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. 95C00006
CRISTINA GALEAS, Respondent.	)	

FINAL DECISION AND ORDER
GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION
(August 8, 1995)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Weldon S. Caldbeck, Esq., for Complainant
Daniel M. Kowalski, Esq., for Respondent

I. *Procedural History*

On January 13, 1995, the Immigration and Naturalization Service (INS or Complainant) filed a Complaint in the Office of the Chief Administrative Hearing Officer (OCAHO). INS asserts that Cristina Galeas (Galeas or Respondent) violated section 274C of the Immigration and Naturalization Act (INA), as amended, 8 U.S.C. § 1324c. Specifically, this single count Complaint alleges that Galeas knowingly used, attempted to use, possessed, obtained, accepted, and received a Form I-688B Employment Authorization Document for the purpose of satisfying a requirement of the INA. The filing of the Complaint followed service on June 13, 1994 of an underlying INS Notice of Intent to Fine (NIF), and a June 22, 1994 request for a hearing for Respondent by counsel. The allegations of the Complaint exactly track those of the NIF. INS asks a civil money penalty of $250, the statutory minimum at which a penalty can be adjudicated.

On January 30, 1995, Respondent timely filed an Answer to the Complaint, stating that "[c]ounsel does not have and is unable to obtain sufficient information to admit or deny the allegations" but that "[t]he charge is denied." Answer at 1. In addition, Respondent asserts that since Respondent "is subject to immediate arrest, detention and deportation . . .[,] the current proceedings would appear to be moot, given that a final order under Sec. 274C would not make respondent any more deportable than she already is." Id. at 1-2.

On February 21, 1995, Complainant filed a Reply to the Answer, arguing that "Respondent's deportability, and the fact she has been found deportable, has nothing to do with the allegations of this case. The distinction between the two cases has been recognized in United States of America v. Oscar Eduardo Villatoro-Guzman, 3 OCAHO 540, (7/22/93) at p. 23." Reply at 1.

In light of this exchange between the parties, by Order dated March 16, 1995 I invited them to focus in subsequent pleadings on the issue of whether Respondent's deportation renders this proceeding a nullity.

On July 3, 1995, Complainant filed a Motion for Summary Decision (Complainant's Motion). A Response was filed by Respondent on July 17, 1995 which included a Motion to Withdraw as counsel of record for Respondent. Those pleadings, in effect, respond to the invitation by the bench.

II. *Discussion*

A. Respondent's Motion to Withdraw

Respondent's counsel asserts that it is appropriate that he withdraw as counsel because "there has been no communication between attorney and client since March 1, 1995, and . . . counsel does not have her address or telephone number, if any, in Honduras. . . ." Response at 4. Counsel adds that he "does not know and has no way of ascertaining her wishes and can only guess at what would be in her best interests." Id.

OCAHO rules of practice and procedure make clear that withdrawal is subject to judicial scrutiny, and that the judge is empowered to grant

or deny a request to withdraw. See 28 C.F.R. § 68.33(c).[1] Although "OCAHO rules are silent as to the factors to consider in determining whether to exercise judicial discretion by granting an attorney's motion to withdraw from representation, . . . it is settled OCAHO case law that counsel are required to remain in proceedings, at least where service of process on the principals is ineffective or otherwise frustrated." United States v. Flores-Martinez, 5 OCAHO 647 at 3 (1995) (Order) (citing and comparing United States v. Primera Enterprises, Inc., OCAHO Case No. 93A00024 (1994) (unpublished) (Order Denying Respondent's Counsel's Motion to Withdraw), United States v. K & M Fashions, 3 OCAHO 411 (1992), United States v. NuLook Cleaners of Pembroke Pines, 1 OCAHO 284 (1991) with United States v. Pembroke Pines, 1 OCAHO 284 (1991), United States v. I.K.K. Associates, 1 OCAHO 131 (1990)). See also Flores Martinez, 5 OCAHO 682 (1995) (Order Denying Motion of Counsel to Withdraw). Accordingly, for the reason that only through continued participation by counsel can the niceties of service of process be satisfied, the Motion to Withdraw is denied.

