

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

November 29, 1995

UNITED STATES OF AMERICA,)	
Complainant,)	
)	
v.)	8 U.S.C. 1324c Proceeding
)	OCAHO Case No. 94C00087
MONICA ZAPATA-COSIO,)	
Respondent.)	
_____)	

DECISION AND ORDER

Appearances: Zsa Zsa DePaolo, Esquire, Immigration and Naturalization Service,
United States Department of Justice, Seattle, Washington for
Complainant;
Jay Stansell, Esquire, Seattle, Washington, for Respondent

Before: Administrative Law Judge McGuire

Procedural History

On November 29, 1993, complainant, acting by and through the Immigration and Naturalization Service (INS), issued and served upon Monica Zapata-Cosio (respondent) Notice of Intent to Fine (NIF) SEA-274C-94-0221, a two (2)-count citation which alleged three (3) violations of the document fraud provisions of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324c, for which civil penalties totaling \$750 were assessed.

In Count I, complainant alleged that respondent knowingly forged, counterfeited, altered, and falsely made the document described therein, namely a Form I-9, and did so after November 29, 1990, for the purpose of satisfying a requirement of the INA, 8 U.S.C. § 1324c(a)(2). Complainant assessed a civil money penalty of \$250 for that alleged violation.

In Count II, complainant charged respondent with having knowingly used, attempted to use, possessed, obtained, accepted, received, and provided the forged, counterfeit, altered, and falsely made documents described therein, i.e. a Form 151 Alien Registration card (A - #- #) and a Social Security card (#- -), and did so after November 29, 1990, for the purpose of satisfying a requirement of the INA, 8 U.S.C. § 1324c(a)(2). Complainant levied civil money penalties totaling \$500, or \$250 for each of those two (2) alleged infractions.

Respondent was advised in the NIF of her right to request a hearing before an administrative law judge assigned to this Office if she filed such a request with INS within 60 days of her receipt of that citation.

On December 6, 1993, respondent timely filed a written request for hearing.

On April 28, 1994, complainant filed the two (2)-count Complaint at issue, reasserting the three (3) alleged violations contained in the NIF, as well as the three (3) civil money penalty assessments totaling \$750.

On May 17, 1994, a Notice of Hearing on Complaint Regarding Civil Document Fraud, along with a copy of the Complaint at issue, were served upon respondent.

On July 7, 1994, complainant filed a Motion for Default Judgment, based upon respondent's having failed to file the required answer to the Complaint.

On July 21, 1994, Administrative Law Judge Robert B. Schneider, to whom this matter was initially assigned, issued an Order To Show Cause Why Default Judgment Should Not Issue, in which respondent was ordered to show cause, within 15 days of her acknowledged receipt of that Order, why complainant's Motion for Default Judgment should not have been granted, or in the alternative, to have filed a request to file a late answer, along with an answer which comported with the requirements set forth at 28 C.F.R. § 68.9(c). Respondent was also advised that if she failed to respond to that Order, complainant's Motion for Default Judgment would be granted.

On August 25, 1994, Judge Schneider granted complainant's Motion for Default Judgment because respondent had failed to comply with the terms of his July 21, 1994 Order.

On September 2, 1994, Jay W. Stansell, Esquire, filed a fully executed United States Department of Justice Form G-28, in which he formally entered his appearance as respondent's counsel of record and also filed a Motion for Leave to File a Late Answer.

On September 2, 1994, also, respondent filed her Answer, in which she generally denied all allegations set forth in the Complaint and asserted nine (9) affirmative defenses.

In the initial affirmative defense, respondent stated:

Complainant asserts in Count I that Respondent "falsely made the following documents: "1. One Employment Eligibility Verification Form I-9 dated 7/27/93 ..." Respondent asserts that an I-9 form is not a document under the Immigration and Naturalization Act (the Act).

As her second affirmative defense, respondent argued:

Complainant asserts in Count I that Respondent "falsely made" the above noted documents. Respondent asserts that filling out an I-9 form does not constitute the "making" of a document.

