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

November 14, 1994

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. 1324c Proceeding
	)	OCAHO Case No. 94C00139
MOURAD ABU REMILEH, Respondent.	)	

ORDER GRANTING COMPLAINANT'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

On September 23, 1993, complainant, acting by and through the Immigration and Naturalization Service (INS), commenced this action by filing a Notice of Intent to Fine (NIF), SPM-274C-93-0085, upon Mourad Abu Remileh (respondent). That citation contained three (3) counts which alleged three (3) violations of the document fraud provisions of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324c, and civil penalties totaling $1,500 were assessed.

In Count I of the NIF, complainant asserted that respondent knowingly and falsely made an Employment Eligibility Verification Form (Form I-9) after November 29, 1990, for the purpose of satisfying a requirement of IRCA, 8 U.S.C. § 1324c(a)(1). Complainant assessed a civil money penalty of $500 for that alleged violation.

Complainant asserted in Count II of the NIF that respondent knowingly used the forged, altered, and falsely made document described therein, a Certificate of Live Birth issued by the Minnesota Department of Health, Section of Vital Statistics, in the name of

Zachary Mohamed Armeli, and did so after November 29, 1990, for the purpose of satisfying a requirement of IRCA, 8 U.S.C. § 1324c(a)(2). For that alleged violation, complainant levied a civil money penalty of $500.

Count III of the NIF contained the assertion that after November 29, 1990, respondent used the document described therein, a Minnesota Department of Health, Section of Vital Statistics, Certificate of Live Birth, in the name of Zachary Mohamed Armeli, knowing that that document was lawfully issued to a person other than the possessor, for the purpose of satisfying a requirement of IRCA, in violation of the provisions of 8 U.S.C. § 1324c(a)(3). Complainant assessed a civil money penalty of $500 for that alleged violation.

In the NIF, respondent was advised of his right to request a hearing before an Administrative Law Judge assigned to this Office if he filed such a request within 60 days of his receipt of that notice.

On October 29, 1993, Lenore Millibergity, Esquire, filed a Notice of Entry of Appearance as counsel for respondent, as well as a timely request for hearing.

On July 27, 1994, complainant filed the two-count Complaint at issue.

In Count I, complainant alleged that respondent knowingly and falsely made a Form I-9 after November 29, 1990, for the purpose of satisfying a requirement of the Immigration Act of 1990 (IMMACT), in violation of IRCA, 8 U.S.C. § 1324(c)(a)(1). Complainant requested a civil money penalty of $500 for that alleged violation.

Complainant alleged in Count II of the Complaint that after November 29, 1990, respondent used, attempted to use, and possessed the allegedly forged, counterfeited, altered, and falsely made document described therein, a Minnesota Department of Health, Section of Vital Statistics, Certificate of Live Birth, in the name of Zachary Mohamed Armeli, knowing that document to be forged, counterfeited, altered, and falsely made that document for the purpose of satisfying a requirement of IMMACT, and thus violated the provisions of 8 U.S.C. § 1324c(a)(2). Complainant also requested a civil money penalty of $500 for that alleged violation.

Copies of the Complaint and the Notice of Hearing were served upon respondent via regular mail, and upon respondent's counsel of record via certified mail, return receipt requested.

The Domestic Return Receipt attached to those copies of the Complaint and Notice of Hearing served upon respondent's counsel was returned to this Office on August 4, 1994, and discloses that respondent's then counsel of record received those documents on August 1, 1994.

On August 10, 1994, the package containing the copy of the Notice of Hearing and Complaint which had been sent to respondent via regular mail was returned to this Office with the notation "Return to Sender, No Forward Order on File."

On August 8, 1994, respondent's counsel filed a Motion to Withdraw from representation, premising that request upon her assertion that in January 1994, she and respondent had agreed that counsel would no longer represent respondent in these proceedings. Respondent's counsel asserted that she would be unable to answer the Complaint in a timely, adequate and competent manner because she has had no contact with respondent since that time.

On August 16, 1994, that Motion to Withdraw was denied for the following reasons. Respondent's counsel of record did not qualify or limit her initial representation of respondent. In addition, she was the only person authorized to receive documents on respondent's behalf and, finally, because her law office was the only address to which documents could be delivered.

On August 19, 1994, Richard L. Breitman, Esquire, filed a Notice of Appearance as successor counsel of record for respondent, and on August 22, 1994, Attorney Millibergity filed a renewed Motion to Withdraw. That motion was granted on August 23, 1994, because successor counsel had filed an entry of appearance, and Attorney Breitman was substituted as respondent's successor counsel of record.

