

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

UNITED STATES OF AMERICA )  
Complainant, )  
 )  
v. ) 8 U.S.C. § 1324c Proceeding  
 ) Case No. 94C00032  
ESTHER FLORES-MARTINEZ, )  
Respondent. )  
\_\_\_\_\_ )

FINAL DECISION AND ORDER GRANTING  
COMPLAINANT'S MOTION FOR SUMMARY DECISION  
(February 14, 1995)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Terry Louie, Esq., for Complainant  
Paula Duthoy, Esq., for Respondent

I. Procedural History<sup>1</sup>

On May 5, 1993, the Immigration and Naturalization Service (INS or Complainant) served a notice of intent to fine (NIF) upon Esther Flores Martinez (Flores or Respondent). The NIF alleged that Flores forged, counterfeited, altered or falsely made two documents for the purpose of satisfying a requirement of the Immigration and Nationality Act (INA), in violation of § 274C(a)(1) of the INA, 8 U.S.C. § 1324c(a)(1). The NIF identified as the two fraudulent documents an Alien Registration Receipt Card (Form I-551) and a Social Security Card.

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<sup>1</sup> The procedural history of this case is substantially set forth in two prior orders, and summarized rather than repeated here. See United States v. Flores-Martinez, 4 OCAHO 647 (1994) and 4 OCAHO 682 (1994). Essential procedural facts will, however, be repeated where necessary.

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On January 19, 1994, Flores, an unauthorized alien, was granted voluntary departure and currently resides in Mexico.<sup>2</sup>

By letter dated May 14, 1993, a timely request for hearing on behalf of Flores and signed by Centro Legal, Inc. (Centro), a nonprofit legal services organization located in Minnesota, was transmitted to INS.

On March 3, 1994, INS filed its Complaint in the Office of the Chief Administrative Hearing Officer (OCAHO). The Complaint charges Flores with knowing use of the documents referred to in the NIF in order to satisfy an INA requirement, in violation of 8 U.S.C. § 1324c(a)(2).

On April 6, 1994, Centro filed an Answer to the Complaint which included a notice of appearance by Paula J. Duthoy, Esq., (Duthoy) of Centro.

On June 6, 1994, Duthoy filed a "notice" of withdrawal from representation of Flores stating that she could not represent a nonresident of Minnesota. On June 8, 1994, Complainant filed a Memorandum in Opposition noting that under 28 C.F.R. § 68.33(c),<sup>3</sup> counsel must obtain the permission of the Administrative Law Judge in order to withdraw from a case. Duthoy filed the appropriate motion to withdraw on August 15, 1994 which I denied in an order dated August 26, 1994. Flores-Martinez, 4 OCAHO 682. The grounds for denying Duthoy's motion are set out in that and a previous order.<sup>4</sup>

On October 12, 1994, a telephonic prehearing conference was held at which counsel agreed that if Respondent were amiable, it would be opportune to conduct an evidentiary hearing probably during in the Spring of 1995.

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<sup>2</sup> Complainant made it clear that, notwithstanding Flores' departure from the United States, it intended to pursue this cause of action despite the fact that Respondent would be forced to defend herself from outside the country. Complainant's Response (dated July 6, 1994) to the June 15, 1994 Order at 1 (referring to Flores-Martinez, 4 OCAHO 647). See also United States v. Flores-Martinez, 4 OCAHO 698 (1994).

<sup>3</sup> See Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. pt. 68 (1994), as amended by 59 Fed. Reg. 41,243 (1994) (to be codified at 28 C.F.R. § 68.2(i), (k)) [hereinafter cited as 28 C.F.R. pt. 68]. See also Celotex Corp. v. Catret, 47 U.S. 317, 326 (1986); Pennsylvania Public Utility Comm'n. v. Federal Energy Regulatory Comm'n., 881 F.2d 1123, 1126 (D.C. Cir. 1989).

<sup>4</sup> See supra note 1. See also United States v. Flores-Martinez, 4 OCAHO 698 (1994) and 4 OCAHO 713 (1994).

