

6 OCAHO 833

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

February 6, 1996

UNITED STATES OF AMERICA,)
Complainant,)
)
v.) 8 U.S.C. §1324c Proceeding
) OCAHO Case No. 95C00110
SURINDER KUMAR,)
A/K/A AMRIK SINGH,)
Respondent.)
_____)

ERRATA

The Order issued on February 5, 1996 entitled Decision and Order is hereby corrected in the following manner: the third line in footnote 4 on page 2 which recites that the time period for response is extended by two days is corrected to read "the time period for response is extended by five days".

SO ORDERED.

Dated and entered this 6th day of February, 1996.

ELLEN K. THOMAS
Administrative Law Judge

6 OCAHO 833

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DECISION AND ORDER

Procedural History

This case¹ arises under Section 274C of the Immigration and Nationality Act (INA), 8 U.S.C. §1324c, enacted by the Immigration Act of 1990, Pub. L. No. 101-649 (1990). On July 6, 1995, the United States Department of Justice Immigration and Naturalization Service (INS or Complainant) filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) alleging that Surinder Kumar, a/k/a Amrik Singh (Kumar or Respondent) committed document fraud in violation of §1324c. The underlying Notice of Intent to Fine issued by INS on October 7, 1994, is attached to the Complaint as Exhibit A.

On July 12, 1995, OCAHO issued a Notice of Hearing and transmitted to the Respondent copies of the Complaint and of the applicable rules of practice and procedure.² The Complaint consists of a single count alleging one violation of §1324c(a)(2), that the respondent knowingly used and possessed a forged, counterfeited, altered and

¹This case was originally assigned to Administrative Law Judge (ALJ) McGuire; it was reassigned to me on October 2, 1995.

² Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. §68 (1995).

6 OCAHO 833

falsely made Alien Registration Receipt Card (INS Form 551, numbered A091 536 148) after November 29, 1990, in order to satisfy a requirement of the Immigration and Nationality Act. The Complainant sought an order to Kumar to pay a statutory minimum civil monetary penalty of \$250.00 and to cease and desist violating §1324c.

On September 12, 1995, INS filed a Motion for Default Judgment. Kumar thereafter engaged counsel and was given leave to file a late answer, which he did on October 27, 1995. On November 9, 1995, a telephonic pre-hearing conference was held at which time leave was given Kumar (with no objection from opposing counsel) to amend the Answer *instanter* to include in paragraph 2 the denial of paragraphs C and D of count I in the Complaint as to the allegation of knowing use and possession of the document in question. Respondent was given 30 days to seek discovery; complainant indicated it had no need for discovery.

The Answer implicitly admits jurisdiction and the status of the parties, as well as the fact that Kumar used and possessed a forged, counterfeited, altered, or falsely made document for the purposes of satisfying a requirement of the INA³; it denies, however, that such possession and use was knowing. It asserts that Respondent Kumar did not know until apprised by the INS that the document was not authentic, and states further that some false I-551s were made by an unnamed immigration official.

On November 15, 1995, INS filed a Motion for Summary Decision together with the Affidavit of Thomas G. Madden, Patrol Agent in Charge of the Livermore, California Station of the U.S. Border Patrol (Exhibit C), and copies of a Form I-213, Record of Deportable Alien (Exhibit A), the Alien Registration Receipt Card in issue (Exhibit B), and the INS Central Index System Printout for A091 536 148 dated November 8, 1995 (Exhibit D). There has been no response to this motion either by way of opposition or by way of objection to the tendered evidentiary materials. No extension of time was requested to make a response, thus the due date for filing a timely response has long since lapsed and the motion is ripe for ruling.⁴

³ 28 C.F.R. §68.9 (c)(1) provides that allegations not denied are deemed to be admitted.

⁴ 28 C.F.R. §68.38(a) provides that an opposing party has ten days in which to file a response; §68 (c)(2) provides that when a pleading is served by ordinary mail, the time period for response is extended by two days.

6 OCAHO 833

The Standards for Summary Decision

The rules of practice and procedure authorize an administrative law judge to enter a summary decision 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 a party is entitled to a summary decision, 28 C.F.R. §68.38(c). This rule is based upon Rule 56(c) of the Federal Rules of Civil Procedure which governs summary judgments in the federal district courts. Accordingly, it is appropriate to consider federal case law in allocating the burdens of production and proof and in evaluating whether the standards have been satisfied.

