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. 93C00033
OSCAR EDUARDO) (July 22, 1993)
VILLATORO-GUZMAN,)
Respondent.)
)

ORDER GRANTING COMPLAINANT'S
MOTION TO STRIKE AFFIRMATIVE DEFENSES

TABLE OF CONTENTS

I. INTRODUCTION 2

A. BACKGROUND OF 8 U.S.C. 1324c 2

B. PROCEDURE FOR A CIVIL DOCUMENT FRAUD CASE 4

II. PROCEDURAL HISTORY 6

III. DISCUSSION 9

A. THE PARTIES' ARGUMENTS 9

1. SUBJECT MATTER JURISDICTION 9

2. ANSWER 10

3. AFFIRMATIVE DEFENSES 10

a. FAILURE TO STATE A CLAIM 10

b. VAGUENESS OF COMPLAINT 12
c. LACK OF DUE PROCESS 12

B. ANALYSIS 12

1. SUBJECT MATTER JURISDICTION 13

2. AFFIRMATIVE DEFENSES 17

a. FAILURE TO STATE A CLAIM 17
b. VAGUENESS OF COMPLAINT 20
c. LACK OF DUE PROCESS 21

IV. CONCLUSION 24

I. *Introduction*

A. Background of 8 U.S.C. 1324c

On November 6, 1986, the Immigration Reform and Control Act of 1986, Pub. L. No. 99-603, 100 Stat. 3359 (1986), (IRCA), which included features critical to stemming the tide of illegal immigration, became law. 136 Cong. Rec. S13628, (statement by Senator Simpson introducing S.3099, 101st Cong., 2d Sess, Sept. 24, 1990). As Congress was aware that the possibility of employment brought illegal aliens to the United States and that employers were willing to hire these illegal aliens at substantially less pay than for authorized workers, it designed legislation making it illegal for employers to knowingly hire, recruit or refer for a fee any unauthorized worker in the United States. 8 U.S.C. 1324a; Section 274A of the Immigration and Nationality Act (Act).

Procedurally, the legislation required employers to check all new hiree's work authorization documentation and to jointly fill out, with the new hiree, an Employment Eligibility Form (Form I-9), in which both swore to the employee's identity and work authorization. 8 U.S.C. 1324a(b). Failure to satisfactorily complete the Employment Eligibility Form for each employee, by either the employer or the employee, could lead to civil monetary penalties for the employer. 8 U.S.C. 1324a(a)(1)(B), (e)(5).

Congress was sensitive to the fact that a possible undesired side effect of the Employment Eligibility paperwork requirement of 8 U.S.C. 1324a was discrimination in the hiring, recruitment or referring for a fee of those individuals who were authorized to work, but who appeared to be foreign born or foreign speaking. Romo v. Todd Corp., 1 OCAHO 25 (8/19/88), aff'd. 900 F.2d 164 (9th Cir. 1990). Thus, Congress included legislation making it illegal to discriminate in the hiring, recruiting or referring for a fee, of an individual, who is authorized to work, based on his/her nationality or citizenship status. 8 U.S.C. 1324b.

In addition, Congress was aware that another reaction to the documentary requirements of 8 U.S.C. 1324a would be an increase in the demand for, the production of, and the use of counterfeit work authorization documentation. Therefore, it included in IRCA an amendment to 18 U.S.C. 1546, Fraud and Misuse of Certain Immigration-Related Documents, which added provisions relating to fraud

associated with the employment verification system and by increasing the criminal penalties under that statute.

