a riot that occurred in Lagos in which the court was "burned to the ground" and all files were lost. *See* Tr. B, 46-47. However, Attorney Adebowale then testified that the riot in question occurred just a few months before the January 2021 hearing in this case—that is, in "September/October" of 2020. *See* Tr. B, 47-48.[21] Thus, that riot occurred several months *after* the court represented that the

[20] As discussed in more detail, *infra*, Respondent himself was inconsistent regarding the number of times he appeared in court in connection with the divorce proceeding. He stated in a declaration prepared in February 2020 that he "did not appear in court after the initial filing," but he later testified that he appeared in court "several times" in 2013. *Compare* Ex. C-37, ¶ 4 *with* Tr. B, 141, 160. Attorney Adebowale testified that he accompanied Respondent and Attorney Joseph to court two or three times, which is consistent with Respondent's testimony regarding the number of times Respondent appeared in court but in tension with Respondent's declaration on that point. *See* Tr. B, 19, 65. This unresolved inconsistency does not aid the credibility of either Respondent or Attorney Adebowale.

[21] Attorney Adebowale testified that the riot was part of a protest against "SARS," an acronym for a Nigerian police unit, the Special Anti-Robbery Squad. Tr. B, 47-48 (testifying about the "EndSARS" protests). The undersigned takes administrative notice that the unrest due to anti-SARS protests in Nigeria occurred principally in October 2020, several months after the High Court of Lagos State notified the United State Government in March 2020 that it could not located the case file for Respondent's divorce action. *Compare, e.g.*, Sam Olukoya & Lekan Oyekanmi, *Nigeria Says 51 Civilians, 18 Security Forces Dead in Unrest*, Associated Press (Oct. 23, 2020), https://apnews.com/article/law-and-order-africa-muhammadu-buhari-lagos-nigeria-d0ddf31e774adf4c8be8d31e304c33c9 (describing unrest related to anti-SARS protests) *with* Ex. C-16 (informing the United States Consulate that, after an exhaustive search, the case file could not be found as of March 2020).

Respondent's divorce file could not be found and, thus, is not a plausible explanation for why the court would have been unable to locate Respondent's file in response to DHS's verification requests. *See* Tr. B, 47-48; *see also* Tr. B, 75-76. Attorney Adebowale also speculated that perhaps the court is "looking for [the file] in the wrong place," including in "another division." Tr. B, 47. However, the record reflects that the United States Consulate General requested the documents from the same division that Attorney Adebowale did, the Litigation Section of the High Court of Lagos State, Lagos Judicial Division. *Compare* Exs. C-15, C-16 *with* Ex. R-17.

Attorney Adebowale also did not explain why Respondent's divorce decree—if the Decree Nisi was issued in 2013 and the Decree Absolute was issued in 2014, as both Respondent and Attorney Adebowale asserted—was not present in the case file maintained by Attorney Joseph and transferred to Attorney Adebowale in 2016. Attorney Adebowale testified that Attorney Joseph left the practice of law in 2016, that Attorney Joseph gave him several case files, including Respondent's file, when he left the law, that Respondent's case had been completed, and that the second divorce decree was not in Respondent's file, though several other documents were, including documents from the court. *See* Tr. B, 20-23, 77-78; Ex. R-19. Although he testified that he knew Respondent's divorce was "complete" before Respondent contacted him in 2019, Tr. B, 68, he did not explain how he would know that it was complete if he did not possess any copies of the relevant documents.[22]

[22] Overall, the record reflects numerous concerns about the genuineness of the second divorce decree obtained by Attorney Adebowale that potentially bear on his credibility and were not resolved at the hearing. First, as noted, the record contains no actual explanation as to how Attorney Adebowale could obtain a copy of the decree in a matter of days, *see* Ex. R-17 (showing the request received by the court on March 20, 2019, and the date of certification by the Assistant Chief Registrar on March 25, 2019), when the issuing court could not locate the relevant case file and could not provide a copy of the decree despite searching for it for multiple months in response to an inquiry by the United States Government, *see* Exs. C-15, C-16 (showing the court was unable to locate the documents despite an exhaustive search between January and March of 2020). Second, the Decree Nisi in the second divorce decree clearly indicates that the Respondent was present at the court on November 4, 2013, even though it is undisputed that Respondent was not in Nigeria on that date. Ex. C-23; *see also* Tr. A, 279. Third, both the Decree Nisi and the Decree Absolute are stamped with a seal and signature of an Assistant Chief Registrar, but the Decree Nisi is not dated and the Decree Absolute is dated March 25, 2019. Ex. C-23. Neither contains the signature of a judge, despite testimony about the judge who decided the case. Tr. B. at 31-34; *see also* U.S. Visa Reciprocity and Civil Documents by Country: Nigeria, U.S. Dep't of State, https://travel.state.gov/content/travel/en/us-visas/Visa-Reciprocity-and-Civil-Documents-by-Country/Nigeria.html (then click to expand "Marriage, Divorce Certificates") (last visited June 8, 2021) (noting that the "Issuing Authority Personnel Title" for a divorce decree in Nigeria is "Judge"). Further, there is no explanation as to why the Decree Absolute is not dated as being issued in 2014. Fourth, Attorney Adebowale testified that individuals in Nigeria have to go through an attorney to obtain a copy of a divorce decree and that a court in Nigeria will not serve the parties with a copy of a divorce decree when the action is concluded. Tr. B., 69, 74. Other sources, however raise questions about that testimony. *See, e.g.*, 5 United Nations Office on Drugs & Crime, *Basic Civil Procedure: Court Users Guide*, 1, https://www.unodc.org/documents/nigeria/publications/courtusersguides/Court_User_Guide_Basic_Civil_Procedure_No_5_PRINT.pdf (last visited June 8, 2021) ("Anyone can obtain a certified true copy of the judgement by completing an application and paying a small fee."); High Court of Lagos State, Civil Procedure Rules (2012), https://www.lagosjudiciary.gov.ng/High Court of Lagos State (Civil Procedure) Rules 2012/5d94d5e6-cac9-11e3-8433-002590d31986_id_5d94d5e6-cac9-11e3-8433-002590d31986.html (Nigeria) (indicating that a judge will enter judgment in an action in open court but nowhere indicating that a judge will not serve the parties with the order or judgment). Although there may be credible and appropriate explanations for all of these concerns, such explanations do not appear in the record, and the absence of a contemporaneous divorce decree issued by a judge calls into serious question the credibility of both Attorney Adebowale and the Respondent. If necessary, the ALJ may clarify any issues related to the second divorce decree on remand. Further, to the extent that questions of credibility related to the second

