

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

February 14, 1994

UNITED STATES OF AMERICA,)
Complainant,)
)
v.) 8 U.S.C. 1324c Proceeding
) OCAHO Case No. 93C00114
GREGORIO ALABADO MAKILAN,)
Respondent.)
_____)

ORDER GRANTING MOTION TO STRIKE AFFIRMATIVE
DEFENSES

On November 20, 1992, complainant, acting by and through the Immigration and Naturalization Service (INS), initiated these proceedings by serving Notice of Intent to Fine (NIF) SNA 274C-93-0001 on Gregorio Alabado Makilan (respondent).

In Count I of the NIF, complainant charged that respondent knowingly forged, counterfeited, altered, and falsely made an Application to file Petition for Naturalization, Form N-400, and Biographic Information, Form G-325, in the name of Gregorio Alabado Makilan, dated September 6, 1992, after November 29, 1990, for the purpose of satisfying a requirement of the Immigration and Nationality Act (INA), in violation of the INA, 8 U.S.C. §1324c(a)(1). Complainant assessed a civil money penalty of \$700 for that alleged violation.

Count II of the NIF charged respondent with having knowingly used a forged, counterfeited, altered, and falsely made Application to file Petition for Naturalization, Form N-400, and Biographic Information, Form G-325, in the name of Gregorio Alabado Makilan, dated September 6, 1992, after November 29, 1990, for the purpose of

satisfying a requirement of the INA, in violation of the INA, 8 U.S.C. §1324c(a)(2). A civil money penalty of \$700 was assessed for that alleged violation.

Count III of the NIF contained the allegation that respondent knowingly used a forged, counterfeited, altered, and falsely made Marriage Contract between Gregorio Makilan and Rosario De Guzman, knowing that that marriage contract was forged, counterfeited, altered, and falsely made, after November 29, 1990, for the purpose of satisfying a requirement of the INA, in violation of the INA, 8 U.S.C. §1324c(a)(2). Complainant also assessed a civil money penalty of \$700 for that alleged violation.

The wording of the NIF advised respondent of his right to file a written request for an evidentiary hearing before an administrative law judge within 60 days of service of the NIF. By letter dated January 11, 1993, respondent timely filed such a request.

On May 27, 1993, complainant filed the Complaint at issue with this Office, reasserting the charges contained in the NIF, and requesting an order directing respondent to cease and desist from the violations, arising under the INA, 8 U.S.C. §1324c, and to pay civil money penalties totaling \$2,100.

On June 28, 1993, respondent filed its Answer, specifically denying therein the allegations of violation set forth in Counts I, II, and III of the Complaint, generally denying the allegations contained in the Complaint not specifically denied, and asserting six (6) affirmative defenses to the violations alleged in the Complaint.

As a first affirmative defense, respondent asserted that complainant fails to state a claim upon which relief may be granted. As its second affirmative defense, respondent asserted that complainant has failed to serve a copy of the Complaint on complainant. In its third affirmative defense, respondent contended that service of the Complaint on respondent by this Office violates the provisions of 8 C.F.R. section 68.31. As a fourth affirmative defense, respondent asserted that complainant has waived whatever right it had to impose civil fines on respondent when complainant agreed, upon withdrawal of respondent's petition for naturalization, that no further action would be taken on that petition. Respondent's fifth affirmative defense contended that complainant has failed to institute the Complaint in a timely manner. Finally, and as a sixth affirmative defense, respondent asserted that the Complaint is in substantial variance with the NIF.

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On November 9, 1993, respondent filed a Motion for Leave to File Amended Answer, together with an attached Amended Answer.

In its Amended Answer, respondent reasserts the specific and general denials it made in its Answer, withdraws its first affirmative defense, asserting that complainant has failed to state a claim upon which relief can be granted, reasserts the five remaining affirmative defenses contained in its Answer, and asserts five additional affirmative defenses, for a total of ten pending affirmative defenses.

The second and third affirmative defenses asserted in respondent's Answer constitute the first and second affirmative defenses asserted in the Amended Answer.

As a new third affirmative defense, respondent contends that service of the Complaint on respondent by the Office of the Chief Administrative Hearing Officer (OCAHO) violates fundamental fairness and due process.

As its seventh affirmative defense, respondent asserts that the Complaint fails to provide a clear and concise statement of facts for the violation alleged.