In her third affirmative defense, respondent contended:

Complainant asserts in Count I that the I-9's which were allegedly falsely made, were falsely made by Respondent "for the purpose of satisfying a requirement of the Immigration and Nationality Act." Respondent asserts that it was not a requirement of the Act for her to allegedly fill out an I-9. The need to fill out an I-9 derives from the requirements of § 274A(b), 8 U.S.C. § 1324a(b), which does not govern the behavior or conduct of employees, but rather sets forth requirements of an employer, or a "person or other entity hiring, recruiting, or referring an individual for employment in the United States." It is therefor not a requirement of the Act for an employee to fill out an I-9.

For her fourth affirmative defense, respondent asserted:

Complainant asserts in Count I that the alleged conduct is a violation of the Act, pursuant to 8 U.S.C. § 1324c(a)(1), § 274C(a)(1). Respondent asserts that the conduct charged is outside of the scope of the Act as intended by Congress. When it drafted § 274C, Congress chose to expressly address conduct relating to the I-9 in only one section of the document fraud section: 8 U.S.C. § 1324c(a)(4), § 274C(a)(4). In that section Congress prohibited a very narrow range of conduct relating to the underlying statutory requirements of employment verification under 8 U.S.C. § 1324a(b) that govern the I-9 process, choosing to expressly prohibit only the use of another persons's documents in filling out an I-9. The fact that Congress declined to more broadly address other I-9 related behavior state [sic] implies that it limited its concerns regarding I-9's to § 274C(a)(4). § 274C(a)(1) should not be read in an over-broad manner to address conduct not otherwise expressly prohibited. Respondent's alleged conduct

does not fall within the conduct prohibited by § 274C(a)(4), or the ground charged, § 274C(a)(1).

For her fifth affirmative defense, respondent argued:

Respondent asserts that the behavior asserted by the Complainant in Count I is analogous to the factual situation in Matter of D -- L -- & A -- M --, Int. Dec. 3162 (BIA 1991), in that the conduct alleged, if true, is merely conduct addressed to non-governmental employer and thus not conduct governed by the INA or § 274C.

For her sixth affirmative defense, respondent contended:

Respondent asserts that the complaint fails to state a claim against him [sic] in that the acts complained of in Count I are not prohibited by § 274C, and therefor are not within the scope of the statute, as more fully stated in Affirmative Defenses First through Fifth.

As her seventh affirmative defense, respondent argued:

Complainant asserts in Count II that certain documents were employed to satisfy a requirement of the Act. Respondent asserts that the conduct underlying this charge, filling out an I-9, is not a requirement of the Act under the circumstances as they relate to Respondent.

In her eighth affirmative defense, respondent urged:

Respondent asserts that the behavior asserted by the Complainant in Count II is analogous to the factual situation in Matter of D -- L -- & A -- M --, Int. Dec. 3162 (BIA 1991), in that the conduct alleged, if true, is merely conduct addressed to non-governmental employer [sic] and thus not conduct governed by the INA or § 274C.

As her ninth and final affirmative defense, respondent stated:

Respondent asserts that the complaint fails to state a claim against him [sic] in that the acts complained of in Count II are not prohibited by § 274C, and therefor are not within the scope of the statute, as more fully stated in Affirmative Defense Seventh and Eighth.

On February 7, 1995, the Chief Administrative Hearing Officer (CAHO) reassigned this case to the undersigned.

On May 31, 1995, complainant filed a pleading captioned Complainant's Motion to Dismiss Count I and Complainant['s] and Respondent's Agreed Statement of Facts and Legal Issues. In that the pleading, complainant advised that in view of the then recent ruling by the CAHO in United States v. Remileh, 5 OCAHO 724 (1995), Count I of the Complaint was being dismissed.

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That because complainant had alleged in Count I of the Complaint that respondent knowingly and falsely made a Form I-9 for the purpose of satisfying a requirement of the INA. In Remileh, the CAHO determined that:

the attestation of an employee to false information on a Form I-9 does not constitute the creation of a "falsely made" document in violation of 8 U.S.C. § 1324c. It is the underlying fraudulent document, submitted to an employer to establish identity and/or work authorization, which is the proper basis of a section 1324c violation against an employee in the context of the employment eligibility verification system of 8 U.S.C. § 1324a.

