

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

March 15, 2023

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

Appearances: Samuel Yim, Esq., Jeffrey Bubier, Esq., Daniel Wilmoth, Esq., for Complainant
Mark Goldstein, Esq. and Jelena Gilliam, Esq., for Respondent

ORDER SUMMARIZING MARCH 7, 2023 POSTHEARING CONFERENCE
AND SETTING POSTHEARING BRIEFING SCHEDULE

I. PROCEDURAL HISTORY

This case arises under the document fraud provisions of the Immigration and Nationality Act (INA), as amended, 8 U.S.C. § 1324c. Complainant, the United States Department of Homeland Security, Immigration and Customs Enforcement (ICE), filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on November 4, 2019, alleging that Respondent, Samuel Tominiyi Fasakin, violated § 1324c(a)(2).

On May 10, 2021, the Court issued a Final Decision and Order following a hearing on the merits. On June 8, 2021, the Chief Administrative Hearing Officer issued an Order by the Chief Administrative Hearing Officer Vacating the Administrative Law Judge’s Final Decision and Order and Remanding for Further Proceedings (Order on Remand). *See generally United States v. Fasakin*, 14 OCAHO no. 1375b, 1 (2021).¹

¹ Citations to OCAHO precedents reprinted in bound Volumes 1 through 8 reflect the volume number and the case number of the particular decision, followed by the specific page in that volume where the decision begins; the pinpoint citations which follow are thus to the pages, seriatim, of the specific entire volume. Pinpoint citations to OCAHO precedents subsequent to Volume 8, where the decision has not yet reprinted in a bound volume, are to pages within the

On September 21–22, 2022, the Court conducted a hearing pursuant to 28 C.F.R. § 68.39.² The record was not closed at the conclusion of the hearing. *See United States v. Fasakin*, 14 OCAHO no. 1375i, 3–4 (2022) (Order Summarizing October 18, 2022 Posthearing Conference); *United States v. Fasakin*, 14 OCAHO no. 1375j, 3–4 (2023) (Order Summarizing February 15, 2023 Posthearing Conference).

On March 1, 2023, the record closed.

On March 7, 2023, the Court held a posthearing conference. Mr. Samuel Yim, Mr. Mark Wilmoth, and Mr. Jeffrey Bubier appeared on behalf of Complainant. Mr. Mark Goldstein and Ms. Jelena Gilliam appeared on behalf of Respondent.

II. POSTHEARING CONFERENCE SUMMARY

A. Closing of the Record

As of March 1, 2023, the record was closed. *See* 28 C.F.R. § 68.49.

B. Rebuttal Evidence

Consistent with directions provided at a prior posthearing conference, Complainant filed Complainant’s Motion to Admit Rebuttal Evidence (filed on February 16, 2023). Respondent timely submitted written objections. *See also Fasakin*, 14 OCAHO no. 1375j, at 4. Complainant sought to admit the following as rebuttal evidence to Exhibit R(II)-6:

C(II)-8: Overseas Verification Request (OVR) Sheet from Jonathan Casper, with attachments

C(II)-9: January 4, 2023 Report of Verification for USCIS, in response to C(II)-8 OVR

C(II)-10: March 3, 2022 Lagos State Judiciary Letter, addressed to Brian Peterson

C(II)-11: January 13, 2023 Signed Statement from Jonathan Casper

The Court GRANTED Complainant’s Motion to Admit Rebuttal Evidence. Exhibits C(II)-8, C(II)-9, C(II)-10, and C(II)-11 are now in the record.

original issuances; the beginning page number of an unbound case will always be 1, and is accordingly omitted from the citation. Published decisions may be accessed in the Westlaw database “FIM-OCAHO,” or in the LexisNexis database “OCAHO,” or on the website at <http://www.justice.gov/eoir/OcahoMain/ocahosibpage.htm#PubDecOrders>.

² OCAHO Rules of Practice and Procedure, 28 C.F.R. pt. 68 (2023).

The Court noted Respondent raised valid arguments relative to the appropriate weight this evidence should be given; however, the exhibits were tangentially relevant to the issues on remand. The admission of these exhibits would allow parties to more fully develop their written briefings,³ and ensures a more robustly developed record.

C. Posthearing Submissions

1. Schedule

The Court first proposed a tentative schedule and then allowed the parties to be heard on the proposed deadlines and quantity of filings. Specifically, Complainant would have 30 days to submit its posthearing brief and Respondent would then, similarly, have 30 days to submit a Response. The Complainant, the party with the burden, would be afforded an opportunity to be heard last, and thus, would have the opportunity to file a reply to the response brief, with a deadline of 15 days. The Court indicated it was amenable to allowing the parties to have an opportunity for sur-reply (Respondent) and response to sur-reply (Complainant), with each filing due 15 days after the previous filing. In any event, the total number of briefings would be either 3 or 5.