B. Complainant's Motion for Summary Decision

OCAHO Rules authorize the administrative law judge (ALJ) to "enter summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that party is entitled to summary decision." 28 C.F.R. § 68.38(c). A fact is material if it might affect the outcome of the case. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). In demonstrating that there is an absence of evidence to support the non-moving party's case, the movant bears the initial burden of proof.

In determining whether the movant has met its burden of proof, all evidence and inferences to be drawn therefrom are to be viewed in a light most favorable to the non-moving party. Matsushita Elec. Indus. Corp. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The burden of production then shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. United States v. Davis Nursery, Inc., 4 OCAHO 694 at 8 (1994) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323-25 (1985)). Failure to meet this burden invites summary decision in the moving party's favor. Respondent's Response to the Motion for Summary Decision asserts arguments in opposition

[1] See generally Rules of Practice and Procedure for Administrative Hearings (Rules), 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].

to Complainant's Motion, but sets forth no specific facts to rebut Complainant's documentary exhibits to its Motion.

1. The Claim that the Motion for Summary Decision Is Out of Time

During the second prehearing conference, the parties stated that they were unable to negotiate a settlement. Consequently, the Report and Order memorializing the conference reflected that "Counsel for Complainant undertook file [sic] a Motion for Summary Decision on or before June 30, 1995; counsel for Respondent will file a response on or before July 17, 1995." Complainant's Motion, filed July 3, 1995, certifies service on Respondent, by counsel, on July 1, 1995. Respondent argues that because the Motion was mailed and received subsequent to June 30, 1995, it should be dismissed as untimely.

I reject Respondent's argument. I do not understand the June 30, 1995 date for filing a Motion for Summary Decision as a deadline in the sense that mandatory dates in lawsuits need to be strictly viewed. June 30 was a date suggested by the parties as a date to expect Complainant's Motion; I did not mandate that a motion must be filed by that date. Moreover, there is no suggestion of prejudice to Respondent by the delay between the anticipated and the actual date of filing of the Motion for Summary Decision.

2. Respondent's Argument that Complainant Failed to Address Remedy Sought

Respondent argues that Complainant's Motion should be denied and the "case should be declared moot and ordered terminated" because Complainant fails to articulate a remedy in the event Respondent is found liable under § 274C and therefore deportable. Response at 2-3. This is so, according to Respondent, because Galeas has already been found deportable in a previous hearing before an immigration judge and "any money judgement or fine would be impossible to execute or collect, unless the INS wishes to pursue her in Honduras." Id. at 2.

Respondent's argument that Complainant failed to address the issue of what remedy will be obtained is incorrect. As Complainant states in both its Motion and the Reply to the Answer, Complainant asks for a finding that Respondent committed document fraud. The fact that Complainant may in effect be left empty-handed by such a ruling because (1) a § 274C respondent has already been deported and/or (2) INS will have difficulty collecting any civil money penalty adjudicated does not alter the allegation of document fraud or the consequences

which ensue from a finding of such a violation of law. In addition, I am unaware of any authority, statutory or otherwise, for Respondent's argument that difficulty in the execution of a judgment requires that the case be dismissed.

Finally, I am persuaded by Complainant's argument that "[t]he specific purpose expressed by Congress in enacting § 1324c was not to create a deportable offense, but to address specific concerns over to [sic] use of fraudulent documents to gain employment and thus circumvent the employer verification requirements found at 8 U.S.C. § 1324a." Motion at 10. That a § 1324c judgment may also lead to deportation is another consequence. See Daniel Levy, A Practitioner's Guide to Section 274C: Part One, 94-6 IMMIGR. BRIEFINGS 1 (1994) (stating that "[s]ection 274C proceedings have two distinct aims. The first is which civil penalties (in the form of monetary fines and cease and desist orders) are imposed upon individuals who engage in the enumerated forms of document fraud. The second aim of these proceedings is found in the exclusion and deportation sections of the INA, which provide that any person who is subject to a final order under INA § 274C is excludable and deportable").