5 OCAHO 724, at 2-3 (1995).

On June 6, 1995, the undersigned issued an Order Dismissing Count I of the Complaint because that alleged violation does not constitute a violation of 8 U.S.C. § 1324c(a)(1) pursuant to the CAHO's decision in Remileh, 5 OCAHO 724 (1995). That dismissal effectively rendered moot respondent's affirmative defenses one (1) through six (6), which had been asserted in connection with the alleged violation in Count I. Resultingly, those three (3) affirmative defenses numbered seven (7) through nine (9) remain at issue. Also remaining for adjudication are the two (2) violations which have been alleged in Count II of the Complaint.

On June 22, 1995, complainant simultaneously filed a Request to Accept Late Filing of Complainant's Opening Brief and an Opening Brief, suggesting these issues for adjudication:

1. Has Respondent possessed and used a fraudulent Alien Registration Receipt card and Social Security card "for the purpose of satisfying a requirement of the Act?"
2. Is the knowing possession and use of fraudulent identity and work eligibility documents for the purpose of obtaining employment, a violation of Section 274C(a)(2) of the Act?
3. Does the INA expressly impose a requirement upon an employee to submit valid documents to an employer?
4. Even if the INA does not expressly impose a requirement upon an employee to provide valid documents to a potential employer, can such a requirement be inferred for the purpose of the document fraud provisions of 274C?
5. Did Respondent "use" a Form I-151 [""] for the purpose of satisfying a requirement of the Act", as stated in allegation A.1. of Count II of the Complaint, where the employer did not rely on that card to fill out Part 2 of the Form I-9?

Those five (5) issues are essentially identical to those previously agreed upon by the parties in the May 31, 1995 Complainant[']s and Respondent's Agreed Statement of Facts and Legal Issues, and have been adopted by respondent in her July 19, 1995 Brief in response to Complainant's Opening Brief. And those five (5) issues, as previously noted, also incorporate the remaining affirmative defenses which have been asserted in respondent's Answer, those numbered seven (7) through nine (9). We now address those issues.

Discussion and Analysis of the Five (5) Stipulated Issues

Issue 1. Did Respondent possess and use a fraudulent Alien Registration Receipt card and Social Security card "for the purpose of satisfying a requirement of the Act?"

Respondent argues in her Brief that her act of "present[ing] documents to her employer in order to demonstrate that she was eligible to work" was not done "for the purpose of satisfying a requirement of the Act" because "the requirements of § 274A relevant to Count II in this case run exclusively to the employer and not the employee." Resp't's Br. at 2.

In support of that argument, respondent asserts (i) that Section 274A of the INA makes only the employers' behavior unlawful; (ii) that the employment verification procedure of Section 274A imposes upon employers the requirement to establish the employees' eligibility to work; (iii) that the applicable legislative history confirms that Section 274A was aimed at imposing requirements on employers rather than upon prospective employees; and (iv) that the structure of the INA confirms that the requirements included in Section 274A are imposed on the employer and not on the employee. Id. at 2-8.

In responding, complainant contends that Section 274A of the INA "imposes a legal obligation upon both an employer and an employee to complete the Form I-9", and asserts that "Section 274A(b)(1)(A) of the Act defines an employer's responsibility pursuant to the Employment Eligibility Verification requirements of the Act" and that "Section 274A(b)(2) of the Act defines an employee's responsibility pursuant to the Employment Eligibility Verification requirements of the Act." Complainant's Opening Br. at 11.

According to complainant, "[w]hen Respondent sought to obtain unlawful employment by presenting fraudulent documents as a means of substantiating employment eligibility, she undertook that action 'for

the purpose of satisfying a requirement of the Act.' " Id. at 12. Further, by "her use of fraudulent documents, Respondent successfully circumvented the purpose of the employment verification system which is designed to prohibit the hiring of persons who are not genuinely authorized to work." Id.

Similar affirmative defenses have been asserted previously to support the argument that the INA commands employers to comply with its employment verification system requirements, but does not require employees to provide genuine work eligibility documentation. See United States v. Morales-Vargas, 5 OCAHO 732, at 2-3, 5 (1995) (modifying Final Decision and Order dated February 14, 1995); United States v. Remileh, 4 OCAHO 706, at 3-4 (1994).

