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

June 20, 1995

UNITED STATES OF AMERICA, Complainant,	)
v.	) 8 U.S.C. 1324c Proceeding) OCAHO Case No. 94C00203
MARISOL CHAVEZ-RAMIREZ, Respondent.	)

ORDER GRANTING COMPLAINANT'S MOTIONS TO STRIKE AFFIRMATIVE DEFENSE AND FOR SUMMARY DECISION

On December 8, 1993, complainant, acting by and through the Immigration and Naturalization Service (INS), issued and served upon Marisol Chavez-Ramirez (respondent) Notice of Intent to Fine (NIF) FRS-274C-94-0029. That citation contained one (1) count which alleged two (2) violations of the document fraud provisions of the Immigration and Nationality Act (INA), 8 U.S.C. § 1324c(a)(2), for which civil penalties totaling $500 were assessed.

In Count I, complainant alleged that respondent knowingly used, possessed and obtained the forged, counterfeited, altered and falsely made documents described therein, namely a Social Security Card SSN1 and a Form 151 Alien Registration Card (A37-897-906), 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 each of those two (2) alleged violations, or a total of $500.

In that December 8, 1993 NIF, respondent was advised of her right to request a hearing before an administrative law judge assigned to this Office if she filed such a request within 60 days of her receipt of that notice.

On December 8, 1993, also, respondent admitted that she was in the United States illegally. See Request for Disposition, Form I-827A, Complainant's January 17, 1995 Motion for Summary Decision, Exhibit E. In lieu of going through a deportation hearing, respondent instead chose to voluntarily depart the United States and return to Mexico, where she currently resides. Id.

On February 4, 1994, David Neumeister, Esquire, filed a written request for a hearing, and also 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.

On December 1, 1994, complainant filed the one (1)-count Complaint at issue, reasserting the allegations set forth in the NIF, as well as the requested civil money penalties totaling $500 for the two (2) alleged infractions.

On December 8, 1994, a Notice of Hearing on Complaint Regarding Civil Document Fraud and a copy of the Complaint at issue were served upon respondent and also upon respondent's counsel of record, David Neumeister, Esquire.

On January 6, 1995, respondent timely filed her Answer, in which she denied all allegations set forth in the Complaint and also asserted one (1) affirmative defense.

In that affirmative defense, respondent asserted that she has been effectively deprived of her due process right to defend herself because she is unable to enter the United States.

On January 17, 1995, complainant filed an unopposed pleading captioned Motion to Strike "Affirmative Defense" Pursuant to 28 CFR 68.11 and Motion For Summary Decision Pursuant to 28 CFR 68.38.

In that motion, complainant requested that the undersigned grant its Motion to Strike the Affirmative Defense because respondent advanced "no viable legal theory nor factual basis to support such a theory," and also requested that its Motion for Summary Decision be granted because "there are no issues of material fact as to liability."

On February 10, 1995, respondent's counsel filed a letter in which he admitted that respondent used "phony" identification in order to obtain employment in the United States. Respondent also requested in that correspondence that complainant dismiss the Complaint since "any anticipated deterrent effect of these proceedings have been rendered moot by the respondent's voluntary departure from the United States on the date of her apprehension."

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, in addressing complainant's Motion to Strike Affirmative Defense, and 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 (1994). 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. United States v. Task Force Security, Inc., 3 OCAHO 563, at 4 (1993). 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.

For her affirmative defense, respondent asserted that she has been deprived of her due process right to personally defend herself because of her inability to enter the United States.

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). As complainant has correctly noted, respondent has failed in her January 6, 1995 Answer, to provide a statement of the facts necessary to support her affirmative defense. It is well settled that affirmative defenses will be ordered stricken when not supported by the required statement of facts. E.g., United States v. Chi Ling, Inc., 5 OCAHO 723, at 4 (1995); United States v. Makilan, 4 OCAHO 610, at 4 (1994).

For that reason, along with the fact that respondent chose to voluntarily depart the United States, respondent's affirmative defense must be stricken. See United States v. Flores-Martinez, 5 OCAHO 733 (1995) (respondent, after having accepted voluntary departure from the United States, was forced to defend herself from outside the country).

Having granted complainant's Motion to Strike Affirmative Defense, we will now review its Motion for Summary Decision. The pertinent procedural rule governing motions for summary decision in document fraud cases provides that "[t]he Administrative Law Judge may enter a summary decision for either party if the pleadings, affidavits, and material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. §68.38(c).

Section 68.38(c) is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in federal court cases. For this reason, federal caselaw interpreting Rule 56(c) is instructive in determining whether summary decision under Section 68.38 is appropriate in proceedings before this Office. Mackentire v. Ricoh Corp., 5 OCAHO 746, at 3 (1995); Alvarez v. Interstate Highway Constr., 3 OCAHO 430, at 7 (1992).

The purpose of summary adjudication is to avoid an unnecessary hearing when there is no genuine issue as to any material fact, as shown by the pleadings, affidavits, discovery, and any other judicially noticed matters. United States v. Anchor Seafood Distribs., Inc., 5 OCAHO 742, at 4

(1995); United States v. Goldenfield Corp., 2 OCAHO 321, at 3 (1991). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (quoting Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 467 (1984)).

An issue of material fact is genuine only if it has a real basis in the record. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586-87 (1986). A genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); United States v. Primera Enters., Inc., 4 OCAHO 615, at 2 (1994). In determining whether there is a genuine issue as to a material fact, all facts and reasonable inferences to be derived therefrom are to be viewed in the light most favorable to the non-moving party. Matsushita, 475 U.S. at 587; Primera, 4 OCAHO 615, at 2.