Respondent's eighth affirmative defense contends that the Complaint is vague and ambiguous, and does not give respondent adequate notice of a violation of law, if any.

As its ninth affirmative defense, respondent asserts that the Complaint demands imposition of fines not authorized by 8 U.S.C. §1324c.

Respondent, as a tenth affirmative defense, contends that the Complaint demands imposition of fines in excess of that authorized by 8 U.S.C. §1324c.

On January 10, 1994, complainant filed a Motion to Strike Affirmative Defenses, requesting therein that the undersigned strike affirmative defenses 1 through 10 on the ground that those defenses are one sentence allegations which are conclusory in nature.

Standards for Decision

While the procedural rules for administrative hearings involving allegations of document fraud under the INA, 8 U.S.C. §1324c, provide

that complainant may file a reply responding to each affirmative defense asserted in an answer (28 C.F.R. section 68.9(d)), they do not expressly provide for motions to strike affirmative defenses. The procedural rules do provide, however, that the Federal Rules of Civil Procedure may be used as a guideline in any situation not provided for or controlled by the procedural rules. 28 C.F.R. §68.1.

Rule 12(f) of the Federal Rules of Civil Procedure provides that "(u)pon motion... the court may order stricken from any pleading any insufficient defense." This rule has been utilized by the administrative law judges in this Office as a guideline in considering motions to strike affirmative defenses. United States v. Applied Computer Technology, 2 OCAHO 306 (3/22/91).

Motions to strike are highly disfavored in the law, and are granted only when the asserted affirmative defenses lack any legal or factual bases. See United States v. Task Force Security, Inc., 3 OCAHO 533, at 3 (6/25/93). For this reason, an affirmative defense will be ordered to be stricken only if there is no prima facie viability of the legal theory upon which the defense is asserted, or if the supporting statement of facts is wholly conclusory. Id., at 4; United States v. Watson, 1 OCAHO 253 (10/19/90); United States v. Broadway Tire, 1 OCAHO 226 (8/30/90).

Decision and Order

The procedural regulation governing answers to complaints in cases involving allegations of document fraud, 28 C.F.R. section 68.9(c), provides that the answer shall include "(a) statement of the facts supporting each affirmative defense."

In its motion, complainant correctly notes that respondent has failed to provide any statement of facts to support any of its ten affirmative defenses. On this ground alone, all ten of respondent's affirmative defenses are deficient and must be stricken for the following reasons.

Affirmative Defenses 1, 2, and 3

In affirmative defense 1, respondent asserts, "Complainant has not served a copy of the Complaint on Respondent." Amended Answer, at 2.

As affirmative defense 2, respondent asserts the following:

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Service of the Complaint on Respondent by the Office of the Chief Administrative Hearing Officer violates the provisions of 8 C.F.R. section 68.31 (1993) in that it violates fundamental principles of separation of powers.

Id.

In affirmative defense 3, respondent asserts that "(s)ervice of the Complaint on Respondent by the Office of the Chief Administrative Hearing Officer violates fundamental fairness and due process."

Respondent's assertion in its first affirmative defense, that complainant has failed to serve a copy of the Complaint upon respondent, while true, does not constitute a viable defense to the violations alleged in the Complaint.

The procedural regulation governing service of complaint, 28 C.F.R. section 68.3 provides, in pertinent part:

(a) Service of complaint... shall be made by the Office of the Chief Administrative Hearing Officer or the Administrative Law Judge to whom the case is assigned...

1. By delivering a copy to the individual party, partner, officer of a corporate party, registered agent for service of process of a corporate party, or attorney of record of a party;

(b) Service of complaint and notice of hearing is complete upon receipt by addressee.

The service page on the Notice of Hearing, to which respondent's copy of the Complaint was attached, indicates that a copy of the Complaint was served upon respondent and his attorney of record. The United States Postal Service domestic return receipt card that was attached to respondent's copy of the Complaint and Notice of Hearing indicates that respondent received his copy of the Complaint on June 28, 1993. These facts indicate that the Complaint has been served in accordance with the governing procedural regulation.

For this reason, respondent's first affirmative defense is insufficient as a matter of law and fact and is ordered to be and is stricken.

