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. 94C00192
KADAY MUSU THORONKA Respondent.	)	

ORDER
(January 11, 1995)

This order addresses an important issue of first impression in the conduct of cases arising under section 103 of the Immigration Reform and Control Act of 1986 (IRCA), as amended, enacting Section 274C of the Immigration and Nationality Act (Act), 8 U.S.C. § 1324c. On October 31, 1994, the Immigration and Naturalization Service (Complainant or INS) filed a complaint against Kaday Musu Thoronka (Thoronka or Respondent). INS alleges that Respondent violated the prohibition against immigration-related document fraud in violation of § 1324c(a)(1) by forging, counterfeiting, altering and/or falsely making an "Employment Eligibility Verification Form I-9 dated March 3, 1994 in the name of Kaday Musu Thoronka."

Previously, on July 27, 1994, INS served Thoronka with a Notice of Intent to Fine (NIF), incorporating a Notice of Rights (NOR). These documents advised her that absent a request for hearing before an administrative law judge (ALJ) within 60 days of service, a final order would issue. The NIF and NOR cautioned the recipient that the final order would assess a penalty of $900.00, would order her to cease and desist from further violations of § 1324c(a)(1), and warned that "as an alien subject to a Final Order for a violation of Section 274C of the Act, you will be excludable pursuant to Section 212(a)(6)(F) of the Act, and deportable pursuant to Section 241(a)(3)(C) of the Act." In accord with

established procedure, counsel for Thoronka filed a timely request for hearing with INS on August 19, 1994.

Of course, a final order, whether imposed by INS absent a request for hearing or adjudicated by an ALJ following such request and filing of a complaint, has an identical effect: a civil money penalty within statutory parameters, an order to cease and desist from further violations of § 1324c, and a basis for an order of deportation which may be ineligible for waiver. The allegations of the complaint track those of the NIF, contending that (1) Respondent "forged, counterfeited, altered and/or falsely made" the Form I-9 "knowing" that such document was "forged, counterfeited, altered and/or falsely made, and contending that (2) Respondent knowingly forged, counterfeited, altered, and/or falsely made" the Form I-9 "for the purpose of satisfying a requirement of" the INA. On November 14, 1994, the complaint was served on counsel for Respondent who had filed the request for hearing in response to the NIF.[1]

On December 5, 1994, Respondent filed a pleading denominated as her "Answer; Affirmative Defenses; Claim for Attorney Fees," which I accept as a timely filed answer to the complaint. Respondent concurrently filed a pleading captioned "Motion to Abate or Conditionally Proceeding [sic]" and a copy of discovery addressed to INS. Thoronka's answer to the complaint admits she signed her name to the Form I-9 "and falsely claimed therein to be a United States citizen." However, she claims that "by making such false claim, she did not" forge, counterfeit, alter and/or falsely make a "'document' within the meaning of the pertinent sections of" the INA. As an affirmative defense, Respondent argues that:

> Insofar as Complainant's Complaint is based on Respondent's false claim to citizenship, its allegations fail to state a claim because an employee's false claim to citizenship on an I-9 form is not a violation of law cognizable under 8 U.S.C. § 1324c, INA § 274C, or a 28 C.F.R. § 68.52(c)(3) document "use, acceptance or creation" sanctionable under 8 U.S.C. § 1324c, INA 274C.

Answer, p.2.

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[1] The rules of practice and procedure for cases before ALJs hearing cases pursuant to § 1324c, 28 C.F.R. pt. 68, provide that a request for hearing in response to a NIF is considered entry of appearance on behalf of the respondent for whom the request is made. See Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. pt. 68 (1994), as amended by 59 Fed. Reg. 41,243 (1994) (to be codified at 28 C.F.R. § 68.2(i), (k)) [hereinafter cited as 28 C.F.R. pt. 68]. Specifically, see 28 C.F.R. § 68.33(b)(5). The same counsel continues to represent Respondent in this case.

Respondent contends that to the extent that the complaint "is based solely on Respondent's false claim to citizenship," INS lacks standing because "the legal effect of this [i.e. Thoronka's] misrepresentation" is pending "before the Immigration Judge adjudicating Respondent's Application for Adjustment of Status (I-485) and Application for Waiver of Ground of Excludability (I-601) in Respondent's deportation proceeding." Answer, p.3. Respondent argues that the pending immigration court proceedings effectively preempt ALJ jurisdiction "where the issue of document fraud is raised contemporaneously in deportation and 274C document fraud proceedings." Id. Respondent relies on a March 26, 1994 opinion letter from James A. Puleo, Acting Executive Associate Commissioner, INS to the INS District Director, San Francisco.[2]

The letter appears to respond to an inquiry by the latter concerning the convergence of a § 1324c case with an application for adjustment of status for an alien seeking a § 212(i) waiver for fraud or mispresentation which is presumably the same conduct that gives rise to the § 1324c action:

> In the case under consideration, this office is of the opinion that the I-601 and I-485 should be adjudicated before the § 274C proceedings are pursued. If the waiver is granted and the subject is otherwise eligible, his status should be adjusted. In such a scenario, it would be inappropriate to pursue the § 274C proceedings, since such a course of action could hold the Service up to ridicule for attempting to deport the subject for the very offense which has been waived.

