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

September 5, 1996

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324c Proceeding
	)	OCAHO Case No. 95C00070
NICOLAS TINOCO-MEDINA, Respondent.	)	

ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION

I. *Background*

On April 17, 1995, the United States Department of Justice Immigration and Naturalization Service (INS or complainant) commenced this action, which 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), by having filed a Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO). In that Complaint, it was alleged that Nicolas Tinoco-Medina (Tinoco-Medina or respondent) committed document fraud in violation of §1324c. The underlying Notice of Intent to Fine, issued by INS on May 11, 1994, was attached to the Complaint as Exhibit A.

On April 18, 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.[1] The Complaint consists of a single Count alleging one violation of §1324c(a)(2), that the respondent

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

knowingly used and possessed a forged, counterfeited, altered and falsely made alien registration receipt card (INS Form I–151, numbered A34 567 897) issued in the name of Jorge V. Rodriguez, and did so after November 29, 1990, for the purpose of satisfying a requirement of the Immigration and Nationality Act. For that single violation, complainant requested a civil money penalty of $800 and an order to cease and desist from violating §1324c.

On August 28, 1995, respondent filed an answer in which he admitted the jurisdiction of this Office and also admitted that the Attorney General is charged by law with investigating and prosecuting charges concerning civil document fraud, but denied the allegation that he is a Mexican citizen; and further denied the remainder of complainant's substantive allegations of civil document fraud.

On September 6, 1995, complainant filed a pleading captioned Motion to Amend Complaint, requesting that the words "by certified mail" be stricken from paragraph 2 of the "Jurisdiction" section of the Complaint, and replaced with the phrase "by personal service." That amendment was allowed.

On January 11, 1995, complainant filed a pleading captioned Motion for Summary Decision. Complainant has relied on the following evidence to support that motion: Form I–213, Record of Deportable Alien (Exhibit A); Affidavit of INS Special Agent Timothy A. Isenhart, sworn to under oath on December 11, 1994 (Exhibit B); San Mateo County Sheriff's Office Crime Report (Exhibit C); San Mateo County Sheriff's Office Arrest Report (Exhibit D); Record of Sworn Statement given by Tinoco-Medina, dated April 19, 1994 (Exhibit E); Notice of Inspection, dated April 20, 1994 (Exhibit F); Affidavit of INS Special Agent Dan Kimball, sworn to under oath on December 11, 1994 (Exhibit G); Employment Eligibility Verification Form I–9 (Form I–9), dated August 18, 1991 (Exhibit H); Safeway Employment Application, dated August 1, 1991 (Exhibit I); Form 214–S Consent to Search Premises, dated April 22, 1994 (Exhibit J); Form I–151, Alien Registration Receipt Card, bearing the name "Rodriguez=V, Jorge" and number A34 567 897 (Exhibit K); Record of Sworn Statement given by Dennis E. Robison, dated April 22, 1994 (Exhibit L); San Mateo County Record of Conviction for Tinoco-Medina (Exhibit M); Letter dated April 14, 1995, from Lurline A. Trizna, INS Forensic Document Analyst, to Special Agent Timothy A. Isenhart (Exhibit N); and INS Central Index System (CIS) Printout regarding Alien

Registration Receipt Card numbered A34 567 897, dated April 14, 1995 (Exhibit O).

From those sources, the following facts have been made available. On April 14, 1994, respondent was arrested at his residence by Deputy Tim Wright of the San Mateo County Sheriff's Office and charged with assault and battery against his wife, Alma Luz Vasquez Lopez (Ms. Vasquez). At that time, neither Ms. Vasquez nor Tinoco-Medina were married and they were living together in an apartment in East Palo Alto, California. At the time of his arrest, respondent variously identified himself as "Nicholas," and then as "Jorge Verduzco." During an inspection of the contents of respondent's wallet, Deputy Wright discovered several documents bearing different names.