Although in the first three years after IRCA's passage the number of apprehensions of illegal aliens along the Southern border fell, making it appear that IRCA was successful in deterring illegal immigration, in 1990 it became apparent that it was not, as apprehensions in that year had increased by 25 percent. 136 Cong. Rec. S13628, (statement by Senator Simpson introducing S.3099, 101st Cong., 2d Sess, Sept. 24, 1990). Additionally, contrary to Congressional expectations, criminal prosecutions of document fraud cases by the U.S. Attorney's Office were not common, as drug and violent crime cases took priority. 139 Cong. Rec. 22903 (1993). Therefore, in 1990, in an effort (1) to assist in the battle against illegal immigration by closing its "back door"; (2) to offer enforcement officers an expeditious alternative to criminal prosecution for document fraud; (3) to help lighten the caseload in both the U.S. Attorney's Office and the federal court system; and, (4) to help combat the increase in the drug smuggling trade along the Southern border of the United States, Senator Simpson introduced new legislation on civil document fraud, which was later incorporated into the Immigration Act of 1990 as Section 274C, Pub. L. No. 101-649, 104 Stat. 4978 (1990) (IA90), which provided that any person or entity who knowingly forged, counterfeited, used, attempted to use, possessed, obtained, accepted, received or provided a counterfeit or falsely made document in order to satisfy any requirement of the Act, would be subject to civil money penalties. 8 U.S.C. 1324c; 136 Cong. Rec. S13628, (statement by Senator Simpson introducing S.3099, 101st Cong., 2d Sess, Sept. 24, 1990); 139 Cong. Rec. 22903 (1993); 56 Fed. Reg. 24758 (1991) (codified at 8 C.F.R. 270) (proposed May 7, 1991).

B. Procedure for a Civil Document Fraud Case

A civil document fraud case begins with a Notice of Intent to Fine (NIF) being issued by the Immigration and Naturalization Service (INS) and served on a Respondent, informing him of the section(s) of the Act that he has allegedly violated, the amount of civil penalty INS intends to have Respondent pay for the alleged violations, and of INS's intention to issue a cease and desist order. 8 C.F.R. 270.2(d), (e), 270.3(b). The NIF also informs Respondent of the following statutory and regulatory rights:

1. that he has the right to contest the NIF by filing a written request for a hearing before an Administrative Law Judge within 60 days from the service of the NIF;

2. that he has the right to legal representation, but not at government expense;

3. that he has a choice of whether or not to submit a written response to each allegation in the NIF, and that if he does respond, these statements, as well as any other he gave, might be used against him in these proceedings; and,

4. that should he not file a timely written request for hearing, Complainant will issue a final and unappealable order directing him to, both, pay the fine specified in the NIF and to cease and desist from the alleged violations of Section 274C.

8 C.F.R. 270.2 (e), (g), 270.3; 8 U.S.C. 1324c(d)(2).

Should Respondent request a hearing, it will be conducted in accordance with the requirements of section 554 of title 5, United States Code, and will be held at the nearest practicable place to the place where Respondent resides or where the alleged violation occurred. 8 U.S.C. 1324(d)(2)(B).

After considering the evidence at a hearing, upon a finding by the administrative law judge that Respondent has violated Section 274C of the Act, the administrative law judge is required to order Respondent to cease and desist from such violations and to pay a civil money penalty. 8 U.S.C. 1324c(d)(3). The appropriate amount of civil money penalties is left to the sound discretion of the administrative law judge, limited only by a statutorily set dollar range; for the first order that Respondent is subject to, the amount shall not be less than $250 or more than $2,000 for each document used, accepted, or created and for each instance of use, acceptance, or creation. 8 U.S.C. 1324c(d)(3). If Respondent becomes subject to a subsequent order, then the civil penalty shall not be less than $2,000 and or more than $5,000 for each document used, accepted, or created and for each instance of use, acceptance, or creation. 8 U.S.C. 1324c(d)(3).

The decision of the administrative law judge becomes the final agency decision and order of the Attorney General unless, within 30 days of the order's issuance, the Attorney General modifies or vacates the decision and order, and then that decision becomes the final decision and order of the Attorney General. 8 U.S.C. 1324c(d)(4). Judicial review of the Attorney General's order, properly filed within 45 days after the date of the final order's issuance, is in the Court of Appeals for the appropriate circuit. 8 U.S.C. 1324c(d)(5).

