

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

February 8, 2023

UNITED STATES OF AMERICA,	)	
	)	
Complainant,	)	
	)	8 U.S.C. § 1324b Proceeding
v.	)	
	)	OCAHO Case No. 2020C00045
DIEGA QUISQUINA-YAXON,	)	
	)	
Respondent.	)	
_____	)	

Appearances: Roman J. Maney, Esq., for Complainant  
Melvern Burnett, Esq., for Respondent

ORDER DENYING COMPLAINANT’S MOTION FOR SUMMARY DECISION

I. INTRODUCTION

This case arises under the document fraud provisions of the Immigration and Nationality Act (INA), as amended by the Immigration Reform and Control Act of 1986, 8 U.S.C. § 1324c (2021). On February 11, 2020, the Department of Homeland Security Immigration and Customs Enforcement (DHS or the Government) filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) against Diega Quisquina-Yaxon (Respondent). The complaint reflects that on August 7, 2019, the Government served a Notice of Intent to Fine (NIF) under Section 274C of the INA on Respondent, and that on September 30, 2019, Respondent timely requested a hearing. Respondent filed an answer to the complaint on March 23, 2020.

On September 9, 2020, the Government filed Complainant’s Motion for Summary Decision, and Respondent filed a Respondent’s Motion in Opposition to Motion for Summary Decision on October 8, 2020.

For the reasons set forth herein, the Government’s Motion for Summary Decision is DENIED.

## II. BACKGROUND AND PROCEDURAL HISTORY

In its complaint, the Government asserts that Respondent, a citizen and national of Guatemala, is present in the United States without authorization, possessed a fraudulent Georgia State identification card and fraudulent Social Security Card, and used the fraudulent documents to obtain employment. Compl. 3–4. The complaint charges Respondent with violating Section 274C(a)(2) of the INA,<sup>1</sup> 8 U.S.C. § 1324c(a)(2), which renders it unlawful to use, attempt to use, possess, obtain, accept, receive, or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement or obtain a benefit under the INA. *Id.* at 4. The Government seeks \$851.50 in penalties. Compl. Exh. A.

According to the Complaint, Homeland Security Investigations (HSI) agents encountered Respondent on August 7, 2019, while conducting a criminal search warrant at Koch Foods in Morton, Mississippi. Compl. 3. Respondent was identified to be a citizen and national of Guatemala, and was administratively arrested and transported for further administrative proceedings. *Id.* At the time of Respondent’s administrative arrest, the Government alleges that she possessed two fraudulent documents: (1) a fraudulent Georgia State identification card containing a picture of Respondent and bearing the name “Milagros Morales Salcedo,” with Identification Number 0532xxxxx; and (2) a fraudulent Social Security Card bearing the same name with social security number 584-9x-xxxx. *Id.* (citing Exh. C). HIS’ immigration database searches indicated that Respondent crossed the U.S./Mexico Border on foot and without inspection at an unknown place other than a port of entry, and had no known pending petitions. *Id.* Respondent initially presented HSI with her documents asserting that she was Milagros Morales Salcedo, but later admitted that she is Diega Quisquina-Yaxon and does not have legal status in the United States. *Id.* at 3–4.

The Government further alleges that Respondent used the fraudulent documents on August 29, 2018 to obtain employment with Koch Foods, and asserts that the employer provided HSI with a copy of Respondent’s Employment Eligibility Verification Form (I-9), which included the fraudulent identification numbers and a photocopy of the fraudulent documents, and was signed by “Milagros Morales Salcedo.” *Id.* at 4 (citing Exh. D). As evidence, the Government submitted the NIF, the Respondent’s request for a hearing, photocopies of the Georgia ID card and social security card bearing the name Milagros Morales Salcedo, and a

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<sup>1</sup> In its Prehearing Statement, the Government also raised the issue of whether Respondent violated section 274C(a)(5) of the INA. C’s PHS 2. However, because this issue was neither raised in the NIF nor the complaint, it is not properly before this Court and will not be considered further.

signed Form I-9 bearing the same names and numbers as the photocopied identification documents.

In her Answer, Respondent denies all allegations for lack of knowledge or information sufficient to form a belief about the truth of such allegations, specifically contests and denies that she violated INA § 274C(a)(2), and requests that the proceedings against her be dismissed. Ans. 1–2.

The parties timely filed prehearing statements in response to the Court’s March 27, 2020 Order. Respondent did not agree to any of the Government’s proposed stipulations, and instead only stipulated: (1) to having been personally served with the NIF on August 7, 2019; and (2) that the form I-9 attached to the Government’s complaint was completed by someone other than Respondent but lacked a translator/preparer certification. Resp’t Prehearing Stmt. 1–2.