Deputy Wright then contacted Special Agent Timothy Isenhart of the Immigration and Naturalization Service (INS). On April 19, 1994, a sworn statement was taken from respondent by Isenhart and another Special Agent, Dan Kimball. In that sworn statement, respondent allegedly admitted that his true name is Nicolas Tinoco-Medina, that he is a Mexican citizen, and that he used an alien registration receipt card issued in the name of "Jorge R. Verduzco" to obtain employment at a Safeway supermarket.

On April 21, 1994, after receipt of an INS Notice of Inspection, Toni Cameron, Safeway's human resources clerk, supplied Agent Kimball with a copy of a Form I–9 and employment application, both completed by respondent. On April 22, 1994, Agent Kimball took a sworn statement from Dennis E. Robison, the individual listed as the certifying official for Safeway. In that sworn statement, Mr. Robison stated that he verified the alien registration receipt card, bearing the number A34 567 897, for "Jorge R. Verduzco," whom he identified to be respondent. Because the number on that Form I–9 did not correspond with any of the documents found in respondent's wallet upon his arrest, the agents conducted another interview with respondent.

During that second interview, respondent allegedly admitted that he had additional fraudulent INS documents at his residence. Agents Isenhart and Kimball then contacted Ms. Vasquez at her employer's business. She accompanied the agents to the apartment she shared with respondent. After she signed a consent to search form (Form 214–S), the agents conducted a search of the apartment. After

several minutes, the agents allegedly asked her assistance in locating the fraudulent registration card, Form I–151. In response, she verbally directed them to a dresser in the living area of the apartment, in which an alien registration receipt card, Form I–151, bearing the name "Rodriguez=V, Jorge" and number A34 567 897, was discovered.

In April, 1995, that document was inspected by the INS Forensic Document Laboratory in McLean, Virginia, and determined to be counterfeit.

On November 29, 1995, a Central Index System (CIS) check was run revealing that the alien registration receipt card number, A34 567 897, has not been issued.

On March 5, 1996, respondent filed a pleading captioned Respondent's Opposition to Complainant's Motion for Summary Decision and Cross-Motion for Summary Decision. Attached in support of that pleading are the sworn declarations of Ms. Vasquez and respondent, dated March 4, 1996.

In that pleading, respondent presents several arguments to show that complainant has not established the essential elements of the civil document fraud charge, thus entitling respondent to summary decision in his favor.

First, he argues that complainant's evidence fails to show that the document at issue is "forged, counterfeited, altered [or] falsely made" and that the document was used in order to satisfy a requirement of the INA. Second, he argues that much of the evidence relied upon by complainant is unreliable, untrustworthy, prejudicial, and has been obtained in derogation of respondent's constitutional and regulatory rights, and thus inadmissible.

Third, he contends that the variance between the wording of the Notice of Intent to Fine (NIF) and the Complaint failed to give him sufficient notice of the charges against him. Finally, he contends that summary decision is an inappropriate means for determining a civil monetary penalty, and should only be ruled upon following an evidentiary hearing.

On March 5, 1996, respondent filed a pleading captioned Respondent's Motion to Suppress Evidence. Respondent requests

that all evidence obtained as a result of the search of his residence be suppressed, including the alien registration receipt card alleged to have been used to gain employment and the alien registration receipt number found thereon. That because the search was allegedly conducted in violation of the Fourth Amendment to the United States Constitution.

In support of that motion, respondent offers the declaration of Ms. Vasquez, sworn to under oath on March 4, 1996. In that declaration, Ms. Vasquez stated that Agents Isenhart and Kimball told her that they had an order to search her apartment. She also states that she did not understand the consent form she signed (Form 214–S) and that if she had been aware of her rights, she would not have consented.

On April 19, 1996, complainant filed a pleading captioned Response to Respondent's Cross-Motion for Summary Decision.

On May 2, 1996, complainant filed a pleading captioned Second Motion to Amend Complaint, Supplement to Motion for Summary Decision and Response to Respondent's Motion to Suppress Evidence.

