

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

MAY 21, 1996

UNITED STATES OF AMERICA,	)	
Complainant,	)	
	)	
v.	)	8 U.S.C. §1324c Proceeding
	)	OCAHO Case No. 96C00024
LEONOR YOLANDA ORTIZ,	)	
Respondent.	)	
_____	)	

**ORDER DENYING COMPLAINANT'S MOTION FOR  
SUMMARY DECISION**

*I. Procedural History*

The complaint in this case, which was filed on February 28, 1996, contains one count which alleges in pertinent part that Respondent knowingly used, attempted to use and possessed a forged, counterfeited, altered, and falsely made Resident Alien Card Form I-551. The complaint was served on March 4, 1996, and on April 9, 1996, Respondent filed an answer which denied most of the allegations of the complaint and also asserted three affirmative defenses. The answer also attached an affidavit by Respondent dated April 1, 1996 in which she swears that she was not aware of the job qualification restrictions in the United States, and that she believed the identification card and social security card to be genuine.

On April 16, 1996, Complainant filed a motion for summary decision in this case, which was supported by a Declaration of Special Agent Jose Garcia dated March 20, 1996 (hereinafter Declaration) with five attachments. The attachments are an Order to Show Cause initiating deportation proceedings (Attachment 1); the Resident Alien Card (Form I-551) in Respondent's possession (Attachment 2); Record of Deportable Alien (Attachment 3); Respondent's Peruvian

6 OCAHO 863

passport (Attachment 4); and a Forensic Document Laboratory Report which states that the Resident Alien Card is counterfeit (Attachment 5).

On April 22, 1996, Respondent filed her opposition to the motion for summary decision which states, among other things, that a genuine issue of material fact exists as to whether Respondent knew that the identification documents in her possession were false. Respondent further notes that in a motion for summary decision the evidence must be weighed in the light most favorable to the party opposing the motion, and the evidence offered in support of the motion for summary decision does not indicate that Respondent knew the documents were false.

Since the initial filings, the parties have continued to file additional documents. Complainant filed a Supplemental Brief on May 2, 1996 with a Supplemental Declaration by Mr. Garcia<sup>1</sup> (hereinafter Supplemental Declaration), a Second Supplemental Brief on May 6, 1996, and a Third Supplemental Brief on May 16, 1996. Both Complainant and Respondent also have filed further affidavits in support of their respective positions. Complainant's Supplemental Brief was filed in response to the April 23, 1996 Order Requiring Further Briefing. The other briefs and submissions were filed without permission, are unauthorized, and are hereby stricken. *See* Rules of Practice and Procedure, 28 C.F.R. §68.11(b), which provides that no reply is permitted unless the Administrative Law Judge so provides.

## II. *Standards Governing Adjudication of Motion, for Summary Decision*

Complainant has attached several documents, including affidavits, in support of its motion for summary decision. A motion for summary decision may be granted if there is no genuine issue of material fact, and the moving party is entitled to decision as a matter of law. *Curuta v. U.S. Water Conservation Lab.*, 19 F.3d 26 (9th Cir. 1994); *New Burnham Prairie Homes, Inc. v. Village of Burnham*, 910 F.2d 1474, 1477 (7th Cir. 1990). In determining whether a fact is material, any uncertainty must be considered in the light most favorable to the non-moving party. *Matsushita Elec. Indus. v. Zenith Radio*, 475 U.S. 574, 587 (1986). The burden of proving that there is

<sup>1</sup>The Supplemental Declaration is dated May 1, 1996, but was superseded by a corrected Supplemental Declaration dated May 2, 1996.

no genuine issue of material fact rests on the moving party but once the movant meets its initial burden, the non-moving party must show that there is a genuine issue of material fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). An issue of material fact is genuine only if it has a real basis in the record and is material only if it might affect the outcome of the case. See *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

### III. *Factual Issues*

As noted above, a motion for summary decision only is appropriate if there are no genuine issues of material fact, and all reasonable inferences must be accorded the non-moving party. When a party supports a motion by affidavits or other extrinsic evidence, the adverse party may not merely rest on the mere allegations or denials in the adverse party's pleadings but must set forth specific facts showing that there is a genuine issue for trial. See, e.g., Rule 56(e) of the Federal Rules of Civil Procedure and 28 C.F.R. §68.1.