The party seeking summary decision assumes the burden of demonstrating to the trier of fact the absence of a genuine issue of material fact. See Celotex Corp., 477 U.S. at 323. Once the movant has carried this burden, the opposing party must then come forward with "specific facts showing that there is a genuine issue for trial." Fed. R.
Civ. P. 56(e); Matsushita, 475 U.S. at 587.

The procedural rule governing motions for summary decision in OCAHO proceedings explicitly provides that "a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing." 28 C.F.R. § 68.38(b).

Rule 56(c) of the Federal Rules of Civil Procedure permits, as the basis for summary judgment, the consideration of any admissions on file. Similarly, summary decision issued pursuant to 28 C.F.R. Section 68.38 may be based on matters deemed admitted. Primera, 4 OCAHO 615, at 3; United States v. Goldenfield Corp., 2 OCAHO 321, at 3-4
(1991).

In Count I, complainant alleged that respondent knowingly used, possessed and obtained the forged, counterfeited, altered and falsely made documents described therein, namely a Social Security Card SSN2 and a Form 151 Alien Registration Card (A37-897-906), and did so after November 29, 1990, for the purpose of satisfying a requirement of the INA, 8 U.S.C. § 1324c(a)(2).

In order to prove the violation alleged in Count I, complainant must show that:

> (1) respondent knowingly used, possessed and obtained the forged, counterfeited, altered or falsely made documents described therein;

(2) after November 29, 1990; and

(3) for the purpose of satisfying a requirement of the INA.

IRCA provides for an Employment Verification System which mandates that in order to gain lawful employment in the United States, an individual must establish both employment authorization and identity. 8 U.S.C. § 1324a(b)(1).

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. See 8 U.S.C. § 1324c; see also United States v. Villatoro-Guzman, 3 OCAHO 540 (1993).

Respondent's counsel has admitted that respondent knowingly used and possessed the forged, counterfeited, altered and falsely made Alien Registration Card described therein, and did so after November 29, 1990, for the purpose of obtaining employment in the United States. See Respondent's February 10, 1995 Letter.

Additionally, complainant has submitted the affidavit of INS Senior Boarder Patrol Agent Steven Borup who asserted that he interviewed respondent at the Fresno Border Patrol Station on December 8, 1993, and that respondent admitted on that occasion that she illegally entered the United States and purchased the counterfeit documents described namely, a Social Security Card SSN1 and a Form 151 Alien Registration Card (A37-897-906). Agent Borup also stated that respondent admitted that she presented those two (2) fraudulent documents to her prospective employer, on July 29, 1991, in order to obtain employment in the United States.

Complainant has also attached a copy of the pertinent Form I-9, which was filled out and signed by respondent on July 29, 1991. That form discloses that respondent presented her prospective employer, Ruiz Foods Products, with the fraudulent Resident Alien Card (A37-897-906) as proof of identity and employment eligibility, and also presented the fraudulent social security card SSN1 as proof of employment eligibility. See Form I-9, Complainant's January 17, 1995 Motion for Summary Decision, Exhibit C. Ernest Moreno, Human Resources Manager for Ruiz Foods Products, examined the two (2) documents presented by respondent and attested to the fact that they appeared to be genuine. Id.

According to the Chief Administrative Hearing Officer's (CAHO) recent 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. Morales-Vargas, 5 OCAHO 732, at 5-6 (1995).

To support its contention that the aforementioned documents presented by respondent were fraudulent, complainant has submitted a copy of the INS Central Index System (CIS) printout for

alien registration number A37-897-906. The CIS confirmed that number A37-897-906 belongs to one Araksi Ozoblu. See CIS Printout, Complainant's January 17, 1995 Motion for Summary Decision, Exhibit F. The social security card bearing the number SSN2 is a nonexistent number, apparently having been fabricated by the maker of the fraudulent documents.

Complainant has thereby established, as alleged in Count I, that respondent knowingly used, possessed and obtained the forged, counterfeited, altered and falsely made documents described therein, namely a Social Security Card SSN1 and a Form 151 Alien Registration Card (A37-897-906), and did so after November 29, 1990, for the purpose of satisfying a requirement of the INA, and thus violated the provisions of 8 U.S.C. § 1324c(a)(2).

Respondent has failed to offer specific facts showing that there is a genuine issue of material fact with regard to her liability for the two (2) violations set forth in Count I. Accordingly, complainant's Motion for Summary Decision is being granted since there is no genuine issue for trial with regard to respondent's liability for the violations set forth in Count I.

In summary, because complainant has shown that there is no genuine issue of material fact regarding the violations alleged in Count I of the Complaint, and has also shown that it is entitled to decision as a matter of law with respect to those violations, complainant's January 17, 1994 Motion for Summary Decision is hereby granted. It is found that respondent has violated the pertinent provisions of the INA in the manners alleged in Count I of complainant's December 1, 1994 Complaint.

In view of this ruling, the only remaining issue is that of determining the appropriate civil money penalties to be assessed for the two (2) Count I violations.

The INA provides for civil money penalties for individuals who violate the document fraud provisions of 8 U.S.C. Section 1324c, and 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 requested the statutory minimum amount of $250 for each of the two (2) violations, and after carefully reviewing the record, it is found that complainant has appropriately recommended those penalty amounts.

Accordingly, respondent is ordered to pay civil money penalties totaling $500, or $250 for each of the two (2) violations alleged in Count I.

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

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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.