3. Respondent's Due Process Arguments

Respondent argues that the evidence submitted by Complainant in support of its Motion, specifically, evidence of Respondent's attempt to obtain an extension of work authorization, is inadmissible. INS provides affidavits of both the immigration examiner who processed Respondent's employment authorization renewal application and who confiscated the I-688b form and the INS agent who investigated the examiner's report and characterized the I-688b as "suspicious." Respondent argues that, since the "[u]se of a fake EAD [i.e. an employment authorization card which Respondent sought to renew] could be a violation of 18 U.S.C. 1546(a), a federal felony carrying a 10-year sentence . . . [and] could trigger criminal liability under other federal criminal statutes as well," Respondent should have been "Mirandized" or, in other words, advised of her constitutional rights to an attorney and to remain silent.[2] Response at 2.

It is well settled that constitutional claims such as Respondent asserts, including Miranda-type warning against self-incrimination and the right to an attorney, are applicable to criminal, but not civil proceedings like § 274C. See, e.g., United States v. Marion, 404 U.S.

[2] See Miranda v. Arizona, 384 U.S. 436 (1966).

307 (1971) (the sixth Amendment speedy trial guarantee applies only after a person has been accused of a crime); INS v. Lopez-Mendez, 468 U.S. 1032, 1038 (1984) ("[a] deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry, though entering or remaining unlawfully in this country is itself a crime . . . [and] [c]onsistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing"); Flores v. Meese, 934 F.2d 991, 1012-13 (9th Cir. 1990) ("[e]xamples of criminal trial protections that do not apply in deportation proceedings include the quantum of proof, the need of Miranda warnings before a voluntary statement is given by the respondent, the ex post facto clause; and the inadmissibility of involuntary confessions"). The principle illustrated by these cases defeats Respondent's claim that because the interview with the INS examiner could have resulted in a criminal prosecution, Miranda warnings should have been given. I am unaware of any such requirement.

Respondent makes a second due process argument that "[o]rdering a hearing in this factual context would be unfair and impractical." I take this statement to mean that because Respondent has been deported, scheduling a hearing would deprive her of procedural due process. This argument is unavailing. Deportation and § 1324c civil penalty cases implicate separate procedures. The fact that a respondent is no longer present in the United States, while a complicating factor logistically, does not require dismissal. Voluntary departure does not bar a § 1324c proceeding. Flores-Martinez, 5 OCAHO 733. Accord United States v. Chavez-Ramirez, 5 OCAHO 774 at 3 (1995) (striking affirmative defense that due process is denied where § 1324c respondent takes voluntary departure). See also United States v. Thoronka, 5 OCAHO 725 at 4 (1995) (INS is not barred from prosecuting a § 1251 adjustment of status proceeding). I have not been provided with citations to any authority which suggest or compel me to stay my hand in this case. Accordingly, this case holds that a final order of deportation is not a bar to a § 1324c proceeding.

4. Summary Decision Granted

In support of its Summary Decision Motion, Complainant attaches several exhibits. One, an affidavit of an analyst at the INS forensic document laboratory (FDL), states that the employment eligibility document used by Respondent is counterfeit. Complainant also states that after Respondent relinquished the document to the INS examiner, she immediately "exclaimed, "oh no, not that card!" . . . [and] admitted

. . . that the card was false and obtained from an unknown vendor in Los Angeles. . . ." Motion at 8 (citing Exh. 5). Furthermore, Complainant alleges that Respondent, when asked to explain the document, stated that "she obtained it in order to be able to gain employment . . . [and] [i]n fact, she indicated that she attempted to use it on one occasion when she had applied for employment. Id. at 9.