II. *Procedural History*

On October 7, 1992, Complainant personally served Respondent, Mr. Oscar Eduardo Villatoro-Guzman, an alleged citizen and national of Guatemala residing in Los Angeles, California at the time of the

Complaint's issuance, with a Notice Of Intent To Fine (NIF). The NIF alleged that Respondent had committed two (2) violations of Section 274C of the Act and stated, further, that Complainant intended to order Respondent to cease and desist from the alleged violations and to have him pay a civil money penalty in the amount of $500 for each violation, for a total civil money penalty amount of $1,000. Specifically, the NIF alleged that, on or after November 29, 1990, in violation of Section 274C(a)(2) of the Act, Respondent obtained and used a counterfeit and falsely made alien registration card (Form I-551), No. A097747276, and a counterfeit and falsely made Social Security Card, No. 626-50-8325, knowing that these documents were counterfeit and falsely made documents, and that Respondent obtained and used them for the purpose of satisfying a requirement of the Act.

The NIF informed Respondent, as required by 8 U.S.C. 1324b and 8 C.F.R. 270.2(e), that he had the right to contest the NIF by filing a written request for a hearing before an Administrative Law Judge within 60 days from the service of the NIF and that he had the right to legal representation, but not at government expense. Respondent was also informed that he had the choice of whether or not to submit a written response to each allegation in the NIF, and that if he did, these statements, as well as any others he gave, might be used against him in these proceedings. 8 C.F.R. 270.2(e). Further, Respondent was warned that, should he not file a timely written request for hearing, Complainant would issue a final and unappealable order directing him to, both, pay the fine specified in the NIF and to cease and desist from the alleged violations of Section 274C. 8 U.S.C. 1324c(d)(2); 8 C.F.R. 270.2(g).

In a timely letter dated November 30, 1992, Respondent, through counsel, requested a hearing. As such, a Complaint, incorporating the NIF and Respondent's timely request for hearing, was filed by Complainant with the Office of the Chief Administrative Hearing Officer (OCAHO) on February 19, 1993. 8 C.F.R. 270.2(a). A Notice of Hearing On Complaint Regarding Unlawful Employment, dated February 22, 1993, and the Complaint, were effectively served on the parties as evidenced by the file copy of the return receipt for certified mail signed on March 2, 1993 by an agent of Respondent's attorney. In these documents, the parties were advised of the filing of the Complaint against Respondent and Respondent was:

1. informed of the requirement to file its Answer within thirty (30) days after receipt of the Complaint and that any previous answer filed with regard to the NIF would not satisfy this requirement;

2. warned that failure to file a timely answer might be deemed by the Administrative Law Judge as a waiver of his right to appear and contest the allegations in the Complaint and that a resulting default judgment might be issued in which any and all appropriate relief could be granted;

3. advised that the hearing would take place in or around Los Angeles, California at a time and date to be determined; and,

4. advised that the proceeding would be conducted in accordance with the Department of Justice's regulations found at 28 C.F.R. Section 68, as amended by the Interim Rule of October 3, 1991, 56 F.R. 50049.

On March 3, 1993, I issued a Notice of Acknowledgment to the parties advising them that I would be presiding over this case. Respondent was again advised of the importance of filing a timely Answer and the resulting consequences of a failure to file.

On April 1, 1993, Respondent filed its timely Answer. On May 11, 1993, Complainant filed a Motion To Strike Affirmative Defenses and a Motion for Summary Decision.

III. *Discussion*

A. The Parties' Arguments

Respondent's Answer was in three parts and raised several issues. On May 11, 1993, Complainant filed a Motion To Strike "Affirmative Defenses" Pursuant To 28 C.F.R. 68.11, which responded to Respondent's arguments raised in its Answer, and a Motion For Summary Decision Pursuant To 28 C.F.R. 68.38. To date, these motions have remained unopposed.

1. Subject Matter Jurisdiction

Respondent's first argument was a denial of this Court's jurisdiction over this case, as the Complaint allegedly did not comply with the requirement of 28 C.F.R. 68.7(b)(1) in that it did not contain a clear and concise statement of facts upon which an assertion of jurisdiction was predicated.

In response, Complainant asserted that Congress provided that (1) where a person or entity has been served with notice of the Immigration and Naturalization Service's intention to fine based on allegations of 8 U.S.C. 1324c violations, and (2) that person or entity had timely requested a hearing, then such a hearing before an administrative law judge in accordance with 5 U.S.C. 554 is authorized by statute. 8

U.S.C. 1324c(d). Complainant asserted further that 28 C.F.R. 68.1 provides that 28 C.F.R. Part 68 applies to Section 274C cases, and the Complaint complied with the requirements of 28 C.F.R. 68.7 by making a clear and concise statement of jurisdiction, supported by the effectively served and incorporated NIF and Respondent's timely hearing request. Thus, Complainant argues that this Court has subject matter jurisdiction over this case.