Presumably, for the same reason that she claims INS should not proceed, Respondent contends that "this court should not take cognizance of this matter unless and until the Immigration Judge has issued his ruling." Answer, p. 3. Finally, Respondent demands an award of attorney fees on the basis that "Complainant's position is not substantially justified." Id. at 4.

Respondent's abatement motion filed concurrently with her answer amplifies the arguments summarized above. The Motion transmits a transcript of an October 4, 1994 master calendar hearing before the Immigration Judge (IJ) on a May 17, 1994 Order to Show Cause (OSC) why she should not be deported as having remained longer in the United States than authorized. Respondent, through the same counsel who also appears before the ALJ, raised before the IJ the issues of the intersection of § 1324c. Inconclusive discussion with the IJ acknowledged that in contrast to the absence of specific authority to

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[2] The Puleo letter is reproduced at 71 Interpreter Releases 226 (Feb. 7, 1994).

waive § 1324c final orders, an argument may prevail that a § 1324c final order is susceptible to waiver (under INA § 212(a)(6)(C) as adverted to in the Puleo letter).

On the one hand, the question whether a § 1324c order can be waived so as to preclude deportation is not before me. I am only on notice that on March 28, 1995 the OSC will be before the IJ, together with Respondent's Application for Adjustment of Status (I-485) and of her Application for Waiver of Ground of Excludability (I-601). On the other hand, the question whether Thoronka has violated § 1324c is not before the IJ. In this context, Respondent's assertion that the thrust of § 1324c is to exclude aliens subject to final orders and not alone to impose civil penalties is unexceptionable. In any event, on December 14, 1994, INS filed its opposition to Thoronka's effort to bar this case from going forward.

INS argues that no statute or regulation bars its exercise of prosecutorial discretion to maintain a § 1324c action against an alien who is before an IJ in an 8 U.S.C. § 1251 proceeding. Moreover,

> There are reasons why the INS may want to bring 1324c proceedings against someone for whom 1251 proceedings have already been initiated. By 8 U.S.C. 1251(a)(3)(C), an alien who is the subject of a final order for violation of section 1324c, becomes subject to deportation. This is a separate, independent ground of deportation which INS may want to raise.

INS Opposition, p. 2.

On December 20, 1994, Respondent filed a Reply which asserts that the situation at hand fits squarely within the Puleo letter, that INS has failed to persuade otherwise, and "has failed to provide even the most minimal explanation to justify its decision to proceed in the face of its own contrary directives." Reply, p. 3, Respondent wants me to agree with her that Complainant's recitation that there are unspecified "'reasons why the INS may want to bring 1324c proceedings against someone for whom 1251 proceedings have already been initiated'" is insufficient "to override the clear import of Mr. Puleo's directive." Reply, p. 2.

Respondent may well be correct when she implies that hindsight might show that considerations of equity and the most efficient utilization of public resources warranted withdrawal by INS of its complaint against her. I do not, however, credit the Puleo letter as barring INS from proceeding on a case by case basis in seeking to develop the jurisprudence under the still-new and barely tested §

1324c. I do not detect in the four corners of the letter a rule of practice so much as a caveat against foolish action. I take the parties as I find them. I do not agree with Respondent that INS falls short by not specifying reasons it may want to proceed under § 1324c even though "1251 proceedings have already been initiated." Absent a bar to moving ahead, I will not stay the orderly course of this proceeding.

Indeed, the reach of the letter is not pervasive or else INS would either have withheld this cause of action, or withdrawn it in the face of Respondent's unambiguous challenge before both the IJ and the ALJ. At a minimum, it is for INS to resolve such internal conflicts as may impact on the public. In this context and absent clear signals to the contrary such as do not appear here, I attribute to INS as a federal entity, a unity of purpose and a consistency in its conduct sufficient to preclude artificial barriers to its exercise of discretion.

It appears from the pleadings that there may be only issues of law and none of fact. Complainant is directed to initiate a set of fact stipulations and to tender them to Respondent, as the predicate for a joint submission together with a statement of issues. If the parties are unable to develop a fact stipulation, or cannot agree on a statement of issues arising from those facts, they shall file separate statements of fact and/or issues. Upon response to this order, **not later than February 13, 1995**, my office will schedule a telephonic prehearing conference to be held on a date subsequent to March 28, 1995.

The motion is overruled.

SO ORDERED.

Dated and entered this 11th day of January, 1995.

MARVIN H. MORSE
Administrative Law Judge