Here both parties have submitted affidavits in support of their positions. Mr. Garcia states in his March 20 Declaration that he apprehended Respondent at her place of employment, Sathers Candy, during an employer sanctions operation. When he interviewed Respondent on February 22, 1995 she admitted that she was a citizen of Peru, that she entered the United States from Canada as a nonimmigrant visitor on or about April 17, 1994 from Canada, with permission to remain for six months, and that she stayed beyond her authorized stay. He further swears that she had a counterfeit Resident Alien Card (Form I-551) and social security card when she was apprehended, which she admitted she purchased at a church in Minneapolis for \$220. Complainant also relies on Mr. Garcia's Supplemental Declaration in which he states that at no time on February 22, 1996 or thereafter did Ms. Ortiz tell him that she thought that the Resident Alien Card that she purchased was legitimately issued or was a genuine document.<sup>2</sup>

In her answer to the complaint Respondent denies the allegations of Count I in its entirety, either outright or on the basis of lack of sufficient knowledge and information.<sup>3</sup> In her opposition to the mo-

<sup>2</sup> However, Mr. Garcia's affidavit does not state that Ms. Ortiz admitted she knew the card was not genuine.

<sup>3</sup> The Rules of Practice provide that a statement of lack of information shall have the effect of a denial. 28 C.F.R. §68.9(c)(1).

6 OCAHO 863

tion for summary decision, Respondent does not address the factual assertions made by Mr. Garcia. However, she contends that there are genuine issues of material fact concerning her knowledge of the genuineness of the documents in her possession. Moreover, Respondent does not merely rely on her opposition. In her April 1, 1996 Affidavit Respondent states that she was unaware of the job qualification restrictions in the United States, that she was approached by two men and a woman who offered, in exchange for payment of a processing fee, to assist her in obtaining a job permit, and that two weeks later she received an identification card and a social security card. She swears in her affidavit that she believed the cards were genuine.

In its Supplemental Brief, Complainant contends that Respondent's assertion, that she believed that the Resident Alien Card, which she purchased from unknown vendors was genuine, is incredible. Complainant further asserts that Respondent's asserted innocence is belied by her educational level (she attended college in Peru) and her general awareness of governmental procedures (she applied for asylum in Canada). C. Supp. Br. at 5. Complainant contends that it is highly unlikely that a person with her background could possibly believe that two unknown vendors could obtain lawful permanent resident status during a street level encounter. *Id.* Complainant maintains "[t]hat a woman of the Respondent's education and experiences with governmental procedures could believe that she could obtain a 'green card' legitimately through unknown vendors is not worthy of belief." *Id.* at 6.

#### A. *Credibility Determinations*

Complainant may be correct that Respondent is not credible, that a woman of her education and experience knew that she could not obtain a permanent resident card in such a manner and that she had to know that the documents were not genuine. However, in a sworn affidavit Respondent specifically has denied Complainant's assertion as to her knowledge. Complainant seeks to have the Court resolve these credibility determinations without an evidentiary hearing and without subjecting the witnesses, including Special Agent Garcia, to cross-examination! Further, I note that Complainant has not supported its motion with either a deposition of Respondent or answers to interrogatories or requests for admissions.

If I were to grant the motion for summary decision, I would necessarily have to make credibility determinations based on the affi-

davits and other extrinsic documents attached to the motions. On a summary decision motion, all reasonable inferences must be accorded the non-moving party. When there are credibility determinations to be made, it is generally inappropriate to attempt to resolve those differences on the basis of a motion for summary decision.<sup>4</sup> Moreover, federal case law, including decisions by the United States Supreme Court and the Eighth Circuit federal appeals court, do not support Complainant's motion. These decisions make it manifestly clear that a court may neither weigh evidence nor make credibility determinations on a motion for summary judgment, especially when state of mind is at issue. *See Anderson v. Liberty Lobby*, 477 U.S. at 255; *Munz v. Michael*, 28 F.3d 795, 798 (8th Cir. 1994); *Pfizer, Inc., v. International Rectifier Corp.*, 538 F.2d 180, 183-184 (8th Cir. 1976).