Respondent asserts in affirmative defense 2 that service of the Complaint by OCAHO violates 28 C.F.R. section 68.31 in that it violates fundamental principles of separation of powers.

That procedural regulation provides:

No officer, employee or agent of the Federal Government engaged in the performance of investigative or prosecutorial functions in connection with any proceeding shall, in that proceeding or a factually related proceeding, participate or advise in the decision of the Administrative Law Judge, except as a witness or counsel in the proceedings.

Respondent's second affirmative defense is insufficient for two reasons. First, OCAHO is not engaged in the performance of investigative or prosecutorial functions in connection with any proceeding. This provision refers to the INS in cases arising under the employer sanctions provisions of IRCA, 8 U.S.C. §1324a, and the document fraud provisions of the INA, 8 U.S.C. §1324c, and to the Office of the Special Counsel for Unfair Immigration Related Employment Practices (OSC) in cases arising under the unfair immigration related employment practices provisions of IRCA, 8 U.S.C. §1324b.

Second, in serving a complaint in an 8 U.S.C. §1324c proceeding, OCAHO is not "participating or advising" in the "decision of the Administrative Law Judge."

For these reasons, respondent's second affirmative defense is insufficient as a matter of law and fact, and is therefore ordered to be and is stricken.

As for respondent's third affirmative defense, respondent has failed to indicate, nor is the undersigned aware of any precedential decision, ruling, determination, statute, or regulation indicating that the service of a complaint in an administrative proceeding in accordance with properly promulgated procedural regulations violates fundamental fairness and due process.

Furthermore, service of the Complaint and Notice of Hearing by OCAHO upon the attorney of record alone has been held to satisfy due process requirements in employer sanctions proceedings before this Office. See United States v. Kirk, 1 OCAHO 72, at 2 (7/19/89), aff'd by CAHO, 1 OCAHO 80 (8/7/89). In this matter, as noted previously, both respondent and his attorney of record received the Complaint and Notice of Hearing.

For these reasons, respondent's third affirmative defense is insufficient as a matter of law and fact, and is ordered to be and is dismissed.

Affirmative Defense 4

In that affirmative defense, respondent asserts:

Complainant waived its right, if it had any, to impose civil fines on Respondent when Complainant agreed, upon withdrawal of Respondent's petition for naturalization, that no further action would be taken based upon that petition.

Respondent misconstrues the authority of complainant to impose civil fines on respondent as a "right." The pertinent provision of the INA, 8 U.S.C. §1324c(d)(3), mandates that a civil money penalty be imposed upon each person or entity who is found to have violated the document fraud provisions of the Act. Accordingly, respondent does not have the authority to waive the imposition of civil fines.

For this reason, respondent's fourth affirmative defense is without basis in law and fact, and is ordered to be and is stricken.

Affirmative Defense 5

In affirmative defense 5, respondent asserts that complainant has failed to institute its Complaint in a timely manner.

Contrary to respondent's assertions, neither the INA, 8 U.S.C. §1324c, nor the procedural regulations governing these proceedings, 28 C.F.R. section 68.1 et seq., specify a set period following the filing of a request for hearing by respondent within which complainant must file a complaint.

For this reason, respondent's fifth affirmative defense is insufficient as a matter of law, and is ordered to be and is stricken.

Affirmative Defense 6

As a sixth affirmative defense, respondent asserts that the Complaint is in substantial variance with the NIF.

A review of Counts I, II, and III in the NIF and in the Complaint indicates that respondent's assertions in affirmative defense 6 are incorrect.

The allegations contained in the NIF and in the Complaint are not identical. Counts I and II, in the Complaint are more specific than the corresponding counts in the NIF, viz., in Count I of the NIF, complainant asserts that respondent "forged, counterfeited, altered, or

falsely made" the document described therein. In Count II of the NIF, complainant asserted that respondent used that "forged, counterfeited, altered, or falsely made" document. In the corresponding counts in the Complaint, complainant asserts only that the document in question was "falsely made."

However, the NIF contains all of the contentions made in the complaint, and the allegations contained in the Complaint are identical to allegations contained in the NIF. Accordingly, respondent's sixth affirmative defense is insufficient as a matter of law, and is therefore ordered to be and is stricken.

Affirmative Defense 7

Respondent asserts, as a seventh affirmative defense, that the Complaint fails to provide a clear and concise statement of facts for the violations alleged.