2. Answer

The second part of Respondent's filing was an effective denial of all the allegations in the Complaint as Respondent stated that no paragraph in the Complaint alleged any facts which would give him sufficient information to admit or deny the allegations. 28 C.F.R. 68.9(c)(1).

3. Affirmative Defenses

Next, Respondent raised three (3) affirmative defenses.

a. Failure to State a Claim

In the first affirmative defenses, Respondent argued that the Complaint failed to state a claim upon which relief could be granted, in that it alleged no facts in support of the alleged violation of law as required by 28 C.F.R. 68.7(b)(3) and was simply a recital of the law.

Complainant responded by pointing out that the Complaint complied with the requirements of 28 C.F.R. 68.7, that the Complaint was drafted using a "notice" pleading style and incorporated the NIF and Respondent's request for a hearing. Specifically, the Complaint factually alleged the following:

1. Mr. Oscar Eduardo Villatoro-Guzman, a citizen and national of Guatemala, was the Respondent in this case;

2. Respondent was served with a NIF on November 7, 1992;

3. Respondent timely requested a hearing before an administrative law judge;

4. Respondent, on or after November 29, 1990, obtained and used two different counterfeit documents, specifically, an allegedly counterfeit and falsely made alien registration card (Form I-551), No. A097747276, and an allegedly counterfeit and falsely made Social Security Card, No. 626-50-8325; and,

5. Respondent knowingly obtained and used these counterfeit documents to satisfy a requirement of the Act.

As further support for the fact that the Complaint was proper, Complainant stated that the form and format of the factual and legal allegations were set forth by OCAHO prior to 1992, that Complainant's enforcement of Section 274C did not begin until after OCAHO directed INS General Counsel to utilize the prescribed Section 274C violation allegation format, and that the 274C Complaint format used in this case is substantially similar to the format used in section 274A Complaints since 1990.

b. Vagueness of Complaint

Respondent's second affirmative defense was that the Complaint was impermissibly vague and deprived Respondent of fair notice of the claim against him; thus, there was an issue of fundamental fairness and a violation of Respondent's Fifth Amendment due process rights. Respondent's argument was that the Complaint was "merely a recital of the statute, and a restatement of the boilerplate language of the NIF, that d(id) not contain any statement of alleged fact"; therefore, Respondent was unable to know the exact nature of the allegations against him and could not admit or deny the allegations.

In opposition, Complainant argued that not only did the Complaint allege all the required elements for a violation of Section 274C but previous cases, U.S. v. Azteca Restaurant, Northgate, 1 OCAHO 33 (11/8/88) and U.S. v. Mutlitmatic Products, Inc., 1 OCAHO 221 (8/21/90), upheld the substantially similar pleading format used in employer sanctions cases under section 274A of the Act.

c. Lack of Due Process

Respondent's third affirmative defense raised the issue of whether Respondent was deprived of his due process rights, as Respondent alleged that his rights under 8 C.F.R. 242.2(c)(2) were not complied with; specifically, Respondent was not advised of "his constitutional rights prior to an alleged interrogation." Respondent's Answer at page 4, paragraph 9.

Complainant responded by stating that it was not clear what interrogation Respondent was referring to, but that Respondent was advised of his rights prior to his confession to the Border Patrol at the Santa Barbara County Jail on October 2, 1992 and supported this

representation with an attached copy of a Record of Sworn Statement, Form I-831. Exh. C.

B. Analysis

1. Subject Matter Jurisdiction

The question of whether a court has proper federal subject matter jurisdiction over a particular case is determined by whether the federal court has the power to hear the case either under the Constitution or the laws of the United States. See Davis v. Passman, 442 U.S. 228, 239, 99 S. Ct. 2264, 2274 (1979) (citations omitted). The Immigration and Nationality Act sets out this court's jurisdiction which Congress both granted, and limited, to (1) cases of employer sanctions wherein there is an alleged violation of Section 274A of the Act involving Form I-9 paperwork violations, (2) cases wherein there is an alleged violation of Section 274B of the Act involving immigration-related employer discrimination, and (3) cases wherein there is an alleged violation of Section 274C of the Act involving document fraud. 8 U.S.C. 1324a, 8 U.S.C. 1324b, 8 U.S.C. 1324c.