The parties conducted discovery between June 9 and August 10, 2020. In response to Respondent’s Request for Discovery, the Government admitted that Respondent’s primary language is Spanish and that the I-9 was not translated to Respondent. C’s Resp. to Request for Discovery 7. However, the Government denied all other requests for admissions, which pertained to Respondent’s English fluency and the manner in which the form I-9 was completed. *Id.* at 6–7. The Government did not produce any additional evidence nor did it request additional discovery from Respondent.

After the close of discovery, the Government filed its Motion for Summary Decision, supported by a Memorandum of Law. The Government reiterates the facts alleged in the complaint and asserts that Respondent has provided no evidence to support her denials of the violations alleged and that no genuine issue of material fact exists with respect to Respondent’s liability. Mot. for Summ. Decision 1–2.

On October 8, 2020, Respondent timely filed an Opposition to the Government’s Motion for Summary decision. Respondent argues that the Government has not met its burden of proof to support a summary decision because there remains a genuine issue of fact with regard to the “knowledge” element of Respondent’s conduct. Resp’t Opp’n to Mot. for Summ. Decision 6. Specifically, Respondent asserts that she has not stipulated to any of the facts alleged by the Government except that she was personally served with the NIF and that Form I-9 is attached to the Government’s complaint. *Id.* at 5. Respondent asserts that the Government has still not established that Respondent signed the I-9, that she knowingly used the documents to obtain employment, that she is literate in English, that she possessed or presented the documents herself, that she completed the I-9 herself, or that she had the assistance of a competent translator. *Id.* Accordingly, Respondent urges the Court to deny the Government’s motion and instead determine the issue during a hearing. *Id.* at 6. Respondent did not submit any evidence.

### III. LEGAL STANDARDS FOR SUMMARY DECISION

Under the OCAHO Rules of Practice and Procedure for Administrative Hearings, the Administrative Law Judge (ALJ) “shall enter a summary decision for either party if the pleadings, affidavits, material obtained . . . , or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision.” 28 C.F.R. § 68.38(c). Because this regulation parallels Rule 56(c) of the Federal Rules of Civil Procedure governing summary judgment in federal court cases, OCAHO may turn to federal case law interpreting Rule 56(c) for guidance when determining whether summary decision is appropriate. *See United States v. Sihombing*, 7 OCAHO no. 944, 361, 363 (1997);<sup>2</sup> *see also* 28 C.F.R. § 68.1 (“The Federal Rules of Civil Procedure may be used as a general guideline in any situation not provided for or controlled by these rules, by the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation.”). Federal cases decided under the Fifth Circuit’s jurisdiction are especially persuasive here, given that the events in this case occurred in the geographical scope of Fifth Circuit jurisdiction.

The party seeking summary decision bears the initial burden of demonstrating the absence of a genuine issue of material fact. *Sihombing*, 7 OCAHO no. 944 at 363 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)). “An issue of fact is genuine only if it has a real basis in the record” and “genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit.” *Sepahpour v. Unisys, Inc.*, 3 OCAHO no. 500, 1012, 1014 (1993) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586–87 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

To establish liability under § 1324c(a)(2), the Government must prove by a preponderance of evidence that Respondent: 1) used or possessed a fraudulent document; 2) with knowledge of the document’s fraudulent nature; 3) after November 29, 1990; and 4) for the purpose of obtaining a benefit under the INA. *See* 8 U.S.C. § 1324c(a)(2); *United States v. Gregorio-Gomez*, 14 OCAHO no. 1359a, 3 (2021) (citations omitted). In the context of summary decision, the Government meets its burden if it shows there is no issue of genuine fact regarding these elements and that Complainant is entitled to judgment as a matter of law. *United States v. Davila*, 7 OCAHO no. 936, 1, 20 (1997). The Court views all evidence and inferences

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

in the light most favorable to the non-moving party when determining whether the movant has met its burden of proof. See *Sihombing*, 7 OCAHO no. 944 at 363; *United States v. Rubio-Reyes*, 14 OCAHO no. 1349a, 4 (2020).

Only after the moving party satisfies its initial burden demonstrating both the absence of genuine issues of material fact and that it is entitled to judgment as a matter of law does the burden shift to the nonmoving party, who must then come forward with contravening evidence. *United States v. Four Seasons Earthworks, Inc.*, 10 OCAHO no. 1150, 3 (2012) (citing *Celotex Corp.*, 477 U.S. at 323). Courts within the jurisdiction of the United States Court of Appeals for the Fifth Circuit, the jurisdiction where the events in this case occurred, have found that, even without submitting evidence of its own, the nonmoving party can defeat the motion for summary judgment by “showing that the moving party’s evidence is so sheer that it may not persuade the reasonable fact-finder to return a verdict in favor of the moving party.” *Rubio-Reyes*, 14 OCAHO no. 1394, at 3 (citing *United States ex rel. Branch Consultants, LLC v. Allstate Ins. Co.*, 782 F. Supp. 2d 248, 256 (E.D. La. 2011)) (internal quotation marks omitted). However, OCAHO rules also explicitly state that when a party opposes a motion for summary decision, it “may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing.” 28 C.F.R. § 68.38(b); see also *United States v. 3679 Commerce Place, Inc.*, 12 OCAHO no. 1296, 4 (2017); *Sihombing*, 7 OCAHO, at 363 (1997).