Additionally, as pointed out by Complainant, *see* C's Br. 28, Attorney Adebowale testified at the hearing that he had never drafted any documents for Respondent's original divorce proceedings, *see* Tr. B, 79. However, one of the documents submitted by Respondent in this case and purportedly contained in Respondent's original divorce file was a "Request to Set Undefended Suit Down for Trial," which states, in its first body sentence "I, ADEBOWALE ADENIGBAGBE ESQ, the Legal Practitioner for the Petitioner certify that this suit is ready for trial and request that it be set down for trial at the High Court of Justice, Lagos, Lagos State." Ex. R-19. The document is apparently signed by Attorney Joseph, but reads as though it was prepared by Attorney Adebowale, in contravention of his testimony that he did not draft any documents in the Respondent's divorce proceedings. In his testimony, Attorney Adebowale averred that this was simply a typographical or clerical error, Tr. B, 80-81, but the credibility of that explanation is called into doubt by the various other concerns about the credibility of Attorney Adebowale's testimony.

For all of these reasons, it appears that the ALJ's determination that Attorney Adebowale "presented nothing that would detract from his credibility," *see* Order at 11, is significantly overstated to the point that it is neither well-reasoned nor supported by substantial evidence in the record, at least as the record presently stands. Consequently, I cannot affirm the ALJ's positive credibility determination regarding Attorney Adebowale based on the existing record.

Even if Attorney Adebowale's testimony were more credible, it is not at all clear that his testimony was sufficient to support the ALJ's factual findings and legal conclusions related to Respondent's knowledge. In other words, the ALJ's credibility determinations for six of the seven witnesses cut in favor of the Complainant, and the ALJ's determination that the credible testimony of Attorney Adebowale essentially outweighs or overcomes the credibility determinations of the other six witnesses does not necessarily follow from the record.

In particular, Respondent's credibility weighs heavily in analyzing the question of his knowledge and whether Complainant met its burden of proof on that issue. And, as the ALJ rightly noted, there were numerous "valid concerns pertaining to the credibility of Respondent," as well as Respondent's nephew. Order at 10.

In the Order, the ALJ noted some of these concerns, but the record reflects several additional concerns as well. The ALJ specifically observed the following:

> Respondent was afforded the privilege of entry to the United States by way of a nonimmigrant visa, which he knowingly overstayed in contravention of the terms of the visa grant. *See* Tr. B, 212. When securing this visa, Respondent did not outright lie; however, he was less than forthcoming at his interview. Respondent had already filed for divorce and was still legally married, but he did not disclose the true nature of affairs related to his marriage at the interview. Tr. B, 170–71. Additionally, he informed government officials that his attorney had sent him the documents, likely in an attempt to bolster the reliability of those documents, when in all reality, he received the documents (identified as Ex. C-37) from his nephew. Tr. B, 187-90. Respondent is also less than clear about whether

divorce decree or Attorney Adebowale's testimony turn on questions of Nigerian law, the ALJ is not bound by the representations of the parties and may consider "any relevant material or source" in determining that law. *See* Fed. R. Civ. P. 44.1; 28 C.F.R. § 68.1 (noting that the Federal Rules of Civil Procedure may be used as general guidelines in OCAHO proceedings).

> he ceased residing with his current spouse and was not particularly forthcoming about how long he resided at the apartment and to whom he sublet it. *See* Tr. B, 151–55, 192–98.
>
> Similarly, Respondent's nephew's credibility is diminished based on his willingness to engage in dishonest activities. The nephew lied to Respondent about the origin of the documents, and then engaged in a second act of deceit by keeping the remainder of the funds intended for the attorney. Tr. B, 92, 96–98, 113, 123–24, 138. The nephew's declaration said that he obtained the documents a week after going to the High Court, Ex. R-21; however, he testified that he obtained the documents that day he went to court. Tr. B, 96. The nephew was also inconsistent as to the number of times he met the attorney who provided the fraudulent documents. *Compare* Tr. B, 94, *with* Ex. R-21.

Id. at 10-11. As the ALJ alluded to in the above discussion, Respondent filed a declaration with OCAHO dated February 20, 2020, in which he stated that he "received [his] final divorce decree in the mail, from [his] lawyer in Nigeria." Ex. C-37. This declaration expressly contradicts Respondent's testimony that he learned in 2019 (many months before his February 2020 statement) that the first set of divorce documents had in fact *not* come from his lawyer. When asked to explain this inconsistency, Respondent testified that it was "a mistake on [his] part" and that he should have put his nephew, not his lawyer. Tr. B, 189-90. However, in Respondent's Reply to the Complainant's post-hearing brief, Respondent argues instead that at the time the February 2020 declaration was submitted, "the Respondent was referring to what he knew at the time of the submission of the documents." R's Reply at 11. There is no qualifying or clarifying language on the face of the February 2020 declaration that supports this interpretation by Respondent. This inconsistency—and the shifting explanations for it—further undermines Respondent's credibility.

Respondent's February 2020 declaration also reflects an additional inconsistency with Respondent's testimony. With respect to his Nigerian divorce proceedings, Respondent's declaration avers that Respondent "did not appear in court after the initial filing because [he] was already in the United States." Ex. C-37. However, both the Respondent and Attorney Adebowale testified at the hearing that Respondent went to court several times in connection with his divorce proceedings. *See* Tr. B, 19, 132, 180. This apparent inconsistency is unexplained and raises additional concerns with either Respondent's credibility, Attorney Adebowale's credibility, or the credibility of both. Additionally, as asserted by Complainant in its post-hearing brief, in his testimony at the hearing, Respondent gave "wildly different" explanations for why he overstayed his visa. *See* C's Br. 28; *compare* Tr. B, 172-73 (asserting he could not cope with the things that his Nigerian wife did with him and stayed "because [he] still ha[d] a valid document that still makes [him] stay") *with* Tr. B, 211, 213 (asserting that he stayed because his U.S. citizen wife was pregnant and he loves her).