In that portion of complainant's pleading filed May 2, 1996, styled Second Motion to Amend Complaint, a request is made to strike from the Complaint the words "Form I–151" and "issued in the name of Jorge V. Rodriguez." According to complainant, allowing this amendment obviates the need to rule on respondent's motion to suppress since the need to produce the Form I–151 is not necessary to prove each element of the charge in the proposed amended complaint.

In that portion of complainant's pleading filed May 2, 1996, styled Response to Respondent's Motion to Suppress, complainant argues that in the event the motion to amend is denied, the search conducted by the INS agents was not in violation of the fourth amendment. That because Ms. Vasquez's consent to search was voluntary and effective; and even in the event that a fourth amendment violation is found, the exclusionary rule should not be applied since the INS agents acted objectively and reasonably in having conducted that search. In support of that argumentation, complainant has provided the Affidavit of Special Agent Timothy A. Isenhart, sworn to under oath on May 1, 1996 (Exhibit AA); the Affidavit of Special

Agent Dan Kimball, sworn to under oath on April 15, 1996 (Exhibit BB); and a copy of a Warrant for Arrest of Alien (Form I–200) (Exhibit CC).

Finally, in that portion of complainant's pleading filed May 2, 1996, styled Supplement to Motion for Summary Decision, complainant introduces an additional item of evidence: a Form I–601, Application for Waiver of Grounds of Excludability (Exhibit P). That evidence is authenticated in the Affidavit of Andrew Arthur, INS Assistant District Counsel, sworn to under oath on April 30, 1996 (Exhibit Q).

On July 18, 1996, respondent filed a pleading captioned Opposition to Complainant's Second Motion to Amend Complaint, in which he argues that complainant's motion to amend is simply an effort to avoid the fourth amendment issue.

On July 18, 1996, respondent also filed a pleading captioned Reply to Government's Opposition to Motion to Suppress Evidence. In that pleading, respondent argues that, even if Ms. Vasquez consented to a search of the apartment, she did not have authority to consent to a search of the dresser, in which the alien registration receipt card was found, because he had a heightened expectation of privacy. The declarations of respondent and Ms. Vasquez, sworn to under oath on July 17, 1996, are offered in support of that argument. Finally, respondent argues that resolution of the fourth amendment issues necessarily involve questions of credibility and cannot properly be decided without an evidentiary hearing.

On July 18, 1996, respondent also filed a pleading captioned Response to Complainant's Supplement to Motion for Summary Decision, objecting to the introduction of Form I–601, evidence which he argues should have been submitted with complainant's initial motion for summary decision. In addition, he argues that the rules of practice and procedure applicable to this proceeding prohibit the filing of supplemental pleadings without the consent of an administrative law judge (ALJ).

On July 18, 1996, the respondent also filed three (3) separate motions to dismiss, alleging, among other things, prosecutorial misconduct, failure of INS to adhere to its own policy, and failure to state a claim upon which relief can be granted. On August 1, 1996, complainant filed responses to those dispositive motions.

II. *Respondent's Motions to Dismiss*

Before proceeding to a consideration of the pending motions to amend complaint and to suppress, and cross-motions for summary decision, it is appropriate to first rule upon respondent's various motions to dismiss. Each of those motions shall be considered in turn.

A. *Respondent's Motion to Dismiss for Prosecutorial Misconduct*

On July 18, 1996, respondent filed a pleading captioned Motion to Dismiss for Prosecutorial Misconduct. As grounds for that motion, counsel argues that complainant "has continually abused its prosecutorial role by introducing impertinent, prejudicial and highly inflammatory matter in these proceedings . . . all of which was intended to cast the Respondent in as poor light as possible, to denigrate his character, and to prejudice the Court against him." Motion to Dismiss for Prosecutorial Misconduct, at 1. Respondent particularly objects to the introduction of evidence concerning his criminal arrest, incarceration and subsequent conviction and to references allegedly made to that evidence. In respondent's cross-motion for summary decision, he has requested that this evidence be stricken from the record.