The Court allowed the parties to be heard on the proposed schedule. Complainant objected to the sur-reply, but confirmed that if the Court is inclined to allow a sur-reply, it would like the opportunity to respond within 15 days. Respondent's counsel agreed with the proposed schedule and stated that while he understood the burden consideration, Respondent desired an opportunity to be heard last.

After considering the positions of the parties, the Court determined the proposed briefing schedule was appropriate (with 5 briefings in total), and it is memorialized in Part III of this Order. The parties are not obligated to provide all available briefings, and a party could waive their next opportunity to be heard by not timely submitting a brief for consideration.

2. Content

The parties may brief whatever proposed facts and argument they desire, but there are certain issues of particular interest to the Court. These issues arise from review of the evidentiary record and the order on remand.⁴

³ See generally, *United States v. R&SL, Inc.*, 13 OCAHO no. 1333b, 24–29 (2022), *aff'd sub nom. R&SL, Inc. v. U.S. Dep't of Homeland Sec.*, No. 22-70026, 2023 WL2182351, *1 (9th Cir. Feb. 23, 2023).

⁴ Legal conclusions must be based on the evidentiary record before the Court. See generally 5 U.S.C. § 706.

The Court emphasized the narrow scope of the issues on remand, and noted that unless good reason arose to disturb a finding of fact or conclusion of law from the Final Order, she would not do so. *See also* Order Summarizing July 29, 2022 Prehearing Conference (listing only 6 contested findings of fact, from the 48 findings of fact made in the Final Order).

a. Issues Identified on Remand

The Chief Administrative Hearing Officer (CAHO) identified three issues on remand:

- (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. 1375b, at 10 (emphasis and spacing added) (citing *United States v. Fasakin*, 14 OCAHO no. 1375a, 2 (2021) (Notification of Administrative Review)).

The third issue—correct legal standard on knowledge, and whether there is preponderant evidence to meet that standard—is the fulcrum on which this case will tilt. In making the observation, the Court encouraged the parties to provide robust analysis on this point.

b. Evidence and Burden of Proof (Credibility)

Noting the record was more developed following the hearing on remand, the Court asked the parties to carefully consider and brief how issues of credibility should be analyzed, and then the impact of conclusions on credibility on Complainant’s obligations (i.e. burden).

The Court reminded the parties the proceedings are governed by the Administrative Procedure Act (APA), the Government has the burden of proof. Turning to a discussion on credibility, the Court encouraged Complainant to be mindful of the distinctions between OCAHO proceedings and other fora in which Complainant appears (i.e. removal proceedings). By way of explanation, the Court noted that in removal proceedings, credibility is analyzed under a separate body of caselaw and is typically viewed through the lens of issues arising when a Respondent seeks to meet his burden on an application for relief from removal.⁵ The Court encourages the parties to carefully consider

⁵ In removal proceedings, the burden is on a respondent show eligibility for relief from removal. *See generally* 8 U.S.C. § 1229a.

the impact of a witness' credibility on whether Complainant has met its burden (i.e., if a witness is not credible, then the reliability of the testimonial evidence is squarely impacted).

i. Burden

The Court encouraged the parties to consider the law and analysis on burden in OCAHO precedent. See *United States v. R&SL, Inc.*, 13 OCAHO no. 1333b, 1 (2022).

“At a hearing on the merits, a complainant’s burden is to prove the factual allegations in the complaint by a preponderance of the admissible and credible evidence. In all events, the complainant bears the burden of proof at all times[.]” *United States v. Tinoco-Medina*, 6 OCAHO no. 890, 720, 730–31 (explaining allocation of the burden of proof). As further explained by the undersigned in *R&SL, Inc.*,

Under Supreme Court law, when evidence is in equipoise, the burden of persuasion determines the outcome . . . [u]nder the [APA], the burden of proof encompasses the burden of persuasion; when the evidence is evenly balanced, the party with the burden must lose[.]

13 OCAHO no. 1333b, at 30 (internal quotation and citations omitted). “The party who bears the burden of proof loses if the record is inconclusive on this crucial point.” *Id.* (citations omitted).

Complainant was counseled to ensure it explains, with specificity, what facts give rise to the conclusion it met its burden, and how, specifically, those facts demonstrate it met its burden.⁶

ii. Evidentiary Record

A final order is “based upon the whole record” and “supported by reliable and probative evidence.” 28 C.F.R. § 68.52. Per the APA, the Court considers “the whole record or those parts thereof cited by a party and supported by and in accordance with reliable, probative, and substantial evidence.” *R&SL, Inc.*, 13 OCAHO no. 1333b, at 7 (citing 5 U.S.C. § 556(d)).