Furthermore, in addition to the credibility concerns related to Respondent's nephew that were noted by the ALJ, the record reflects that Respondent's nephew was also evasive and less than forthcoming on numerous other issues, including how much money his uncle would send him, *see* Tr. B, 106, when his uncle requested that he contact Attorney Joseph, *see* Tr. B, 108-10, when he last saw his uncle's ex-wife, *see* Tr. B, 114, and when he began dodging his uncle's calls, *see* Tr. B, 120. Notably, Respondent's nephew was unable to give even an approximate date for when he was supposedly confronted by his family regarding the fraudulent divorce documents he sent his uncle and confessed to his actions. *See* Tr. B, 117. Respondent's nephew later testified that this confession to his family is not something "you take with levity here in Africa," and that he had

"no option than to tell the truth or my life is at risk by what I'm about to do." Tr. B, 124-25. It appears that his confession to his family was a significant event for Respondent's nephew, and his inability to remember even an approximate date of the event calls into question the overall credibility of his account of the events related to this case.

Significantly, Respondent's nephew stated that he did not know the divorce decree he sent Respondent was fake. Ex. R-21. However, he offered no explanation—and the record reveals none—regarding the source of information that the enigmatic Mr. Kunle allegedly used to fabricate the first divorce decree. The fraudulent first divorce decree contains a great deal of information that reflects either personal details about the Respondent—e.g., the names of Respondent's children, the correct birthdate of one of those children, and the partially correct birthdate of the other child—or information that was actually correct, at least compared to the ostensibly genuine second divorce decree—e.g., the date of the Decree Nisi, November 4, 2013. *Compare* Ex. C-6 *with* Ex. R-17. The record contains no evidence as to how Mr. Kunle would have known any of that information in order to obtain the fraudulent first divorce decree, as there is no evidence that he ever met Respondent or that Respondent's nephew gave that information to him.[23] Even if Respondent's nephew did provide the information, the record does not reveal why he—if he genuinely believed Mr. Kunle intended to obtain an authentic divorce decree—would have needed to have given Mr. Kunle personal information about the Respondent or any information other than the case number and the parties' names in order to obtain the decree or how he would have known the date of the Decree Nisi to provide to Mr. Kunle. This unexplained disconnect between the averments of Respondent and his nephew that neither knew the first divorce decree was fraudulent and the ability of Mr. Kunle to utilize information that presumably only Respondent or his nephew knew in order to fabricate that decree does not enhance the credibility of either Respondent or his nephew and should have been considered by the ALJ as part of the overall facts and circumstances of the case. *Cf. Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2575 (2019) (courts are "not required to exhibit a naiveté from which ordinary citizens are free") (quoting *United States v. Stanchich*, 550 F.2d 1294, 1300 (2d Cir. 1977)).

To summarize, the ALJ's conclusions that Respondent's Nigerian attorney testified credibly, that his testimony "bolster[ed] and confirm[ed] key components of Respondent's testimony and the nephew's testimony," and that his testimony permitted the ALJ "to make factual findings and legal conclusions related to circumstantial knowledge" are not sufficiently supported by the record to be affirmed. On remand, the ALJ should take into account the above-identified issues related to the credibility of all three of Respondent's witnesses—in addition to the overall facts and circumstances of the case reflected in the record—in more fully discussing and weighing the credibility of the witnesses.

[23] Respondent's nephew testified that he "only told [Mr. Kunle] the names involved" in the divorce action, referring to the names of Respondent and Respondent's wife in Nigeria. Tr. B at 94-95. The record does not indicate that Respondent's nephew provided Mr. Kunle with the names of Respondent's children, their birthdates, or the date of the Decree Nisi and, thus, does not indicate how Mr. Kunle obtained that information. The record also provides no reason for Respondent's nephew to have needed to provide that information to Mr. Kunle, particularly if he believed Mr. Kunle would obtain Respondent's genuine divorce decree.

B. Respondent's Knowledge of the Errors on His First Divorce Decree

To establish a violation of 8 U.S.C. § 1324c(a)(2), Complainant must prove, by a preponderance of the evidence, 8 U.S.C. § 1324c(d)(2)(C); 28 C.F.R. § 68.52(b), 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." [24] *United States v. Rubio-Reyes*, 14 OCAHO no. 1349, 3 (2020) (citations omitted). The ALJ's decision on whether Complainant has met its burden "shall be based upon the whole record." 28 C.F.R. § 68.52(b); *see also Ortiz*, 6 OCAHO no. 889, at 719 (for purposes of deciding cases brought under 8 U.S.C. § 1324c, "knowledge may be proved by conduct and by all the facts and circumstances surrounding the case"). The ALJ's decision shall also "be supported by reliable and probative evidence." 28 C.F.R. § 68.52(b).

There is no dispute over the first, third, and fourth elements in the instant case, but the parties vigorously dispute whether Complainant proved the second element, Respondent's knowledge. The ALJ determined that Complainant had not met its burden of proof on that point. Order at 11-15, and that is the principal issue under review.

Before turning to the ALJ's decision in more detail, it is important first to clarify the relevant terminology and law involving the concept of knowledge for purposes of 8 U.S.C. § 1324c. A violation of 8 U.S.C. § 1324c(a)(2) requires, *inter alia*, conduct performed knowingly, namely that the respondent knew the relevant documents to be forged, counterfeit, altered or falsely made. Unlike 8 U.S.C. § 1324a, which also requires proof of knowing conduct in certain instances, *see, e.g.*, 8 U.S.C. § 1324a(a)(1)(A) (providing that it is unlawful to hire an alien for employment knowing the alien is an unauthorized alien as defined by 8 U.S.C. § 1324a(h)(3)), the regulations applicable to 8 U.S.C. § 1324c do not contain a definition of "knowing," *compare* 8 C.F.R. § 274a.1(l) (defining "knowing" for purposes of 8 U.S.C. § 1324a and made applicable to OCAHO by 8 C.F.R. § 1274a.1(b)) *with* 8 C.F.R. §§ 270.1 and 1270.1 (defining only the terms "document" and "entity" for purposes of 8 U.S.C. § 1324c).