In that argumentation, respondent seeks to utilize selective excerpts from the pertinent legislative history in support of her argument that only employers are bound by the document fraud provisions of the INA. However, the rules of statutory construction make it clear that "[t]he plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." Gemsco, Inc. v. Maretzo, 324 U.S. 244, 260 (1945). As a result, "it is elementary that where the language of a statute is clear and unambiguous, there is no occasion to look at its legislative history." City of Rome v. United States, 446 U.S. 156, 199 (1980) (Powell, J., dissenting); see also Lindahl v. Office of Personnel Management, 470 U.S. 768, 810 (1985) (White, J., dissenting) (chastising the majority for "depart[ing] from both of the fundamental principles of statutory construction: that a court's object is to give effect to the intent of the enacting legislature, and that the surest guide to the intent of the legislature is the language of the statute itself."). Hence, only where the statute is patently ambiguous or unclear should resort be made to extrinsic aids, such as legislative history, in order to assist in accurately determining the true legislative intent. And when, as here, the statutory wording is clear the use of such secondary sources should not be examined, much less relied upon.

In Morales-Vargas, the seminal case addressing the issue of whether Section 274A's requirements are applicable to both employees and employers, respondent admitted substantially the same facts as in the instant case--that he had knowingly used a forged Resident Alien Receipt card and a fraudulent Social Security card in order to obtain employment--but contended that his actions were not committed "for

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the purpose of satisfying a requirement of the INA." Morales-Vargas, 5 OCAHO 732, at 1-3 (1995).

In summarizing that argumentation, the CAHO stated:

respondent's brief contains the argument that 8 U.S.C. § 1324a, which codifies the employment eligibility verification system, does not impose any duties upon the employee, only upon the employer. Accordingly, the respondent contends that providing false documents to an employer to prove employment eligibility would not constitute a violation of any duty imposed as a 'requirement of this Act' [the INA], and thus does not fulfill the 'purpose' element of section 1324c(a)(2).

Id. at 5 (citation omitted).

The CAHO agreed that "liability for failure to properly verify identity and employment eligibility rests on the employer ... However [the CAHO further indicated], it is inconceivable that these statutory requirements could be satisfied unless the employee produces a legally acceptable document or combination of documents." Id. The CAHO further determined that, "[a]t the very least, section 1324a implicitly imposes a requirement on the employee to provide valid documents to an employer as part of the verification process." Id.

Finally, the CAHO advised that the wording of the provision in question

does not say any requirement of the INA imposed upon the person or entity that commits document fraud, nor does it say any requirement which the person or entity who commits document fraud must meet in order to gain a benefit or avoid a liability under the INA. It simply refers to any requirement of the INA, without exception. Thus, the issue in this case is not whether the verification requirements should be characterized as those of the employer or of the employee. The fact is that the actions of both the employer and the employee in the verification process are undertaken to satisfy a requirement of the INA.

Id. at 6 (emphasis added; footnote omitted).

Accordingly, in light of that analysis, it is found that respondent's possession and use of the fraudulent Alien Registration Receipt card (number A - #- #) and Social Security card (number #- -) to obtain employment were acts done "for the purpose of satisfying a requirement of the Act." See also Complainant & Resp't's Agreed Statement Facts & Legal Issues at 2 (Stipulated Facts 5, 6, 9) (admitting that respondent presented her employer with the described documents, knowing they were fraudulent, as proof of her employment eligibility).

Issue 2. Is the knowing possession and use of fraudulent identity and work eligibility documents for the purpose of obtaining employment, a violation of Section 274C(a)(2) of the Act?

In order to prove a violation of Section 274C(a)(2) of the Act, 8 U.S.C. § 1324c(a)(2), complainant must demonstrate 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 Count II;
- (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.

The Social Security Card

The stipulated facts contain sufficient proof to conclusively establish the first three (3) elements of the charged Section 1324c(a)(2) violation.

Specifically, as to element one (1), respondent admitted in Stipulated Facts three (3), six (6), and eight (8) that:

3. Respondent signed section one of the Employment Eligibility Verification Form I-9 on July 27, 1993 ...
6. At the time of hire, Respondent presented Wyndham Hotel [the employer] with a Social Security card -- as proof of employment eligibility.
8. Wyndham Hotel used Respondent's Social Security Card and/or number to complete Section 2, List B, of the Employment Eligibility Verification Form I-9.