An issue of 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). It is material only if, under governing law, it might affect the outcome of the proceeding, *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). In determining whether there is a genuine issue of material fact, all facts and reasonable inferences are to be viewed in the light most favorable to the non-moving party. *Matsushita*, 475 U.S. at 587. Once the movant has carried its burden however, the opposing party may not rest upon the mere denial in the pleading, but must come forward with specific facts showing that there is a genuine issue for trial. 28 C.F.R. §68.38(b). Questions as to a state of mind, e.g. whether someone knew or should have known a particular fact, are generally inappropriate for summary decision, but where such a state of mind is substantially undisputed, so that the record is devoid of facts and circumstances to rebut the movant's version, summary decision may issue if the evidence is such as would entitle the moving party to a directed verdict at trial. Where contradictory inferences may be drawn from facts, however, no summary decision may issue even if the facts are undisputed, *Fonda v. Gray*, 707 F.2d 435, 438 (9th Cir. 1983).

It is the initial responsibility of the moving party to point to evidence which, if uncontradicted, would entitle it to a directed verdict at trial, thus it is the applicable substantive law which identifies the material facts. Here, in order to prove a violation of §1324c(a)(2), the Complainant has the burden of showing:

- 1) the respondent used, attempted to use, possessed, obtained, accepted, or received or provided the forged, counterfeit, altered, or falsely made document(s),

6 OCAHO 833

- 2) knowing the documents to be forged, counterfeit, altered, or falsely made,
- 3) after November 29, 1990,
- 4) for the purposes of satisfying any requirement of the INA.

The single issue put in dispute by the initial pleadings in this case is the issue of knowledge, inasmuch as respondent did not expressly deny allegations that he is a citizen and national of India, or that he used and possessed a forged, counterfeited, altered, or falsely made I-551 in order to satisfy the INA. Rather, the answer states only that Respondent did not knowingly perform these acts.

Evidence Considered

In addition to the Affidavit and accompanying materials submitted by complainant INS, the record also includes the Complaint, the Answer, the Interrogatories posed by Respondent Kumar, and the responses thereto submitted by complainant.⁵

A. The Pleadings

The complaint alleges that the Respondent, on or after November 29, 1990, used and possessed a forged, counterfeited, altered, and falsely made I-551, number A091 536 148, knowing the same to be forged, counterfeited, altered, and falsely made, in order to satisfy a requirement of the INA. Respondent's Answer states that the Complaint fails on the ground that such possession and use was not knowing, and further asserts:

In what has become a notorious incident of inside corruption within the Immigration and Naturalization Service in that region of the country in 1992, an immigration official misappropriated his authority to make I-551s for unwitting individuals who believed that the method of obtaining these I-551s was legitimate and standard. Thus it is respondent's conviction that he did not know that he used and possessed such forged, counterfeited, altered and falsely made document until the Immigration and Naturalization Service asked him for his document and apprised him of its lack of authenticity.

The Answer, as is customary, is signed by Respondent's counsel, not by Respondent. It is not verified.

⁵ Contrary to 28 C.F.R. §68.6(b), both the interrogatories and the responses were filed with the Administrative Law Judge; I have accordingly made them part of the record for purposes of this motion.

6 OCAHO 833

B. Affidavit and Exhibits

The Affidavit of Thomas G. Madden states under oath that the affiant in October 1994 was the agent in charge of the Livermore Station, Dublin, California, and that on the morning of October 7, 1994, he and Agent Paul Demers accompanied Union City police to a residence where Union City police believed there might be illegal aliens. Affiant states that he identified himself to Kumar and asked him for documentation, and that Kumar produced an Alien Registration Receipt Card (Exhibit B) which Agent Madden immediately suspected to be counterfeit. Affiant states that he then contacted the Border Patrol dispatcher to run a Central Index System (CIS) record check on alien registration number A091 536 148, and that record check revealed the number to be assigned to Manuel Sanchez, male, a citizen and national of Mexico (Exhibit D). Also accompanying the Madden affidavit is Exhibit A, an INS Form I-213, Record of Deportable Alien, completed by Senior Patrol Agent Demers, which reports details of the further investigation performed, including various conflicting statements made by Respondent over several hours of questioning, and summaries of contacts with the German Consulate in San Francisco and with Hayward Fishery and Restaurant, where Respondent was allegedly employed as a cook.