As a general statutory term, "knowingly" has a range of meanings, and unless otherwise specified, it typically includes both actual and constructive knowledge. *See, e.g.*, *Freeman United Coal Mining Co. v. Fed. Mine Safety & Health Review Comm'n*, 108 F.3d 358, 363 (D.C. Cir. 1997) (collecting cases). Further, Congress has made clear that it will specify actual knowledge if it intends to limit a statutory mens rea to actual knowledge, *see, e.g.*, 8 U.S.C. § 1324(a)(3) (requiring "actual knowledge" for criminal liability based on knowingly hiring at least 10

[24] Following the Federal Rules of Civil Procedure, OCAHO allows alternative pleadings and charges in a complaint. *See United States v. Alpine Staffing, Inc.*, 12 OCAHO no. 1303, 21 n.11 (2017). Thus, as an apparent matter of prosecutorial discretion, Complainant charged Respondent with violating only 8 U.S.C. § 1324c(a)(2), rather than also charging, in the alternative, a violation of 8 U.S.C. § 1324c(a)(5), which makes it unlawful to knowingly "file . . . any application for benefits under [the INA], or any document required under [the INA], or any document submitted in connection with such application or document, with knowledge or in reckless disregard of the fact that such application or document was falsely made. . . ." The clear text of 8 U.S.C. § 1324c(a)(5) reflects a potentially lower mens rea regarding the submission of a false document in support of an application for an immigration benefit—i.e. "reckless disregard"—than is required for a violation of 8 U.S.C. § 1324c(a)(2).

unauthorized aliens within a 12-month period), and no such specification is present in 8 U.S.C. § 1324c. Moreover, OCAHO case law has indicated that a violation of 8 U.S.C. § 1324c may be established by constructive knowledge. *See Ortiz*, 6 OCAHO no. 889, at 719 ("knowledge may be proved by conduct and by all the facts and circumstances surrounding the case, and one may infer knowledge if a party deliberately avoids acquiring full or exact knowledge of the nature and extent of suspicious dealings").[25] Accordingly, for purposes of 8 U.S.C. § 1324c, the "knowingly" mens rea encompasses either actual knowledge or constructive knowledge. *See Freeman*, 108 F.3d at 363-64 (administrative agency's interpretation of mens rea of "knowingly" as encompassing both actual knowledge and constructive knowledge is reasonable where the statutory language does not unambiguously require actual knowledge).

Although those two forms of knowledge are well-established, the contours of their definitions and how they are proven, especially in situations without an admission or direct evidence of knowledge, have provided fertile ground for argument for many years. *See, e.g.*, *United States v. Jonel, Inc.*, 8 OCAHO no. 1008, 9-13 (1998) (summarizing various ways courts and commentators have attempted to define knowledge in the absence of direct evidence of actual knowledge). However, a recent unanimous Supreme Court decision, *Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768 (2020), provides helpful guidance that clarifies a lot of the issues regarding actual and constructive knowledge. In *Sulyma*, the Supreme Court interpreted the scope of a statutory provision involving "actual knowledge." *See id*. at 773-79. In doing so, it clarified the difference between actual knowledge and constructive knowledge. *See id*. at 776. Actual knowledge is awareness of something in fact. *See id*. ("Thus, to have 'actual knowledge' of a piece of information, one must in fact be aware of it."). Actual knowledge is also knowledge that is "more than 'potential, possible, virtual, conceivable, theoretical, hypothetical, or nominal.'" *Id*. (quoting Black's Law Dictionary 53 (4th ed. 1951)). In contrast, "the law will sometimes impute knowledge—often called 'constructive' knowledge—to a person who fails to learn something that a reasonably diligent person would have learned." *Id*.

After clarifying the distinction between these two types of knowledge, the Supreme Court also helpfully reiterated three ways in which actual knowledge may be proven in litigation.[26] *Id*. at 779 ("Nothing in this opinion forecloses any of the 'usual ways' to prove actual knowledge at any stage in the litigation.") (citing *Farmer v. Brennan*, 511 U.S. 825, 842 (1994)). First, actual knowledge may be shown by direct evidence, i.e., an admission. *See id*. Second, actual knowledge

[25] Certain imprecise language in *Ortiz* may inadvertently suggest that the burden of proof regarding knowledge in cases brought under 8 U.S.C. § 1324c shifts once the complainant establishes a prima facie case of knowledge. 6 OCAHO no. 889, at 719 ("Once Complainant has established a prima facie case of knowledge, the burden will shift to the Respondent to come forward with evidence refuting Complainant's case."). To be clear, this language in *Ortiz* refers to shifting the burden of production, not the burden of proof. The burden of proof of establishing all four elements of a violation of 8 U.S.C. § 1324c(a)(2), including knowledge, always rests with the complainant. Once the complainant has introduced prima facie evidence of those elements, the burden of production shifts to the respondent to introduce evidence of its own to controvert the complainant's evidence. "If the respondent fails to introduce any such evidence, the unrebutted evidence introduced by the [complainant] may be sufficient to satisfy its burden of proof." *United States v. Durable, Inc*., 11 OCAHO no. 1231, 5 (2014) (explaining the difference between the burden of proof and the burden of production).

[26] Nothing in *Sulyma* suggests that these three methods are limited to proving only "actual knowledge," and each may also establish proof of "constructive knowledge" as well.

may be proven by inference from circumstantial evidence. *Id*. Finally, evidence of "willful blindness"[27] may also show actual knowledge. *Id*.

Although *Sulyma* arose in a different context, the Supreme Court's discussion of knowledge is nevertheless clear and instructive, and I find it appropriate to use in the context of OCAHO adjudications under 8 U.S.C. § 1324c. Accordingly, to establish a violation of 8 U.S.C. § 1324c(a)(2), a complainant must demonstrate, *inter alia*, the respondent's either actual or constructive knowledge of the relevant document's status as one that has been forged, counterfeited, altered or falsely made, and a complainant may prove either form of knowledge by direct evidence, circumstantial evidence, or evidence of willful blindness.