The procedural regulations require that a complaint filed pursuant to 8 U.S.C. §1324c contain "(t)he alleged violations of law, with a clear and concise statement of facts for each violation alleged to have occurred." 28 C.F.R. §68.7(b)(3).

A review of the Complaint reveals that in Count I, complainant has asserted that respondent knowingly falsely made an Application to file Petition for Naturalization dated September 6, 1991, and a Biographical Information dated September 6, 1990, after November 29, 1990 for the purpose of satisfying a requirement of the INA.

In Count II, complainant asserts that respondent knowingly used the allegedly falsely-made documents described in Count I after November 29, 1990 for the purpose of satisfying a requirement of the INA.

In Count III, complainant asserted that respondent used a forged, counterfeited, altered, and falsely-made Marriage Contract after November 29, 1990 for the purpose of satisfying a requirement of the INA.

These acts were each alleged to be violations of specific provisions of the INA, 8 U.S.C. §1324c.

In a recent decision it was held that similar assertions in a complaint alleging violations of the document fraud provisions of the INA, 8 U.S.C. §1324c, satisfied the pertinent requirement that the complaint

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contain a "clear and concise statement of facts." See United States v. Villatoro-Guzman, 3 OCAHO 540, at 20 (7/22/93).

For this reason, respondent's seventh affirmative defense is ordered to be and is stricken.

Affirmative Defense 8

As an eighth affirmative defense, respondent asserts that the Complaint is vague and ambiguous and does not give respondent adequate notice of a violation of law, if any.

A review of the Complaint indicates that complainant specifically names Gregorio Alabado Makilan as the respondent and specifically identifies the allegedly forged, counterfeited, altered, or falsely made documents falsely made and/or used after November 29, 1990. The provisions of 8 U.S.C. §1324c implicated in each count are specifically identified.

For these reasons, I find that the Complaint is not vague, and, contrary to respondent's assertions, contains sufficient facts to provide adequate notice of the violations alleged therein. See id., at 20-21.

Accordingly, respondent's eighth affirmative is ordered to be and is stricken.

Affirmative Defenses 9 and 10

As a ninth affirmative defense, respondent contends that the Complaint demands imposition of fines not authorized by 8 U.S.C. §1324c. Similarly, respondent's tenth affirmative defense asserts that the Complaint demands imposition of fines in excess of that authorized by 8 U.S.C. §1324c.

Contrary to respondent's contentions in its ninth affirmative defense, the "fines" requested by complainant are authorized under 8 U.S.C. §1324c.

In the Complaint, complainant asserts that respondent has engaged in activities prohibited under the document fraud provision of the INA, 8 U.S.C. §1324c(a).

The document fraud provision provides:

With respect to a violation of (8 U.S.C. §1324c(a)), the order under this subsection shall require the person or entity to cease and desist from such violations and to pay a civil money penalty in an amount of -

(A) not less than \$250 and not more than \$2,000 for each document used, accepted, or created and each instance of use, acceptance, or creation, or

(B) in the case of a person or entity previously subject to an order under this paragraph, not less than \$2,000 and not more than \$5,000 for each document used, accepted, or created and each instance of use, acceptance or creation....

8 U.S.C. §1324c(d)(3).

Complainant has requested a civil money penalty in the amount of \$700 for each violation alleged in the Complaint. Contrary to respondent's contentions in its tenth affirmative defense, this is within the range of civil penalty amounts mandated by the document fraud provision for each violation of 8 U.S.C. §1324c(a), as indicated above.

Because the civil money penalties requested by complainant are mandated under the document fraud provision of the INA, and because the civil money penalties requested are within the range of penalty amounts for each specific violation alleged, respondent's ninth and tenth affirmative defense are insufficient as a matter of law, and are therefore ordered to be and are stricken.

In summary, complainant's Motion to Strike Affirmative Defenses is granted. Accordingly, the ten affirmative defenses asserted by respondent in its Amended Answer are hereby ordered to be and are stricken.

The parties will commence and/or continue and conclude all discovery efforts in order to be fully prepared to proceed with the hearing in this matter, which has been scheduled to begin at 9:00 a.m. on Wednesday, April 27, 1994, in San Antonio, Texas.

JOSEPH E. MCGUIRE
Administrative Law Judge