According to the report, the owner of Hayward Fishery indicated that Kumar began work in February 1991 under the name Amrik Singh with a different I-551 numbered A29 458 071, but in February 1992, he presented new INS documents with the name Surinder Kumar, and the number A091 536 148. A new form I-9 was then completed in the name of Kumar. The report also includes several admissions allegedly made by Kumar, including a statement that he originally had paid \$80.00 in order to use the I-551 of Amrik Singh in 1991 to obtain employment with Hayward Fishery. He made several conflicting statements about his acquisition of Alien Registration Receipt Card A091 536 148 at different points in the questioning, saying that he paid \$5000.00, \$4,500.00, or \$500.00 for it at an Indian store in Stockton, the name of which he was unwilling to disclose. He said he was led to believe he had completed the necessary applications for legal immigrant status. At various times he indicated the document was purchased four years ago, five years ago, and "in 12-91". At times he refused to answer questions at all. He also gave conflicting statements as when and how he entered the country.

C. Interrogatories and Answers

Kumar's interrogatories are chiefly directed to the physical features of the I-551 document itself. They ask whether it is possible that except for Kumar's name, the document itself could be genuine, specific details as to these features, and whether a translator assisted in the communications between Kumar and the INS. Specifically, the answers state that Kumar communicated clearly in English, and that the specific defects in the alien registration receipt card were such that any trained agent would identify it as counterfeit because the color of the INS seal on the front was wrong, the color of the blue background on the reverse was wrong, the printed departmental identification on the front was the wrong size and typeface, and the map boundary lines on the reverse were oversized. Further, Madden states that he is qualified to testify that the card was not a genuine INS "blank" obtained from the INS alien registration card production facility.

Admissibility of the Evidence

In administrative proceedings, the strict technical rules of evidence are somewhat relaxed. 5 U.S.C. §556(d) excludes only evidence which is irrelevant, immaterial, or unduly repetitious. Thus if the evidence is reliable, probative, and substantial, it will generally be admitted.

In any event, if a party fails to object or move to strike submitted evidence, that failure ordinarily constitutes a waiver of any objection, *Casus Office Machs. v. Mita Copystar Am., Inc.*, 42 F.3d 668 (1st Cir. 1994). Nevertheless, and notwithstanding any failure to object to the evidentiary submissions, §68.38(b) requires that any affidavit shall "show affirmatively that the affiant is competent to testify to the matters stated therein" and shall "set forth such facts as would be admissible in evidence in a proceeding subject to 5 U.S.C. 556 and 557" in order to support a motion for summary decision.

A summary decision, in other words, is not a penalty to be imposed for the failure of the nonmoving party to respond to a motion. Only if the evidentiary materials demonstrate by uncontradicted admissible evidence that the moving party would be entitled to judgment as a matter of law does the burden of production shift to the non-movant to set forth—by affidavit or otherwise—specific facts showing that there is a genuine issue. Assessing whether the

6 OCAHO 833

movant has met this burden requires that the evidence be construed in the light most favorable to the non-movant, but only reasonable inferences need to be drawn.

Examining the Madden affidavit in light of these standards, it sets forth facts which are clearly within the affiant's personal knowledge, stating that on the morning of October 7, 1994⁶, he and Agent Paul Demers accompanied Union City police to a residence where he had a conversation in English with the Respondent Kumar, who identified himself as a native of India and presented Alien Registration Receipt Card A 091 536 148, of which Exhibit B is a copy, as his own. Madden states his suspicions respecting the authenticity of the card were based on the physical feel of the laminate and "certain security features" of the document. As a Border Patrol Agent for 17 years, Madden has the expertise to make such an assessment.

The Affidavit goes on to recite that Madden contacted the dispatcher to run a CIS record check. Exhibit D is a copy of a CIS record showing alien registration number A091 536 148 to be assigned to a Mexican national named Manuel Sanchez. Madden further states that when he informed Kumar that the card number was not assigned to him, Kumar confessed that the card was a counterfeit which he had purchased from a document vendor in Stockton, California. At this point, Agent Madden states that he arrested Kumar and transported him to the Livermore Station.

Accompanying the affidavit as Exhibit A is an INS Form I-213, Record of Deportable Alien, dated October 7, 1994, which does not bear the signature of Agent Madden. It is, however, signed by Agent Demers who is identified in the Affidavit as having accompanied Madden to Union City. It details additional investigative steps subsequent to Kumar's arrest, evidently taken by Demers, but does not indicate Agent Madden's participation, if any, in the follow-up investigation.