Specifically, with regard to Section 274C cases, the statute states, in relevant part:

> (d) Enforcement-...
>
> (2) Hearing-
>
> (A) In general.-Before imposing an order described in paragraph (3) against a person or entity under this subsection for a violation of subsection (a), the Attorney General shall provide the person or entity with notice and, upon request made within a reasonable time (of not less than 30 days, as established by the Attorney General) of the date of the notice, a hearing respecting the violation.
>
> (B) Conduct of hearing.-Any hearing so requested shall be conducted before an administrative law judge. The hearing shall be conducted in accordance with the requirements of section 554 of title 5, United States Code.

8 U.S.C. 1324c(d)(2) (Emphasis added).

Thus, as this case pertains to a violation of 8 U.S.C. 1324c, a review of the above statute establishes that, by Congressional grant, this Court does indeed have subject matter jurisdiction over it.

It is appropriate at this point for me to determine whether the proper procedure was followed in invoking this court's jurisdiction. The

regulation setting forth the procedure for issuing and serving the NIF, as well as describing its contents, 8 C.F.R. 270.2, states in relevant part:

> (d) Notice of Intent to Fine-The proceeding to assess administrative penalties under section 274C of the Act is commenced when the Service issues a Notice of Intent to Fine. Service of this notice shall be accomplished by personal service....Service is effective upon receipt....The person or entity identified in the Notice of Intent to Fine shall be known as the respondent.....
>
> (e) Contents of the Notice of Intent to Fine-1. The Notice of Intent to Fine shall contain the basis for the charge(s) against the respondent, the statutory provisions alleged to have been violated, and the monetary amount of the penalty the Service intends to impose....
>
> (f) Request for hearing before an administrative law judge-If a respondent contests the issuance of a Notice of Intent to Fine, the respondent must file with the INS, within 60 days of the Notice of Intent to Fine, a written request for a hearing before an administrative law judge.

The Rules of Practice and Procedure, 28 C.F.R. 68.1 et al, promulgated by the Attorney General, are the implementing regulations for Sections 274C of the Act. The pertinent regulation, 28 C.F.R. 68.7(b), states in relevant part:

> (b) A complaint filed pursuant to section 274A, 274B, 274C of the INA shall contain the following:
>
> (1) A clear and concise statement of facts, upon which an assertion of jurisdiction is predicated;

Thus, I must determine if a properly issued and served NIF alleging violation of Section 274C of the Act, a timely request by the Respondent for a hearing filed with OCAHO, and a Complaint filed with OCAHO, which properly alleges violation of Section 274C of the Act and facts setting forth and supporting this Court's jurisdiction, exist in this case.

Examining the record, I find that a NIF, conforming to the requirements of 8 C.F.R. 270.2, was issued and properly served on Respondent on October 7, 1992[1], a timely request for hearing by Respondent

---

[1] I have noted that although the NIF is signed by both an agent of the Border Patrol and Respondent, acknowledging personal service, and Respondent has not raised it as an issue, the NIF does not reflect the date of signature. In making my finding of proper personal service and a timely request for hearing, I have considered the entire record,
(continued...)

has been made on November 30, 1992[1], the Complaint was properly filed with OCAHO on February 19, 1993 and properly served on Respondent on March 2, 1993.

Further, in examining the Complaint itself, I find that it states:

> 1. This cause of action arises, and jurisdiction of the Office of the Chief Administrative Hearing Officer is invoked, under 8 U.S.C. 1324c.
>
> 2. A Notice of Intent to Fine (Exhibit A) was served on the Respondent on October 7, 1992 and Respondent has timely requested a hearing (Exhibit B).

Exhibit A and Exhibit B were attached to the Complaint. Thus, jurisdiction has been factually asserted and supported in the Complaint. Therefore, I find that the Complaint conforms to the requirements of 28 C.F.R. 68.7 as to a proper assertion of jurisdiction.