Turning to the instant case, the ALJ cited most of the relevant standards discussed above, Order at 9, but the ALJ's analysis reflected in the Order is not entirely clear or consistent in how they were applied. For instance, at one point the ALJ noted that "Complainant did not prove that Respondent *actually knew* the difference between" Ikeja and Lagos, indicating a standard of actual knowledge.[28] *Id.* at 13-14 (emphasis added). At another point, however, the ALJ referred to Complainant's failure to prove knowledge imputed to Respondent, which is indicative of a constructive knowledge standard. *Id*. at 14-15. At yet another point, the ALJ noted that the testimony of Attorney Adebowale permitted her to make findings related to Respondent's "circumstantial knowledge," *id*. at 11, which appears to confusingly conflate a formulation of the

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[27] In 2010, the Supreme Court summarized the following state of jurisprudence regarding "willful blindness":

> While the Courts of Appeals articulate the doctrine of willful blindness in slightly different ways, all appear to agree on two basic requirements: (1) The defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact.

Global-Tech Appliances, Inc. v. SEB S.A., 563 U.S. 754, 769 (2011). Although the second, "deliberate-action" prong in *Global-Tech* has provoked some subsequent debate and commentary, *see, e.g*., *United States v. Fofanah*, 765 F.3d 141, 151 n.2, 154-55 n.4 (2d Cir. 2014) (Leval, J. concurring) (suggesting that the Supreme Court's incorporation of this prong in its discussion in *Global-Tech* was mistaken or, at the least, misleading), most Circuits have held that deliberate action encompasses deliberate (or conscious) avoidance or deliberate inaction, though not deliberate indifference, *see, e.g*., *United States v. Goffer*, 721 F.3d 113, 128 (2d Cir. 2013) ("*Global–Tech* simply describes existing case law. In so holding, we follow other decisions in this Circuit since *Global–Tech* that have applied the traditional conscious avoidance doctrine."); *United States v. Butler*, 646 F.3d 1038, 1041 (8th Cir. 2011) ("a defendant's willful blindness may serve as the basis for knowledge if, in light of certain obvious facts, reasonable inferences support a finding that a defendant's failure to investigate is equivalent to burying one's head in the sand" (cleaned up) (citing *United States v. Chavez-Alvarez*, 594 F.3d 1062, 1067 (8th Cir. 2010)); *United States v. Salman*, 618 F. App'x 886, 890 (9th Cir. 2015) ("where a reasonable person would make further inquiries, a failure to investigate can be a deliberate action" for purposes of *Global-Tech* (cleaned up)). The Third Circuit, the Circuit in which this case arises and whose precedent provides instructive guidance, *see* 28 C.F.R. 68.56, has similarly adopted a definition of willful blindness derived from *Global-Tech* and rooted in an individual's deliberate avoidance: "[C]ourts applying the doctrine of willful blindness hold that defendants cannot escape the reach of ... [the law] by deliberately shielding themselves from clear evidence of critical facts that are strongly suggested by the circumstances." *Roye v. Att'y Gen*., 693 F.3d 333, 343 n.13 (3d Cir. 2012) (alterations in original) (quoting *Global-Tech*, 563 U.S. at 766-67); *see also Ragbir v. United States*, 950 F.3d 54, 65 n.29 (3d Cir. 2020) ("*Global-Tech* did not promulgate a new test; rather, it stated already settled law. . . The 'deliberate avoidance' prong was also clear law within this Circuit by 1995."). In short, deliberate avoidance of inquiry in the face of obvious circumstances in which there is a high probability an individual knows a fact exists is evidence of willful blindness and, thus, may be evidence of knowledge.

[28] As discussed, *infra*, the record does suggest, in fact, that the Respondent has actual knowledge of the difference between Ikeja and Lagos. *See* Tr. B, 66, 181.

mens rea itself (constructive knowledge) with a type of evidentiary proof of the existence of that mens rea (circumstantial evidence). *Cf. Jonel*, 8 OCAHO no. 1008, at 10 (referencing the admonition of the eminent legal scholar Jerome Hall "against confusing a mental state with proof of its existence"). The ALJ also did not specifically address whether the record contained any evidence of willful blindness—a concept that is analytically distinct from constructive knowledge and circumstantial evidence, *see Sulyma*, 140 S. Ct. at 779—that would prove either actual or constructive knowledge, despite that argument being raised and briefed by Complainant. *See* C's Reply at 1-2. Because the ALJ appears to have used different standards of knowledge in evaluating the evidence at different points—or, at the least, did not clearly and consistently articulate the standard employed—and did not clearly address a key argument by one of the parties regarding a method of proof of the mens rea, I cannot affirm the ALJ's decision as well-reasoned and free from legal error. On remand, the ALJ should ensure that her analysis of whether Complainant has proven that Respondent acted knowingly for purposes of 8 U.S.C. § 1324c(a)(2) is consistent with the principles outlined above.

In addition to the issues in the ALJ's decision regarding the legal standard for a "knowingly" mens rea, the ALJ's assessment of the evidence to which that standard applies does not appear to be fully supported by the record and does not necessarily reflect fact-finding that is "supported by and in accordance with . . . reliable, probative, and substantial evidence." 5 U.S.C. § 556(d). At the least, the decision is not sufficiently "well-reasoned and detailed" to be affirmed in its current posture. *See ABC Roofing & Waterproofing*, 2 OCAHO no. 358, at 442 (CAHO affirmance, in part, of an ALJ's decision where "[t]he ALJ's conclusions are based on a well-reasoned and detailed analysis of the credibility of witnesses and corroborating evidence").

The ALJ discussed four facial errors in the first divorce decree identified by the Complainant—i.e., the incorrect court location (Ikeja, rather than Lagos), an error in the birthdate of one of the Respondent's children, the legal grounds for divorce, and indicia that the Respondent was present on the day the document was allegedly issued—but found that none of those errors was "egregious" enough to be sufficient evidence to establish the Respondent's knowledge of the falsity of the decree. Order at 15. Upon review, however, the ALJ's conclusion regarding these errors is insufficiently supported by the record to be affirmed.