Interrogatory answers bear the signature of Agent Madden. Though made under oath, their form is defective in that they recite that they are made "to the best of my knowledge and belief" rather

⁶ There is some confusion in the record as to whether the arrest was made on October 6 or October 7, 1994. Agent Madden's affidavit states it was on the 7th while the Form I-213 indicates it was the 6th.

than that they are made on personal knowledge. Nevertheless, in examining these answers together with the Madden affidavit, it is clear that Madden is competent to testify to the matters stated therein; indeed, the Interrogatory Answers simply explain further details of the matters covered in the affidavit.

With respect to Form I-213 (Exhibit A), there are two distinct questions. First, the Madden affidavit makes no reference to it, thus in the strictest sense, it may not be properly authenticated. Second, there is a question as to whether the information contained in the document (as opposed to the document itself) is such as would be admissible under 5 U.S.C. 556 and 557 as required by 28 U.S.C. §68.38(b). In other words, taking the declaration in the I-213 to be the testimony which Agent Demers would give if he were in court testifying, the question is whether the evidence would be admissible as part of his testimony.

OCAHO cases have generally held I-213 forms admissible while not necessarily affording them great weight or credibility. In *United States v. Mester Mfg. Co.*, 1 OCAHO 18 (1988), the Administrative Law Judge held “a substantial portion, though not all” of an I-213 admissible noting, however, with respect to INS forms, that they were often “at the margin of trustworthiness for evidentiary purposes” 1 OCAHO 18, 79 n.20⁷, *cf. United States v. Villegas-Valenzuela*, 5 OCAHO 784 at 9 (1995), *United States v. Jenkins*, 5 OCAHO 743 at 7 (1995), *United States v. China Wok Restaurant, Inc.*, 4 OCAHO 608 at 11 (1994), *United States v. Mr. Z. Enters.*, 1 OCAHO 288, 1890-91 (1991), *United States v. Y.E.S. Indus.*, 1 OCAHO 198, 1316-1317 (1990). The Ninth Circuit has long held I-213 forms to be admissible in deportation hearings⁸ in which the burden of proof is by clear and convincing evidence rather than, as here, a mere preponderance of the evidence. See, e.g., *Espinosa v. INS*, 45 F.3d 308 (9th Cir. 1995), *Calhoun v. Bailar*, 626 F.2d 145 (9th Cir. 1980), *Trias-Hernandez v. INS*, 528 F.2d 366 (9th Cir. 1975). The test applied in those proceedings is whether

⁷ Citations to OCAHO precedents reprinted in the bound Volume 1, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States*, reflect consecutive pagination within that bound volume; pinpoint citations to Volume 1 are to the specific pages, seriatim, of the *entire* volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 1, however, are to pages within the original issuances.

⁸ It should be noted however, that deportation hearings are not subject to the APA.

6 OCAHO 833

the hearsay statement is “probative” and whether its admission is “fundamentally fair,” *Cunanan v. INS*, 856 F.2d 1373, 1374 (9th Cir. 1988), *Baliza v. INS*, 709 F.2d 1231, 1233 (9th Cir. 1983), *Bachelier v. INS*, 625 F.2d 902, 904 (9th Cir.1980). Generally speaking, these cases demonstrate that under circumstances where the alien has had no notice of the hearsay statement or no reasonable opportunity to confront the declarant, the objection to its omission will be sustained.

In this case, the I-213 is a report of findings of an investigation made pursuant to authority granted by law, completed contemporaneously with the investigation, by one of the agents who conducted the investigation; it appears to have been prepared in accordance with normal record keeping requirements and demonstrates substantial indicia of reliability. The only inconsistencies are those created by Respondent’s shifting explanations of the circumstances under which he entered the country and under which he purchased the I-551. Most importantly, Respondent has such a relationship to the proffered material that he is most likely to know the facts as to both its accuracy and its genuineness and yet has made no objection to it. If he did not make the admissions contained in the I-213, he was free to challenge all or part of it, yet did not do so. Particularly with respect to his own admissions, I have given substantial weight to this evidence.