Complainant's attempts to overcome Respondent's denials in the answer and the affidavit are unavailing. Complainant argues that the circumstances of Respondent's solicitation by the unknown vendors strongly suggests that this is a "street level operation by counterfeit document vendors, a common place occurrence in many major metropolitan areas in the United States" and "that a woman of the Respondent's education and experiences with governmental procedures could believe that she could obtain a 'green card' legitimately through unknown vendors is not worthy of belief."<sup>5</sup> C. Supp. Br. at 6. As to the first statement, there is no record evidence that this type of operation is a common place occurrence in United States major metropolitan areas, and, as to the latter, Complainant may be correct that Respondent's assertions are unworthy of belief, but that type of credibility determination is appropriate only after a trial, after the witnesses have testified and have been subjected to cross-ex-

<sup>4</sup> Complainant has not cited any OCAHO cases which holds that it is proper to resolve credibility issues on a motion for summary decision. However, in *United States v. Kumar*, 6 OCAHO 633 (1996), summary decision was granted for the United States in a case alleging knowing use and possession of a forged, counterfeited, altered and falsely made Form 551 Alien Registration Card. As in this case, the government's motion in *Kumar* was supported by a affidavit and other extrinsic evidence. However, in *Kumar*, unlike here, the respondent failed to file an affidavit or to respond to the motion in any way. Thus, the evidence submitted by the government was uncontradicted, the motion was unopposed, and summary decision was granted.

<sup>5</sup> Those type of arguments are appropriate either for closing argument or a post hearing brief.

6 OCAHO 863

amination. For that reason alone, Complainant's motion for summary decision should be denied.

*B. State of Mind*

Complainant's motion also seeks to have the Court determine state of mind in a summary decision. It is Complainant's burden to prove the allegations of the complaint by a preponderance of the evidence, including the assertion in Paragraph C of Count I of the complaint that Respondent used, attempted to use, and possessed the Resident Alien Card knowing that such document was forged, counterfeited, altered and falsely made. Thus, Complainant must show that Respondent "knowingly" used the forged documents. *See United States v. Morales-Vargas*, 5 OCAHO 732, at 3 (1995) (Modification by Chief Administrative Hearing Officer of the Administrative Law Judge's Decision); *United States v. Noorealam*, 5 OCAHO 797, at 2 (1995).

Federal case law holds that summary resolution is particularly inappropriate when there are issues concerning the state of mind of a party. Because determining someone's state of mind usually requires the drawing of factual inferences, summary judgment is usually an inappropriate means of resolving an issue of this type. *See Pfizer, Inc., v. International Rectifier Corp.*, 538 F.2d 180 (8th Cir. 1976); *Braxton-Secret v. A.H. Robins Company*, 769 F.2d 528 (9th Cir. 1985). When an issue requires determination of state of mind, the trier of fact must be afforded the opportunity to observe the demeanor, during direct and cross-examination, of a witness whose subjective motive is at issue. *Consolidated Electric Co. V. United States.*, 355 F.2d 437, 438-39 (9th Cir. 1966). Thus, the party moving for summary judgment bears a heavy burden when the case involves intent and motive. *Snyder v. Howard Johnson's Motor Lodges*, 412 F. Supp. 724 (S.D. Ill. 1976). Here, Complainant has not supported its motion with a deposition of Respondent, answers to interrogatories or requests for admissions, or even a signed interview statement (even though an INS agent interviewed Respondent). Significantly, while Agent Garcia states that in his Supplemental Declaration that Respondent did not assert that the Resident Alien Card was genuine, he does not state that Respondent affirmatively admitted that she knew they were false. Indeed in her answer to the complaint, her affidavit and her opposition to the motion, Respondent has strenuously and consistently asserted the opposite. Here we have an issue of credibility involving a party's state of mind, and, applying the pertinent case

6 OCAHO 863

law, it is clear that this case is inappropriate for summary decision at this time.<sup>6</sup>

*IV. Conclusion*

For the reasons expressed above, and because there are genuine issues of material fact concerning Respondent's knowledge of the genuineness of the Resident Alien Card, Complainant's motion for summary decision is denied.

**SO ORDERED:**

ROBERT L. BARTON, JR.  
Administrative Law Judge

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<sup>6</sup> Given my ruling that there are genuine issues of material fact which preclude summary decision in this case, I will not address the question of the applicability of *United States v. Remileh*, 5 OCAHO 724 (1995) and the other cases cited in my April 23, 1996 Order.