As an initial point, the ALJ addressed each error in the first divorce decree individually, and it is not clear from the decision whether the ALJ also considered them cumulatively. *Id.* at 11-15. An ALJ's decision must "be based upon the whole record," 28 C.F.R. § 68.52(b), and an ALJ is required to consider "all the facts and circumstances surrounding the case" in order to determine whether a complainant has met its burden of proof regarding knowledge, *Ortiz*, 6 OCAHO no. 889, at 719. Thus, the cumulative effect of multiple errors in a document may be sufficient to prove knowledge by a preponderance of the evidence even if each individual error standing alone would not be. Consequently, on remand, the ALJ should address the errors both individually and cumulatively in assessing whether Complainant has met its burden of proof regarding the mens rea. Moreover, in doing so, the ALJ should also bear in mind "the whole record," 28 C.F.R. § 68.52(b), and all of the "circumstances surrounding the case," *Ortiz*, 6 OCAHO no. 889, at 719, which include, at the least, the lack of credibility of Respondent and his witnesses, the inconsistent stories regarding how the first divorce decree was obtained, and the somewhat unresolved credibility and provenance of the second divorce decree.

Turning to the individual errors in the first divorce decree more specifically, the ALJ's conclusions about three of those errors individually are not clearly supported by the record.[29] First, the ALJ dismissed the location discrepancy in the first divorce decree with the observation that the court in Ikeja "is not the entity which generates divorce decrees." Order at 13. However, the ALJ's statement does not capture the actual error. The error in the first divorce decree is the location of the judicial division—i.e. Ikeja rather than Lagos—*not* the court's jurisdiction or authority to grant a divorce. *Compare* Ex. C-6 (false first divorce decree from the Ikeja Judicial Division of the High Court of Lagos State) *with* Ex. R-17 (second, purportedly genuine divorce decree from the Lagos Judicial Division of the High Court of Lagos State). Although the undersigned agrees that a lay respondent may not necessarily be expected to know which court has jurisdiction to grant divorces or issue divorce decrees, that was not the relevant incorrect information.[30] Rather, the error was the location of the court, and none of the Respondent's witnesses provided a clear explanation as to why Respondent would not know that Ikeja was not the location of the court where he allegedly appeared. To the contrary, the Respondent testified that he went to court three times and that all three appearances occurred at the court in Lagos. Tr. B, 181. Although Respondent and his witnesses attempted to minimize the significance of the error by noting that Ikeja is in the same state as Lagos and that cases may be transferred among divisions of the High Court of Lagos State, there is no evidence in the record that Respondent's case itself was transferred, that Respondent considered Ikeja and Lagos to be synonymous or interchangeable, or that he considered them to refer to one single location or one court.[31] To the contrary, the record is clear that they are different

[29] In isolation, the ALJ's determination that an incorrect ground for divorce on the first divorce decree is insufficient to establish Respondent's knowledge of the falsity of that decree is supported by the record. Order at 14. Legal grounds for divorce in Nigeria, like all issues of foreign law, are questions of law, not fact, and OCAHO generally follows Federal Rule of Civil Procedure 44.1 in analyzing questions of foreign law. *See* 28 C.F.R. § 68.1 (noting that the Federal Rules of Civil Procedure may be used as general guidelines in OCAHO proceedings). Considering all relevant evidence, it appears that "irreconcilable difference," which is reflected on the first divorce decree, is not a valid ground for divorce in Nigeria, but the irretrievable breakdown of the marriage, which is reflected on the second decree, is. *See* Immigration Refugee Board of Canada, Responses to Information Requests, *Nigeria: Divorce Law and Practices Among Christians, Including Grounds, Procedures, Length of Process, Property Dispositions, Child Custody and Consequences for the Woman and Her Family*, NGA101047.E (Mar. 21, 2006), available at https://www.justice.gov/sites/default/files/eoir/legacy/2013/12/18/NGA101047.E.pdf. Although the Respondent is a well-educated professional—i.e. he has a college degree, worked as an engineer in Nigeria, and is currently a mental health counselor in the United States. Tr. B. at 168-69—he is nevertheless a layman to the law, and there is no evidence that the legal distinction between "irreconcilable differences" and an "irretrievable breakdown" for purposes of Nigerian divorce law, by itself, would be so obvious to him as to establish his knowledge of the first divorce decree's falsity. However, in conjunction with the other errors in the first divorce decree, which are more obvious, and the credibility concerns of the Respondent and his witnesses, this error may still serve as marginal cumulative evidence of Respondent's knowledge—or lack thereof. Because I am vacating the ALJ's decision in its entirety, the ALJ is free to re-assess this error on remand if she believes it is warranted or appropriate.

[30] The undersigned takes administrative notice that a High Court in Nigeria may grant divorces. *See* U.S. Visa Reciprocity and Civil Documents by Country: Nigeria, U.S. Dep't of State, https://travel.state.gov/content/travel/en/us-visas/Visa-Reciprocity-and-Civil-Documents-by-Country/Nigeria.html (then click to expand "Marriage, Divorce Certificates") (last visited June 8, 2021) (listing "The High Court of Justice" as the issuing authority for divorce certificates in Nigeria). Thus, absent any credible evidence to the contrary, it appears that either division—i.e. Ikeja or Lagos—of the High Court of Lagos State can issue divorce decrees.