“The Court must ensure the evidence is sufficiently reliable, and then it must consider what weight, if any, to assign the evidence based on its probative value.” *Id.* at 24.

Reliability of Documentary Evidence

⁶ Complainant, as the “proponent” in this case, has an obligation to build a sufficient record under the APA. See *United States v. Koy Chinese & Sushi Rest.*, 16 OCAHO no. 1416b, 3 (2023) (citing 5 U.S.C. § 556(d)). “[A]rgument is not evidence[.]” *R&SL, Inc.*, 13 OCAHO no. 1333b, at 32.

“The proponent of documentary evidence must ‘authenticate a document by evidence sufficient to demonstrate that the document is what it purports to be[.]’” *Id.* (citing *United States v. Carpio-Lingan*, 6 OCAHO no. 914, 1, 5 (1997)). As to the reliability of documentary evidence, *id.*:

Generally, documentary evidence that is complete, signed, sworn under penalty of perjury, dated, authenticated, laid down with foundation contain sufficient indicia of reliability. See *United States v. Psychosomatic Fitness LLC*, 14 OCAHO no. 1387a, 5–7 (2021); *United States v. Bhattacharya*, 14 OCAHO no. 1380a, at 4–5 (2021) . . . Affidavits are reliable if “they are sworn and signed by the affiants . . . contain facts that would be admissible in evidence . . . rely on personal knowledge . . . [and] show that the affiants are competent to testify to the matters stated therein.” *Nickman v. Mesa Air Grp.*, 9 OCAHO no. 1113, 14 (2004).

Reliability of Testimonial Evidence

“In assessing the reliability of testimonial evidence, and ultimately, the probative value of that evidence, the Court must consider whether witnesses have testified credibly.” *Id.*

In the Order on Remand, the CAHO identified that ALJs may consider the following when assessing witness credibility: “incredulous testimony, inconsistencies, suspicious memory lapses and blame shifting . . . shifting and inconsistent answers . . . testifying in a vague and evasive manner . . . [and] demonstrably false statements.” *Fasakin*, 14 OCAHO no. 1375b, at 4 (internal citations omitted).

As to expert witnesses, OCAHO may look to Federal Rule of Evidence 702⁷ as permissive guidance. See *R&SL, Inc.*, 13 OCAHO no. 1333b, at 25–26 (citations omitted). “Expert witness testimony may result from a process of reasoning which can be mastered only by specialists in the field . . . [it] is relevant if the knowledge underlying it has a valid connection to the pertinent inquiry . . . it is reliable if the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant discipline.” *Id.*

Assessment of Probative Value

⁷ Federal Rule of Evidence 702 provides that a “witness who is qualified as an expert by knowledge, skill, experience, training, or education” may provide opinion testimony if:

- (a) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) the testimony is based on sufficient facts or data;
- (c) the testimony is the product of reliable principles and methods; and
- (d) the expert has reliably applied the principles and methods to the facts of the case.

“Probative value is determined by how likely the evidence is to prove some fact[.]” *United States v. Commander Produce, LLC*, 16 OCAHO no. 1428d, 9 n.5 (2023) (citation omitted). “Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence, and (b) the fact is of consequence in determining the action.” *United States v. Rose Acre Farms, Inc.*, 12 OCAHO no. 1285, 8 (2016) (quoting Fed. R. Evid. 401).

c. Penalties

The Court expects parties to present arguments on civil penalty in their posthearing briefs. *See* 28 C.F.R. § 68.52(e).

d. Proposed Findings of Fact

The Court cautioned against submissions which contemplate the Court engaging in a scavenger hunt through the record for various facts. To that end, the parties are highly encouraged to provide proposed findings of fact in an enumerated list, with a citation to the record following each proposed fact.

III. POSTHEARING BRIEFING SCHEDULE

Complainant’s posthearing brief is due 30 days from the date of this Order.

Respondent’s posthearing brief is due 60 days from the date of this Order.

Complainant may file a reply within 15 days of service of Respondent’s posthearing brief.

Respondent may file a sur-reply within 15 days of service of Complainant’s reply.

Complainant may respond to the sur-reply within 15 days of service of Respondent’s sur-reply.

“Unless an extension of time is given by the Chief Administrative Hearing Officer for good cause, the [ALJ] shall enter the final order within sixty (60) days after . . . post-hearing briefs[.]” 28 C.F.R. § 68.52(b).⁸

⁸ For example, the time period contemplated by § 68.52 would begin the day that Complainant files its response to the sur-reply, should the parties choose to file a reply and sur-reply. The Court further advised the parties of a potential upcoming detail to OCIJ, and that given the case schedule, the parties would receive a notice informing them as such.

SO ORDERED.

Dated and entered on March 15, 2023.

Honorable Andrea R. Carroll-Tipton
Administrative Law Judge