On January 5, 1995, Complainant filed a Motion for Summary Decision and Memorandum in Support of Motion for Summary Decision [hereinafter S.J. Motion]. On January 18, 1995, Centro filed a Response to the Motion for Summary Decision [hereinafter Response] to which Complainant, on the same day, also responded in the form of a Supplemental Memorandum in Support of the Motion for Summary Decision [hereinafter Memorandum].

## II. *Discussion*

### A. Summary Decision

OCAHO rules of practice and procedure provide that an "Administrative Law Judge may enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, 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). A fact is material if it might affect the outcome of the case.<sup>5</sup>

In addition to the rules which specify the standard for granting a motion for summary decision, OCAHO rules of practice and procedure set forth requirements for responding to such a motion. "[A] party opposing the motion may not rest upon the mere allegations or denials of such pleading." 28 C.F.R. § 68.38(b) (emphasis added). The opposing party "may respond to the motion by serving supporting or opposing papers with affidavits, if appropriate. . . ." 28 C.F.R. § 68.38(a). 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) (emphasis added).

The requirement that an opposing party submit affidavits or some type of evidence setting forth specific facts showing that there is a genuine issue for trial is expanded on in case law and scholarly analysis of the parallel rule contained in the Federal Rules of Civil Procedure.<sup>6</sup> See Fed. R. Civ. P. 56. As with 28 C.F.R. § 68.38, a party opposing summary judgment under Rule 56

must dispute or contradict the evidence of the movant on material factual issues with evidence of a substantial nature as distinguished from legal conclusions, and with

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<sup>5</sup> Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986).

<sup>6</sup> The Federal Rules of Civil Procedure are available as a general guideline for the adjudication of OCAHO cases. See 28 C.F.R. § 68.1.

concrete particulars as opposed to mere formal denials or general allegations which do not show the facts in detail and with precision.

28 Fed. Proc., L. Ed. § 62:539 (1984).

Furthermore, "[a] mere denial of the movant's allegations unaccompanied by any evidentiary support, or a bare contention that there are disputed facts, no matter how often repeated, will not prevent summary judgment. . . ." Id. Particular attention is paid to the use of affidavits in opposing a Rule 56 motion and "[a]lthough the Rule calls for 'affidavits of a party opposing the motion,' some courts have unhesitatingly accepted affidavits from counsel." 47 A.L.R. Fed. 206, 215-216 (1980). This is especially true "when the opposing party [like Flores] is unavailable to submit affidavits . . . [and] counsel may have no alternative to submitting his [or her] own affidavits." Id. No affidavits or other evidence were submitted on behalf of Flores. Accordingly, the principle and purpose which underlie the concept of motions for summary decision/summary judgment would be defeated if unsupported argumentation were allowed to defeat the motion and compel an unnecessary evidentiary hearing.

#### B. Factual Analysis

Respondent's one-page Response states that Flores "denies that she presented false documents," "that she fill [sic] out any of the information on the Form I-9," and "did not know what was on the form." Response at 1. The Response argues that "the Service has failed to show that Respondent 'knowingly' committed any of the acts" Respondent allegedly committed. Id.

The documentary materials submitted as evidentiary support to Complainant's Summary Decision Motion, however, belie Respondent's assertions. Complainant sets forth specific contentions and exhibits, including affidavits, which prima facie evidence that Flores (1) knew the documents at issue were fraudulent, and (2) presented the fraudulent documents in order to obtain employment.

To support its contentions, Complainant attaches a Request for Admissions in which Respondent admits to being an illegal alien and to purchasing a false or fraudulent resident alien card and social security card. Responses to Request for Admissions Nos. 1-8. In addition, Complainant attaches the affidavit of Daniel Salyers (Salyers), Senior Border Patrol Agent, who states that, during an interview, Flores admitted that she was smuggled across the border without inspection and that she purchased the two documents. Salyers

also states that Flores admitted that both of the documents are fraudulent and that she used them to obtain employment.

Complainant attaches the affidavit of Anne E. Vande Weerd (Vande Weerd), former personnel assistant of Heartland Food Company, who processed Flores' Form I-9. Flores presented Vande Weerd with the two documents at the time Flores applied for employment at Heartland Food Company. Vande Weerd recalls that she recorded the information given to her by Flores onto the Form I-9.