On September 30, 1994, respondent filed its Answer, in which he denied each and every allegation in the Complaint, and also asserted three (3) affirmative defenses to the alleged violations.

For his first affirmative defense, respondent asserted that "[t]he INA requires only that employers verify documents and no obligation has been created by the INA upon respondent."

Respondent's second affirmative defense asserted that "[n]o act occurred with respect to representations to an official of the United States government."

In its third affirmative defense, respondent asserted that "[t]he amount of the proposed penalty is excessive."

On October 28, 1994, complainant filed a Motion to Strike Affirmative Defenses, moving to strike all three (3) of complainant's affirmative defenses on the ground that they had been improperly asserted.

The procedural rules applicable to cases involving allegations of document fraud are those codified at 28 C.F.R. Part 68, which provide that "[t]he Rules of Civil Procedure for the District Courts of the United States may be used as a general guideline in any situation not provided for or controlled by these rules. . . ."28 C.F.R. § 68.1.

Accordingly, because the pertinent OCAHO procedural rules do not provide for motions to strike, it is appropriate to use Rule 12(f) of the Federal Rules of Civil Procedure as a guideline in considering motions to strike affirmative defenses. United States v. Makilan, 4 OCAHO 610, at 3 (2/14/94). That rule provides in pertinent part that "the court may order stricken from any pleading any insufficient defense." Fed. R. Civ. P. 12(f).

There is a great reluctance in the law to strike affirmative defenses, and motions to strike are only granted when the asserted affirmative defenses lack any legal or factual grounds. See United States v. Task Force Security, Inc., 3 OCAHO 563, at 4 (9/23/93). Therefore, 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. Makilan, 4 OCAHO 610, at 4; Task Force, 3 OCAHO 563, at 4.

The procedural regulation governing answers to complaints in document abuse cases provides that the answer shall include "[a] statement of the facts supporting each affirmative defense." 28 C.F.R. § 68.9(c)(2).

Complainant has correctly noted that respondent had failed in its September 30, 1994 Answer, to provide any statement of the facts to support any of its three (3) affirmative defenses.

The first affirmative defense asserted by respondent consists of the following sentence: "The INA requires only that employers verify documents and no obligation has been created by the INA upon respondent;" a one (1) sentence conclusory statement which asserts

that employers are only required to verify documents and the that INA created no duty upon aliens to produce genuine documentation.

Respondent is charged with violating 8 U.S.C. Sections 1324c(a)(1) and 1324c(a)(2), which make it "unlawful for any person or entity knowingly - (1) to forge, counterfeit, alter, or falsely make any document for the purpose of satisfying a requirement of this Act, (2) to use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of this Act,"8 U.S.C. §§ 1324c(a)(1); 1324c(a)(2) (emphasis added).

It is well documented that the INA created civil money penalties for both employers who knowingly accept fraudulent documents and for aliens who knowingly use fraudulent documents. 8 U.S.C. § 1324c; see also United States v. Villatoro-Guzman, 3 OCAHO 540 (7/22/93).

For that reason, along with the fact that respondent did not support its affirmative defense with a statement of facts, respondent's first affirmative defense must be stricken.

In its second affirmative defense, respondent argued that it did not make any representations to a United States government official. As complainant correctly pointed out, Section 1324c does not require a representation, or more appropriately a misrepresentation, to a government official. Section 1324c merely prohibits the knowing use of false documents.

Accordingly, respondent's second affirmative defense is also being stricken for that reason and further because it has not been supported factually.

In its third affirmative defense, respondent argued that the fines levied were excessive. The civil money penalty provision for document fraud violations provides in pertinent part:

> 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 assessed civil money penalties in the amount of $500 for each of the two (2) violations alleged in the Complaint. Contrary to respondent's contentions in its third affirmative defense, the $500 proposed civil money penalties for each of the two (2) alleged violations at issue are not excessive since both sums are on the lower side of the statutory $250 to $2,000 range covering offenses of this type.

In summary, the civil money penalties requested are within the range of penalty amounts for each specific violation alleged, and further because respondent did not support his third affirmative defense with the required statement of facts, that affirmative defense is also being ordered to be and is stricken.

In summary, complainant's Motion to Strike Affirmative Defenses is granted and all of the three (3) affirmative defenses asserted by respondent in its Answer are hereby ordered to be and are stricken.

JOSEPH E. MCGUIRE
Administrative Law Judge