In summation, I find that Congress has given me the power to hear this case of alleged violation of Section 274C, that a proper Notice of Intent To Fine was effectively and properly served on Respondent, that Respondent filed a timely request for hearing with OCAHO, that a Complaint was issued and properly and effectively served on Respondent and that the Complaint complies with the regulatory requirements in setting forth a clear and concise statement of facts which supports this Court's jurisdiction. Thus, Respondent's argument that this Court does not have subject matter jurisdiction is misplaced and incorrect.

2. Affirmative Defenses

a. Failure to State a Claim

Respondent argues that there are no facts alleged in the Complaint sufficient to state a claim upon which relief can be granted and that the Rules of Practice and Procedure, specifically 28 C.F.R. 68.7(b)(3), require a statement of the alleged violations of law, "with a clear and concise statement of facts for each violation alleged to have occurred."

Federal Rule of Civil Procedure 8(a) contains a similar pleading requirement to 28 C.F.R. 68.7(b)(3) which states:

---

[1](...continued)
including Complainant's Exh. J, Form I-213, Record of Deportable Alien, which affirms the personal service of the NIF on Respondent on October 7, 1992.

> A pleading which sets forth a claim for relief...shall contain...a short and plain statement of the claim showing that the pleader is entitled to relief....

F.R.C.P. 8(a).

The Supreme Court has considered the issue of what will suffice in setting forth a claim sufficient to defy dismissal. In examining the standard of specificity required to satisfy the pleading requirements of Federal Rule of Civil Procedure 8(a), the Court, in Conley v. Gibson, 355 U.S. 41 (1957), denied a Respondent's argument that the Complaint should be dismissed because it failed to set forth specific facts in support of its general allegation and stated:

> The decisive answer...is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary,all the Rules require is a "short and plain statement of the claim" that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests....Such simplified "notice pleading' is made possible by the liberal opportunity for discovery and other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues....The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits. (citation omitted).

Id. at 47.

The Supreme Court has not deviated from this standard and has recently quoted from the above language in Leatherman v. Tarrant County Narcotics Unit, 113 S.Ct. 1160, 1993 U.S. Lexis 1941 at 9 (1993)("The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a 'short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."). It should be noted that the pleading must contain "sufficient detail...so that the defendant, and the court, can obtain a fair idea of what the plaintiff is complaining, and can see that there is some legal basis for recovery". Davis v. Passman, 442 U.S. 228, 238, 99 S.Ct. 2264, 2273, n.15 (1979). In fact, the accepted rule is that dismissal for failure to state a claim is only appropriate when it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45, 78 S.Ct. 99. 102 (1957).

A review of the Complaint in this case reveals that Complainant has alleged that the Respondent in this case is Mr. Villatoro-Guzman, that on or after November 29, 1990, he had knowingly obtained and used two counterfeit documents, specifically an alien registration card, Form I-551, No. A097747276, and a Social Security Card, No. 626-50-8325 and that he had obtained and used these documents to satisfy a requirement of the Act. These acts were alleged to be in violation of Section 274C, as follows:

> Wherefore, it is charged that the Respondent is in violation of section 274C(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1324c(a)(2), which renders it unlawful on or after November 29, 1990, for a person or entity knowingly to use and obtain any counterfeit, or falsely made document for the purpose of satisfying a requirement of the Act.

Applying the Supreme Court's standard to the requirement in 28 C.F.R. 68.7 of "clear and concise statement of facts" for each violation and recognizing that Respondent has the opportunity for liberal discovery and other pretrial procedures, it is clear to me that Respondent's argument that the Complaint lacks sufficient facts to state a claim upon which relief can be granted is misplaced. See U.S. v. Multimatic Products, 1 OCAHO 221 (8/21/90).

b. Vagueness of Complaint

Respondent argues that the Complaint is vague and does not contain "any statement of fact, but only contains a recital of law". To the contrary, the Complaint specifically names Oscar Eduardo Villatoro-Guzman as Respondent and identifies the alleged counterfeit documents that were obtained and used on or after November 29, 1990. Obviously, these allegations are facts and not statements of law contained in the wording of the statute.