The Burden of Production

The Complainant bears the burden of proof at all times in this case. As there is in the record uncontradicted evidence of each element of its prima facie case, INS would thus be entitled to a directed verdict at trial absent some evidence tending to show some contradiction of its version of events to be possible. While I must draw every reasonable inference in favor of the non-movant, it must be recognized that inferences are not drawn from the air, and it is the opposing party’s obligation to produce a factual predicate from which the inference may be drawn, *Bhan v. N.M.E. Hosps., Inc.* 669 F. Supp. 998, (E.D. Cal. 1987), citing *Richards v. Neilson Freight Lines*, 602 F. Supp. 1224, 1244 (E.D. Cal. 1985), *aff’d* 810 F.2d 898 (9th Cir. 1987). At this point, it is up to the Respondent to put forth his evidence, if any. The present record lacks evidence of facts and circumstances from which it could be reasonably be inferred that Kumar could have believed the document he purchased at a store in

Stockton was a genuine one. What separates this case from those in which courts have been reluctant to grant summary decisions involving issues of knowledge or state of mind is the nonmoving party's own admissions. By their very nature, these admissions have considerable probative value, *Friedel v. City of Madison*, 832 F.2d 965, 974 n.7 (7th Cir. 1987), particularly in light of his nonresponse to Complainant's evidence.

A party resisting summary decision may not rest on the mere allegations in the pleadings, *Posey v. Skyline Corp.*, 702 F.2d 102 (7th Cir. 1983), *cert. denied* 464 U.S. 960 (1983), but must set forth specific facts or circumstances which would permit a reasonable fact finder to find in his favor or at least to draw some inference in his favor. He has not done so. While asserting in the Answer that the complaint fails as to knowing possession may suffice as a denial in a responsive pleading, it is inadequate to raise a genuine issue of fact in the face of Complainant's affidavit and exhibits. An unsworn pleading signed by an attorney is not sufficient to contest factual matter in an affidavit. There must be some competent evidence, by way of counter-affidavit or other evidentiary material which would indicate that an issue of fact remains. The assertion that some unidentified INS employee allegedly made I-551s for unwitting individuals similarly raises no factual issue. It is unclear whether by this assertion the Respondent intends to argue estoppel, entrapment, or some other affirmative defense based upon the alleged conduct of an unidentified INS employee in 1992. In any event, the paragraph fails to raise a material issue. First, if it does attempt to set forth a defense, it fails to comply with §68.9(c)(2) in that it does not set forth a statement of the facts which support it. Second, it nowhere alleges that Respondent believes that he obtained the document in question from or had any connection whatever with the alleged unidentified INS agent. Third, the unsworn conclusory statement of counsel in a pleading that it "is respondent's conviction that he did not know that he used and possessed such forged, counterfeited, altered or falsely made document" is not evidence. An attorney's expression of opinion about his client's former state of mind raises no issue. The burden was effectively shifted to Kumar to put forth some evidence from which a rational fact finder could find in his favor, and he has failed to do so.

Complainant's motion must therefore be granted based on uncontroverted evidence that Respondent Kumar purchased a fraudulent Alien Registration Receipt Card for an undisclosed price from a doc-

6 OCAHO 833

ument vendor in Stockton, California subsequent to November 29, 1990 and that he knowingly submitted the fraudulent card to Hayward Fishery in February 1992 for the purpose of showing identity and eligibility to work.⁹

Civil Money Penalty

8 U.S.C. §1324c(d)(3) provides penalties for a first offense violation consisting of a cease and desist order and a civil money penalty not less than \$250.00 and not more than \$2000.00. No criteria for mitigation or aggravation are set forth.

The Complainant here has requested the statutory minimum and I find that to be reasonable.

Findings, Conclusions, and Order

I have considered the record as a whole, including the Complaint, Answer, Interrogatories and Responses, Motion, and accompanying documentary materials. As is more fully set forth above, I determine and conclude that:

1. There is no genuine issue as to any material fact and the Complainant's Motion for Summary Decision is granted;
2. Respondent, after November 29, 1990, possessed, used, and attempted to use a forged document 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);
3. Respondent shall pay a civil money penalty in minimum statutory amount of \$250.00.
4. Respondent shall cease and desist from violating 8 U.S.C. §1324-(c)(a)(2).

SO ORDERED.

Entered and dated this fifth day of February, 1996.

ELLEN K. THOMAS
Administrative Law Judge

⁹ Kumar evidently also admitted using another I-551 document in the name of Amrik Singh to obtain employment in 1991 in the first instance; that use is not charged in this complaint, and I make no findings respecting it.

6 OCAHO 824

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.