Parties providing evidence to support or resist a summary decision must present it through means designed to ensure its reliability. See *Rubio-Reyes*, 14 OCAHO no. 1394, at 3 (citing *Parker v. Wild Goose Storage, Inc.*, 9 OCAHO no. 1081, 3 (2002)).

#### IV. DISCUSSION AND ANALYSIS

The Court does not find that Complainant has met its burden of showing no issue of material fact as to Respondent’s liability under INA § 274C(a)(2), nor that it is entitled to judgment as a matter of law.

Specifically, as to the elements of whether Respondent used or possessed the documents, and whether the Respondent acted with knowledge of the documents’ fraudulent nature, the Court finds that there is a question of material fact based on the admissible evidence in the record. While the Government asserts in its pleadings that Respondent knowingly presented these fraudulent documents to obtain employment, “factual allegations made in a brief or memorandum are not evidence and may not be considered as such.” *United States v. Stanford Sign & Awning, Inc.*, 10 OCAHO no. 1145, 8 (2012) (citing *United States v. Hotel Martha Washington Corp.*, 6 OCAHO no. 846, 216, 225 n.5 (1996)). Apart from the charging documents and Respondent’s request for hearing, the only documents the Government provided are photocopies of a Georgia state identification card, a social security card, and an Employment

Eligibility Verification Form (Form I-9) signed on August 29, 2018. Compl. Exhs. C, D. None of the Government's submissions contain externally verifiable sources, such as investigative reports, a Record of Deportable/Inadmissible Alien (Form I-213), or signed affidavits corroborating the Government's account of events. *See, e.g., Rubio-Reyes*, 14 OCAHO no. 1349, at 4 (denying complainant's motion for summary decision in the absence of "affidavits, investigative reports, or a Record of Deportable/Inadmissible Alien (Form I-213)"). Nor do these submissions establish that Respondent acted with knowledge of the documents' fraudulent nature.

Respondent has denied all of the Government's alleged facts, *see generally* Ans.; specifically, Respondent asserts that the Government has not established that Respondent signed the I-9, that she knowingly used the documents to obtain employment, that she is literate in English, that she possessed or presented the documents herself, that she completed the I-9 herself, or that she had the assistance of a competent translator. Resp't Opp'n to Mot. for Summ. Dec. 5. Respondent has not provided any evidence in support of these assertions, and had the Government submitted signed affidavits or additional evidence corroborating the allegations, Complainant would have needed to produce more than mere allegations and denials in her pleadings to defeat the Government's motion. *See* 28 C.F.R. § 68.38(b). However, here, the Government's evidence is "so sheer that it [does] not persuade the [Court] to return a verdict" in its favor. *Rubio-Reyes*, 14 OCAHO no. 1349, at 3 (internal citation and quotation marks omitted) (denying complainant's motion for summary decision, noting "[s]ummary decision does not issue automatically, even when the nonmoving party fails to respond to a motion"). The Government has failed to meet its burden in the first instance. *See, e.g., Gregorio-Gomez*, 14 OCAHO no. 1359a, at 4 (holding that the Government failed to meet its burden when its motions offered "no affidavit, deposition transcript, discovery admission, or other form of potentially admissible evidence which supports the factual claims," and noting that "[t]he burden shifts to the Respondents only after the Government has met its initial burden of proving the absence of material factual issues.").

## V. CONCLUSION

Construed in the light most favorable to the nonmoving party, the underdeveloped record, which currently consists only of the pleadings of the parties and three photocopied documents, does not show that there is no genuine issue as to any material fact as to whether Respondent knowingly possessed or presented fraudulent documents to obtain a benefit under the INA.

Accordingly, the Court finds that the Government has not met its burden of showing that absence of any material fact or that it is entitled to judgment as a matter of law. The Government's Motion for Summary Decision is DENIED. Given this holding, the Court will set a status conference in this matter.

SO ORDERED.

Dated and entered on February 8, 2023.

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Honorable Jean C. King  
Chief Administrative Law Judge

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ERRATA

The Order Denying Complainant’s Motion for Summary Decision, issued on February 8, 2023, is hereby amended to correct the following:

1. Page 2 is corrected to read: “HSI’s immigration database searches indicated that Respondent crossed the U.S./Mexico Border on foot and without inspection at an unknown place other than a port of entry, and had no known pending petitions.”
2. Page 6 is corrected to read: “Respondent has not provided any evidence in support of these assertions, and had the Government submitted signed affidavits or additional evidence corroborating the allegations, Respondent would have needed to produce more than mere allegations and denials in her pleadings to defeat the Government’s motion.”



SO ORDERED.

Dated and entered on February 13, 2023.

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Honorable Jean C. King  
Chief Administrative Law Judge