[31] Although Attorney Adebowale testified that he never explained the difference between the Ikeja Division and the Lagos Division to the Respondent, the import of that testimony appears minimal. Tr. B, 42. First, as Attorney Adebowale also testified, he was not Respondent's attorney when the divorce action was filed, and he did not know whether Respondent's original attorney, Attorney Joseph, had explained the difference. *Id*. Thus, the fact that he personally did not explain the difference to Respondent does not establish that Respondent was unaware of or did not know the difference. Second, the only apparent difference between the divisions appears to be their locations, and it

locations, *id*. at 36, and that the Respondent appeared only at the division in Lagos and not at the one in Ikeja, *id*. at 66, 181. *See also id*. at 111 (testimony from Respondent's nephew that Respondent never lived in Ikeja). More significantly, because the ALJ's decision mischaracterizes the nature of the error regarding the court locations, her dismissal of the error as insufficient to prove knowledge does not necessarily find support from the record and, thus, cannot be affirmed.[32]

The ALJ dismissed the issue with the birthdate of one of Respondent's children as simply a typographical error that the Respondent did not notice and an error that was immaterial to the divorce. Order at 14. The undersigned recognizes that typographical errors may occur in court documents, as even OCAHO occasionally publishes errata due to such errors. *See* 28 C.F.R. § 68.52(f) (in cases arising under 8 U.S.C. § 1324c, an ALJ may correct clerical mistakes or typographical errors within 30 days after the entry of a final order). However, the issue is not the plausibility of the Respondent's explanation per se, but rather the basis for crediting it. As discussed, *infra*, typographical errors such as misspellings may be obvious indicia of fraud in certain circumstances, and the ALJ's decision does not state why she credited the Respondent's explanation over the Complainant's. Moreover, due to the credibility concerns with the Respondent's witnesses discussed above and the overall circumstances of the case, the record as a whole does not provide a clear basis for doing so such that I can affirm the ALJ's decision. Furthermore, although the birthdate is apparently not material to the divorce itself, it is material to whether the first divorce decree is an authentic document and to whether the Respondent knew of its falsity, particularly in light of the other errors in the decree and the other circumstances of this case. Accordingly, for all of these reasons, the undersigned cannot affirm the ALJ's decision on this issue.

The ALJ dismissed the question of the notation on the first divorce decree of Respondent's possible presence in Nigeria on November 4, 2013, as one of interpretation, namely that it referred to testimony Respondent gave previously and not necessarily on the date the Decree Nisi was supposedly issued. Order at 14. Again, the ALJ did not explain why she credited the Respondent's explanation over the Complainant's, particularly in light of the noted credibility issues and all of the facts and circumstances of the overall case. More significantly, other evidence in the record directly calls Respondent's explanation into question, and the ALJ's decision does not address that evidence. First, the Decree Nisi in the first divorce decree refers to "THIS COURT," i.e. the court at Ikeja, taking testimony from the Respondent. Ex. C-6. However, neither Respondent nor his witnesses testified that Respondent ever appeared at the court in Ikeja. *See* Tr. B, 66, 181. Thus, even if the document referred to testimony taken prior to November 4, 2013, it would still suggest

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is not clear why Respondent would not know the locational difference between Ikeja and Lagos or why an attorney would be required to explain that geographic difference to him in order for him to know it.

[32] For similar reasons, the ALJ's observation that "the DHS officers who reviewed for the documents initially at the interviews did not notice the different division listed [i.e. Ikeja rather than Lagos]" is not a persuasive or sufficient basis for her ultimate conclusion. Order at 13. As Complainant pointed out. C's Br. on Review, 16, at the time the officers reviewed the first divorce decree, they had no reason to believe that the Ikeja Division did not issue the divorce decree because they were unaware that the purportedly authentic divorce decree had been issued by the Lagos Division. *See also* U.S. Visa Reciprocity and Civil Documents by Country: Nigeria, U.S. Dep't of State, https://travel.state.gov/content/travel/en/us-visas/Visa-Reciprocity-and-Civil-Documents-by-Country/Nigeria.html (then click to expand "Marriage, Divorce Certificates") (last visited June 8, 2021) (listing "The High Court of Justice" as the issuing authority for divorce certificates in Nigeria and, thus, suggesting that either the Ikeja Division or the Lagos Division could issue divorce decrees).

an obvious error because it would have referred to Respondent giving testimony at the Ikeja division even though there is no evidence that Respondent ever appeared at the court in Ikeja. *See id.* Second, the purportedly authentic second divorce decree clearly indicates that Respondent was present at the court in Lagos on the date the Decree Nisi was issued, November 4, 2013, even though it is undisputed that he was not in Nigeria on that date.[33] Ex. R-17. In other words, *both* sets of divorce documents obtained by the Respondent raise questions regarding his whereabouts on November 4, 2013, and these questions are, at the least, adverse to his position regarding his lack of knowledge. In short, the ALJ's decision on this point does not necessarily follow from the record and, thus, cannot be affirmed.

Finally, the ALJ also pointed to a recent Board decision, *Matter of O-M-O-*, 28 I&N Dec. 191 (BIA 2021), as persuasive authority supporting her conclusions about the first divorce decree. Order at 13-14. Although Board decisions are not binding in OCAHO proceedings, they may constitute persuasive authority if appropriate. Nevertheless, because *Matter of O-M-O-* is both legally and factually distinguishable from the instant case, its persuasive value is minimal. Moreover, aspects of that decision actually cut against the Respondent and the ALJ's assessment.

Legally, *Matter of O-M-O-* addressed circumstances in which an immigration judge may find a document to be fraudulent without forensic analysis. 28 I&N Dec. at 193-97. Its principal concern was whether the documents at issue undermined the credibility of the respondent's asylum claim, and not necessarily on whether the respondent knew that the documents were false.[34] *Id*.

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[33] Complainant attempted to re-cross-examine Attorney Adebowale on this issue; however, the ALJ presiding at the hearing objected to the questioning as outside the scope of earlier questioning, and Complainant withdrew the question. Tr. B, 84-85. The issue goes to the credibility of the witness, and witness credibility is an exception to the general limitation on cross-examination to matters addressed on direct examination. Fed. R. Evid. 611(b); *see also* 28 C.F.R. § 68.40(a) (providing that the Federal Rules of Evidence should be used as a general guide to evidentiary matters in OCAHO proceedings, unless otherwise provided by statute or OCAHO's specific regulations). Thus, had Complainant attempted to raise its questions on cross-examination, the presiding ALJ's objection would have been improper. *See also* 5 U.S.C. § 556(d) ("A party [in a proceeding conducted under the APA] is entitled . . . to conduct such cross-examination as may be required for a full and true disclosure of the facts."); 28 C.F.R. § 68.40(b) ("Every party shall have the right . . . to conduct such reasonable cross-examination as may be required for a full and true disclosure of the facts."). Moreover, this line of questioning could also be considered rebuttal evidence, though Complainant did not identify it as such. *See* 5 U.S.C. § 556(d) ("A party [in a proceeding conducted under the APA] is entitled . . . to submit rebuttal evidence"); 28 C.F.R. § 68.40(b) ("Every party shall have the right . . . to submit rebuttal evidence."). Because Complainant did not raise this line of questioning until re-cross-examination and did not assert that it constituted rebuttal evidence, the procedural appropriateness of it is less clear. *See* 28 C.F.R. § 68.40(b) (ALJ can limit cross-examination to "reasonable bounds"). Nevertheless, regardless of whether the presiding ALJ's objection was correct, documentary submissions containing copies of the second divorce decree were admitted into evidence and are part of the record. Exs. C-23, R-17. Consequently, those documents constitute evidence that the ALJ should have considered. *See* 28 C.F.R. § 68.52(b). On remand, the ALJ may address them and any questions raised by them relevant to this case as she deems appropriate consistent with applicable law.