Complainant & Resp't's Agreed Statement Facts & Legal Issues at 1-2.

These stipulations have clearly established that respondent used, attempted to use, possessed, obtained, accepted, or received the forged, counterfeit, altered or falsely made Social Security card described in Count II.

As to element two (2), Stipulated Facts nine (9) and 10 conclusively demonstrate that respondent knew that the Social Security card was fraudulent:

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9. Respondent knew that the ... Social Security card (#- -) she provided as proof of employment eligibility w[as] fraudulent.
10. Respondent purchased the ... Social Security Card from her friend Edwina for \$170.

Id. at 2.

Concerning element three (3), that these events took place after November 29, 1990, Stipulated Facts two (2) and three (3) disclose that these actions occurred in July, 1993:

2. Respondent was hired for employment by Wyndham Garden Hotel on or about July 27, 1993.
3. Respondent signed section one of the Employment Eligibility Verification Form I-9 on July 27, 1993 ...

Id. at 1-2.

The final element addresses whether respondent presented the Social Security card "for the purpose of satisfying a requirement of the Act." As previously discussed in the CAHO's modification of Morales-Vargas, "respondent's act of presenting the fraudulent documents to prove identity and employment eligibility in order to gain employment is sufficient to satisfy the last element of a Section 1324c(a)(2) violation, specifically that the documents were presented in order to satisfy any requirement of the INA." United States v. Chavez-Ramirez, 5 OCAHO 774, at 6 (1995) (citing Morales-Vargas, 5 OCAHO 732, at 5-6 (1995)).

Accordingly, it is found that respondent violated Section 274C(a)(2) of the INA, 8 U.S.C. § 1324c(a)(2), by having used the Social Security card (number #- -) in the manner alleged in Count II of the Complaint.

Issue 3. Does the INA expressly impose a requirement upon an employee to submit valid documents to an employer?

Issue 4. Even if the INA does not expressly impose a requirement upon an employee to provide valid documents to a potential employer, can such a requirement be inferred for the purpose of the document fraud provisions of 274C?

These issues, which focus upon the question of whether the INA expressly or implicitly, through its document fraud provisions in 274C, imposes a requirement upon an employee to submit valid documents to

an employer, have also been resolved previously by the CAHO, who determined that it was "inconceivable that these statutory requirements could be satisfied unless the employee produces a legally acceptable document" and that "[a]t the very least, section 1324a implicitly imposes a requirement on the employee to provide valid documents to an employer as part of the verification process." Morales-Vargas, 5 OCAHO 732, at 5 (1995). In view of that ruling, these two (2) issues must be and are being resolved adversely to respondent, also.

The Alien Registration Receipt Card

Subsumed within element one (1) of the previous analysis regarding the factors which must be established in order to prove a violation of Section 274C(a)(2) of the INA, is that issue presented by respondent and complainant which has been numbered five (5) within their agreed upon legal issues:

Issue 5. Did Respondent "use" a Form I-151 ["]for the purpose of satisfying a requirement of the Act", as stated in allegation A.1. of Count II of the Complaint, where the employer did not rely on that card to fill out Part 2 of the Form I-9?

As stated in the CAHO's modification of Remileh, "[i]t is the underlying fraudulent document, submitted to an employer to establish identity and/or work authorization, which is the proper basis of a section 1324c violation against an employee in the context of the employment eligibility verification system of 8 U.S.C. § 1324a." United States v. Remileh, 5 OCAHO 724, at 3, 9 (1995) (emphasis added).

The conduct specifically prohibited by Section 274C(a)(2) of the INA includes respondent's use, attempted use, possession, obtaining, accepting, receiving or providing of fraudulent documents to satisfy a requirement of the Act. 8 U.S.C. § 1324c(a)(2). There is no basis for finding that any of these actions require the employer to "use" the documents provided by respondent to complete Section 2 in order for a violation of Section 1324c to have occurred. To suggest that such broad statutory language can be avoided merely because the employer, in the verification procedure, relied upon only two (2) of the three (3) documents presented to it by respondent to complete Section 2 of the Form I-9, is unsupported by the applicable case law.