The Response to the Motion for Summary Decision does not counter the exhibits proffered by Complainant by any showing of inaccuracy. Indeed, other than argumentation, the Response fails to address Complainant's Motion.[3] It is evident from the evidence submitted that there is no substantial dispute of material fact to warrant a confrontational evidentiary hearing. I find Complainant's exhibits persuasive proof that Respondent knowingly obtained and used a fraudulent employment eligibility document in violation of § 1324c. Accordingly, Complainant's Motion for Summary Decision is granted. If a hearing were necessary, INS proposes to "facilitate Respondent's appearance by paroling her into the country for that purpose." Motion at 13. As in Flores-Martinez, 5 OCAHO 698 at 4, while I may question the use of public resources to maintain a § 1324c case which pursues the alien who has departed the country, that is a policy determination outside my responsibility.

5. Civil Money Penalty

Although there are OCAHO cases in which the ALJ, granting a dispositive motion in favor of liability, severs the issue of civil money penalty for a separate inquiry, that separate inquiry is not necessary where Respondent is on notice that a pending motion addresses the issue of civil money penalty as well as liability. See United States v. Fox, 5 OCAHO 756 at 3 (1995); United States v. Raygoza, 5 OCAHO 729 at 3 (1995) (discussing United States v. Martinez, 2 OCAHO 360 (1991), vacated and remanded in part, Martinez v. I.N.S., 959 F.2d 968 (5th Cir. 1992) (unpublished)).

Complainant's Motion explicitly implicates and addresses both liability and the civil money penalty. As Respondent has been found in violation of § 1324c, and Complainant asks the statutory minimum

[3] See Flores-Martinez, 5 OCAHO 733 at 4-5 (finding that where "Respondent submits no documentary evidence in support of her denials, nor does she include affidavits, documents or witnesses' statements as contemplated by 28 C.F.R. §§ 68.38(a) and (b) . . . Respondent's Response is insufficient to avoid the Motion for Summary Decision").

only,[4] I find a civil money penalty in the amount of $250 to be a reasonable and just sum to levy against Respondent.

III. *Ultimate Findings, Conclusions and Order*

I have considered the Complaint, Answer, motions and accompanying documentary materials submitted by the parties. All motions and other requests not previously disposed of are denied. Accordingly, as previously found and more fully explained above, I determine and conclude the following:

1. Respondent's Motion to Withdraw as counsel of record is denied;

2. Complainant's Motion for Summary Decision is granted;

a. Respondent has provided only mere allegations and denials in the Response to Complainant's Motion for Summary Decision which are insufficient to overcome Complainant's Motion for Summary Decision under 28 C.F.R. §§ 68.38(a) and (b);

b. upon considering the documentary evidence submitted, I am unpersuaded that there is a genuine issue as to any material fact and, therefore, Complainant's Motion for Summary Decision is granted;

3. Respondent used, possessed, obtained, accepted, received, or provided the forged, counterfeited, altered or falsely made document listed in the Complain for the purpose of satisfying a requirement of the INA, in violation of § 274C(a)(2) of the INA, 8 U.S.C. § 1324c(a)(2);

4. it is appropriate and just that Respondent pay a civil money penalty at the statutory minimum in the amount of $250;

5. that Respondent shall cease and desist from violation of § 274C(a)(2) of the INA, 8 U.S.C. § 1324c(a)(2).

This Final Decision and Order Granting Complainant's Motion for Summary Decision "shall become the final agency decision and order of the Attorney general unless, within 30 days, the Attorney General modifies or vacates the decision and order, in which case the decision and order of the Attorney General shall become a final order. . . ." 8 U.S.C. § 1324c(d)(4).

"A person or entity adversely affected by a final order under this section may, within 45 days after the date the final order is issued, file a petition in the Court of Appeals for the appropriate circuit for review of the order." 8 U.S.C. § 1324c(d)(5).

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[4] See 8 U.S.C. § 1324c(d)(3).

SO ORDERED.

Dated and entered this 8th day of August, 1995

MARVIN H. MORSE
Administrative Law Judge