Respondent also argues that the Complaint tracks the wording of the statute. Admittedly all complaints will track a statute, to one degree or another, so that all the elements of an offense or violation will be alleged. Therefore, I find that the Complaint's tracking of the language of Section 274C of the Act does not make this Complaint vague or insufficient.

Reviewing the facts alleged in the Complaint that allege violation of Section 274C of the Act, I find that the Complaint is not vague, as Complainant has alleged sufficient facts which have put Respondent on fair notice of the charges against him and that any additional information which Respondent may require can be obtained either

through discovery or by filing appropriate motions with this court. Should Respondent not be able to obtain the needed information, it should notify the court and I will take the appropriate action.

c. Lack of Due Process

As to Respondent's third argument that "Complainant violated the regulations at 8 C.F.R. 242.2(c)(2) by not advising the Respondent of his constitutional rights prior to an alleged interrogation", I am not sure what constitutional rights Respondent refers to, as his argument appears to address the violation of Respondent's regulatory rights. In fact, a review of the language of 8 C.F.R. 242.2(c)(2) makes it clear that it does not apply in this document fraud case.

The second sentence of the regulation sets forth the triggering event for the rights advisal to which Respondent has referred:

> When a warrant of arrest is served under this part, the respondent shall have explained to him/her the contents of the order to show cause, the reason for the arrest and the right to be represented by counsel of his/her own choice at no expense to the Government...

8 C.F.R. 242.2(c)(2)(emphasis added).

This warrant of arrest refers only to a warrant of arrest that is issued, either, at the time an Order to Show Cause in a deportation proceeding is issued or at any time after that, until the time a Respondent becomes subject to a duly issued warrant of deportation. 8 C.F.R. 242.2(c)(1). Thus, a warrant of arrest, issued at the time of or after, and related to, an existing Order to Show Cause in a deportation case, triggers the rights advisal to which Respondent refers.

Since this case is not a deportation case, but is a document fraud case, and no Order to Show Cause or warrant of arrest have been issued, 8 C.F.R. 242.2(c)(2) does not pertain to Respondent. As such, I find that Respondent is not entitled to those rights associated with 8 C.F.R. 242.2(c)(2) in regard to this case.

I do note that Complainant has filed a copy of the Form I-831, pertaining to Respondent, Record of Sworn Statement, dated October 2, 1992 and signed by a Border Patrol Agent, which Complainant asserts shows that Respondent was advised of his rights prior to his making a statement to the Border Patrol. The Form I-831, which was allegedly read to Respondent, advises Respondent of the following rights:

1. Respondent had the right to remain silent;

2. Anything Respondent said could be used against him in court, or in any immigration or administrative proceeding;

3. Respondent had the right to talk to an attorney for advice before INS asked him any questions, if he wished;

4. If Respondent could not afford an attorney, one would be appointed for him before any questioning took place, if he wished.

5. If Respondent decided to answer questions without an attorney present, Respondent would still have the right to stop answering at the time of questioning, or at any other time, until he talked to an attorney.

After these rights were read to Respondent, he allegedly stated that he did not wish to have an attorney or other person present to advise him, that he was willing to answer questions at the time of questioning, and that he would swear that all statements that he would make would be the truth, the whole truth and nothing but the truth.

Although Respondent has not addressed the issue, I note that Respondent allegedly refused to sign the Record of Sworn Statement after allegedly giving a voluntary statement. At this time, though, I will not make a finding as to whether these rights were read to him prior to his statement, as that would require a credibility finding. My findings here, solely relate to Respondent's argument regarding the rights advisal under 8 C.F.R. 242.2(c)(2).

IV. *Conclusion*

In conclusion, based on the analysis set forth in this decision and order, I find that Respondent's argument for dismissal based on lack of subject matter jurisdiction is incorrect. Further, Complainant's Motion to Strike Affirmative Defenses is granted. Prior to ruling on Complainant's pending Motion for Summary Decision, I will conduct a prehearing telephonic conference with the parties to discuss the issues raised in that motion.

SO ORDERED this 22nd day of July, 1993, at San Diego, California.

E. MILTON FROSBURG
Administrative Law Judge