Further, even though respondent "did not check any of the boxes in Section 1 of the ... Form I-9 which followed the statement 'I attest,

under penalty of perjury, that I am (check one of the following):' ", respondent has admitted that she "signed section one of the ... Form I-9 on July 27, 1993, which section was filled out to include alien registration receipt number A - - # in the space next to the box marked "A Lawful Permanent Resident (Alien # A _____)". Complainant & Resp't's Agreed Statement Facts & Legal Issues at 1-2 (Stipulated Facts 3-4). Quite correctly, complainant argues that "Wyndham's [respondent's employer] failure to 'use' that fraudulent document [[the Alien Registration Receipt card] to complete section two is unrelated to Respondent's violation of section 274C(a)(2) of the Act." Complainant's Br. at 14.

Thus, element one (1) above has been conclusively established since it has been shown that respondent "used, attempted to use, possessed, obtained, accepted, received or provided" the fraudulent Alien Registration Receipt card described in Count II.

As to element two (2), respondent has conclusively admitted in Stipulated Facts nine (9) and 10 that she knew the Alien Registration Receipt card was fraudulent:

9. Respondent knew that the Resident Alien Receipt Card (A - #- #) ... she provided as proof of employment eligibility w[as] fraudulent.
10. Respondent purchased the fraudulent Alien Registration Receipt Card ... from her friend Edwina for \$170.

Complainant & Resp't's Agreed Statement Facts & Legal Issues at 2.

Respondent has also admitted in Stipulated Facts two (2) and three (3) that these events took place after November 29, 1990, thus satisfying element three (3). See id. at 1-2.

In addition, because respondent's act of presenting the fraudulent documents to prove identity and employment eligibility in order to gain employment has been held sufficient to satisfy the last element of a Section 1324c(a)(2) violation, specifically that the documents were presented in order to satisfy any requirement of the INA, element four (4) has also been conclusively established. United States v. Chavez-Ramirez, 5 OCAHO 774, at 6 (1995) (citing Morales-Vargas, 5 OCAHO 732, at 5-6 (1995)).

As to both violations alleged in Count II, in conjunction with the legal effects of the Stipulated Facts agreed upon by both parties, complainant has established as a matter of law that respondent has

knowingly used, attempted to use, possessed, obtained, accepted, received, or provided the fraudulent documents detailed therein in order to satisfy a requirement of the INA, in violation of Section 274C(a)(2) of the Act, 8 U.S.C. § 1324c(a)(2).

Accordingly, respondent is hereby found to have violated the pertinent provisions of the INA in the manners alleged in Count II of complainant's April 28, 1994 Complaint.

All that remains at issue, therefore, is a determination of the appropriate civil money penalties to be assessed for those two (2) violations.

The INA provides for civil money penalties for individuals who violate the document fraud provisions of 8 U.S.C. Section 1324c. For first-time offenders those fines range from a statutorily mandated minimum of \$250 to a maximum of \$2,000 for each instance of use, acceptance, or creation. 8 U.S.C. § 1324c(d)(3)(a).

Complainant has assessed the statutory minimum amount of \$250 for each of the two (2) violations, or a total civil penalty assessment of \$500. It is further found that complainant quite obviously has not acted unreasonably, nor has it been shown that it either abused its discretion in levying those minimum assessments or that it acted arbitrarily or capriciously in having done so.

Order

In view of the foregoing, it is ordered that the appropriate civil money penalty assessment for the two (2) violations is \$500, or \$250 for each of the two (2) violations alleged in Count II.

It is further ordered that respondent cease and desist from further violations of 8 U.S.C. § 1324c(a)(2).

JOSEPH E. MCGUIRE
Administrative Law Judge

Appeal Information

This Order shall become the final order of the Attorney General unless, within 30 days from the date of this Order, the Chief Administrative Hearing Officer shall have modified or vacated it. Both administrative and judicial review are available to respondent, in accordance with the provisions of 8 U.S.C. §§ 1324c(d)(4); 1324c(d)(5), and 28 C.F.R. § 68.53.