Finally, to support the claim that the documents used by Flores are fraudulent, Complainant submits an INS Central Index System printout and the examination report of the documents at issue by the INS forensic document laboratory. These exhibits to the motion conclude that both the alien verification card and social security card are counterfeit.

In contrast to Complainant, Respondent submits no documentary evidence in support of her denials, nor does she include affidavits, documents or witnesses' statements as contemplated by 28 C.F.R. §§ 68.38(a) and (b). See United States v. China Wok Restaurant, 4 OCAHO 608 (1994) (granting Complainant's Motion for Partial Summary Decision because "Respondent's denials and conclusions are not supported by documents, affidavits or witnesses' statements"); Brooks v. Watts Window World, 4 OCAHO 570 (1993); United States v. Nevada Lifestyles, 4 OCAHO 463 (1992).<sup>7</sup> She merely denies Complainant's allegations. "As one commentator has said:

"It has always been perilous for the opposing party neither to proffer any countering evidentiary materials nor file a 56(f) affidavit ."

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<sup>7</sup> Respondent fails to satisfy the 28 C.F.R. § 68.38(b) requirement that the opposing party to a summary decision motion set forth specific facts showing that there is a genuine issue of fact. The answers to the Request for Admissions on which Respondent relies contain denials, but they do not satisfy pleading requirements on the motion practice. For example, when asked to admit that the Form I-9 at issue "is a genuine and accurate copy . . . executed by her and Heartland Food Co[.], . . ." Respondent fails to dispute the validity of the admission. Rather, she answers "I signed forms that they told me to sign. I do not know what was on the forms." Respondent's Answers to Admissions No. 12. Failure to understand what she undertook when she signed the Form I-9 is not a denial of knowledge that the underlying documents were false. Moreover, having conceded at Nos. 7 and 8 that she "purchased" the false documents, her denial at No. 9 that she lacked knowledge that they were false is not credible, as such documents, when authentic, are not available for purchase. Although Respondent's refusal to acquiesce in all the requests for admissions may imply a lack of "knowledge," that failure to acquiesce is not a sufficient showing to satisfy the requirement of 28 C.F.R. § 68.38.

Adickes v. S.H. Kress & Co., 398 U.S. 144, 160 (1970). Accordingly, I find and conclude that Respondent's Response is insufficient to avoid the Motion for Summary Decision.

III. Ultimate Findings, Conclusions, and Updates

I have considered the Complaint, Answer, motions and accompanying documentary materials submitted by the parties. All motions and other requests not previously disposed of are denied. Accordingly, as previously found and more fully explained above, I determine and conclude the following:

1. that Respondent has provided only mere allegations and denials in the Response to Complainant's Motion for Summary Decision which are insufficient to overcome a Motion for Summary Decision under 28 C.F.R. §§ 68.38(a) and (b);
2. that upon considering the documentary evidence submitted, I am unpersuaded that there is a genuine issue as to any material fact and, therefore, Complainant's Motion for Summary Decision is granted;
3. that Respondent possessed, used, and attempted to use the forged documents listed in the Complaint for the purpose of satisfying a requirement of the INA, in violation of § 274C(a)(2) of the INA, 8 U.S.C. § 1324c(a)(2);
4. that Respondent pay a civil money penalty in the amount of \$500.00 (\$250.00 for each violation listed in the Complaint);
5. that Respondent cease and desist from violating § 274C(a)(2) of the INA, 8 U.S.C. § 1324c(a)(2).

This Final Decision and Order Granting Complainant's Motion for Summary Decision "shall become the final agency decision and order of the Attorney General unless, within 30 days, the Attorney General modifies or vacates the decision and order, in which case the decision and order of the Attorney General shall become a final order. . . ." 8 U.S.C. § 1324c(d)(4).

"A person or entity adversely affected by a final order under this section may, within 45 days after the date the final order is issued, file a petition in the Court of Appeals for the appropriate circuit for review of the order." 8 U.S.C. § 1324c(d)(5).

**SO ORDERED.**

Dated and entered this 14th day of February, 1995.

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MARVIN H. MORSE  
Administrative Law Judge