[34] Although the Board noted in *Matter of O-M-O-* that it was reasonable for the immigration judge to conclude that the respondent was aware of the issues with his documents, 28 I&N Dec. at 197, that observation was in the context of determining whether the respondent had an opportunity to address the issues before the immigration judge relied on them as a basis for an adverse credibility determination and the denial of the respondent's applications for protection from removal, *id*. (citing *Matter of Y-I-M-*, 27 I&N Dec. 724, 728 (BIA 2019)), rather than in the context of determining whether that respondent knowingly submitted those documents. Indeed, in removal proceedings, credibility, persuasiveness, and the burden of proof are distinct concepts, and even a credible claim may be denied if it is not persuasive or sufficient to meet the burden of proof. *See Garland v. Dai*, 593 U.S. ___, 2021 WL 2194837,

The fraudulent nature of the first divorce decree is not at issue in the instant case, and the only legal question is whether Respondent knew of that nature, which is a question not directly at issue in *Matter of O-M-O-*. And, factually, the errors in the documents at issue in *Matter of O-M-O-* (namely a misspelling, the incorrect identity of the purported signing official, and issues with a seal) are distinguishable from those at issue in the Respondent's case. *See id*. at 192. In short, due to these distinctions, the persuasive value of *Matter of O-M-O-* is limited and insufficient to warrant affirming the ALJ's decision.

Further, if anything, *Matter of O-M-O-* actually militates to some extent against the ALJ's conclusions about the errors in the first divorce decree. For instance, that decision refers to "incorrect information" in a document as one of the "hallmarks of fraud," *id.* at 194, which suggests that the incorrect information about the court location in Respondent's first divorce decree is a "hallmark of fraud" and something that is obvious and egregious enough to indicate knowledge of the falsity. Similarly, *Matter of O-M-O-* suggests that typographical errors such as misspellings may nevertheless be obvious evidence of falsity. *See id*. at 195-96 (argument that a spelling error is really a colloquialism is insufficient to explain why the error would appear in an official document). Thus, *Matter of O-M-O-* does not necessarily support Respondent's dismissal of the error in his child's birthdate as a simple typographical error or the ALJ's acceptance of that argument.[35] Finally, *Matter of O-M-O-* cautions adjudicators against making speculative assertions of falsity in cases where a respondent testifies credibly. *Id*. at 193-94. In the instant case, however, there are significant questions surrounding Respondent's credibility, and *Matter of O-M-O-* certainly does not require accepting explanations for false documents from an otherwise incredible respondent. Therefore, overall, *Matter of O-M-O-* does not provide a sufficiently persuasive basis to affirm the ALJ's decision.

Because the ALJ's decision does not appear to be fully supported by the record as a whole—or, at the least, does not reflect full consideration of the entire record—and because it does not necessarily reflect fact-finding supported by reliable, probative, and substantial evidence, I cannot affirm it in its current posture. On remand, the ALJ should ensure that her analysis of whether Complainant has proven that Respondent acted knowingly for purposes of 8 U.S.C. § 1324c(a)(2) is based on the record as a whole, including all of the facts and circumstances of the case, consistent with the forgoing discussion.

V. CONCLUSION

In sum, the ALJ's credibility finding as stated in the Order regarding Attorney Adebowale is not supported by the record; at the least, it is not sufficiently detailed or well-reasoned to affirm on the present record. Further, based on the record, the undersigned also cannot be certain that the ALJ consistently applied the correct standard of knowledge in evaluating the evidence put forward to prove the requisite knowingly mens rea, that the ALJ fully and correctly evaluated the evidence at issue, and that the ALJ's decision is based on the whole record and all of the facts and

*8 (2021). Thus, in removal proceedings, an application supported by fabricated evidence may still be subject to denial even if the record does not establish that the respondent knew it was fabricated.

[35]Although the respondent in *Matter of O-M-O-* argued that the misspelling in the document at issue was a colloquialism rather than a typographical error, there is no indication in the decision that the Board would have been persuaded by a typographical-error explanation in light of all of the circumstances.

circumstances of the case. Overall, the undersigned is compelled to conclude that the Order is not necessarily free from errors of law and that it is not based on substantial evidence in the record.

Although the undersigned possesses de novo review authority, both the numerous legal and factual issues addressed above that would benefit from further development by the ALJ and the statutory time constraint for reviewing ALJ decisions, 8 U.S.C. § 1324c(d)(4), caution against issuing a final decision and order in the present posture. Rather, I find it more prudent to vacate the Order and remand this case to the ALJ for further proceedings. *See United States v. Crescent City Meat Co.,* 11 OCAHO no. 1217, 6 n. 6 (CAHO 2014) (vacating and remanding the case to an ALJ rather than determining a civil money penalty in the first instance).[36]

Accordingly, for the reasons set forth above, the ALJ's Final Decision and Order of May 10, 2021, is hereby VACATED, and the case is REMANDED for further proceedings consistent with this order.

_____
James McHenry
Chief Administrative Hearing Officer

[36] To be clear, I express no opinion on the overall outcome of the merits of the case and make no determination as to whether Complainant has met its burden of proof regarding the allegations in the complaint. Although Complainant's burden is only a preponderance of the evidence, *Ortiz*, 6 OCAHO no. 889, at 719, it is not a trivial burden and cannot be dispensed with perfunctorily.