Assuming that evidence is inadmissible, respondent has failed to demonstrate the legal predicate, OCAHO precedent or procedural rules, that would give this Office the power to grant the extraordinary relief he seeks in this motion. The only relief available or appropriate is an order striking the submitted evidence from the record. As noted, respondent has already moved to strike this evidence. Consideration is given to that motion later in this Order.

Accordingly, respondent's Motion to Dismiss for Prosecutorial Misconduct is hereby denied.

B. *Respondent's Motion to Dismiss for Failure of INS to Adhere to its Own Policy*

On July 18, 1996, respondent filed a pleading captioned Motion to Dismiss for Failure of INS to Adhere to its Own Policy, seeking an order of dismissal or, in the alternative, a stay of these proceedings. In support of that motion, respondent submitted the Declaration of Ralph J. Leardo, respondent's counsel.

Respondent contends that a memorandum of opinion, issued in early 1994 by the INS acting Executive Associate Commissioner James A. Puleo (Puleo Memo), has established INS policy to the effect that, in cases where an applicant for adjustment of status has a pending I–601 relating to the conduct which would form the basis of charges under 274C, the adjustment should be adjudicated before the 274C proceedings are pursued. Respondent advises that he filed an I–601 application subsequent to the commencement of this case.

The Puleo Memo responded to the concerns of David N. Ilchert, San Francisco District Director, concerning a pending case being handled by that office. Whether the concerns expressed in that memo rise to the level of official policy or rule of law is far from certain. As the ALJ stated in *U.S. v. Thoronka*, in considering a similar argument, the Puleo Memo is probably not a "rule of practice so much as a caveat against foolish action." 5 OCAHO 725, at 4 (1995).

In any event, respondent has again failed to demonstrate the legal predicate, OCAHO precedent or procedural rules, that would give this Office the power to grant the relief he seeks in this motion. He argues that this Office has an obligation to ensure that the INS adheres to its own policies, and may do so through some measure of inherent power. Absent a clear bar to moving ahead, neither a dismissal nor a stay of proceedings may be granted.

Accordingly, respondent's Motion to Dismiss for Failure of INS to Adhere to its Own Policy is hereby denied.

C. *Respondent's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted*

On July 18, 1996, respondent filed a pleading captioned Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted, seeking dismissal of this case.

The pertinent procedural rule governing motions to dismiss in cases arising under 274C provides that:

> The respondent, without waiving the right to offer evidence in the event the motion is not granted, may move for a dismissal of the complaint on the ground that the complainant has failed to state a claim upon which relief can be granted. If the Administrative Law Judge determines that the complainant has failed to state such a claim, the Administrative Law Judge may dismiss the complaint.

28 C.F.R. §68.10.

A motion to dismiss for failure to state a claim upon which relief can be granted under 28 C.F.R. §68.10 is akin to a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6).[2] *See Zarazinski v. Anglo Fabrics Co., Inc.,* 4 OCAHO 638, at 9 (1994). In considering such a motion, a federal court must assume the facts as alleged in the complaint are true. *Kasathsko v. IRS,* 6 OCAHO 840, at 3 (1996). Furthermore, a federal court liberally construes the complaint and views it in the light most favorable to the complainant. *Scheuer v. Rhodes,* 416 U.S. 232, 236 (1974).

A court will not dismiss a complaint merely because the plaintiff's allegations do not support the particular legal theory it advances, as the court is under a duty to examine the complaint to determine if the allegations provide a basis for relief under any possible theory. *Id.* Therefore, a complaint should not be dismissed for failure to state a claim unless the plaintiff can prove no facts in support of its claim that would entitle it to relief. *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

The Complaint at issue consists of a single count alleging one violation of §1324c(a)(2), that the respondent knowingly used and possessed a forged, counterfeited, altered and falsely made alien registration receipt card (INS Form I–151, numbered A34 567 897) issued in the name of Jorge V. Rodriguez, and that he did so after November 29, 1990, in order to satisfy a requirement of the Immigration and Nationality Act.

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),

2) knowing the document(s) to be forged, counterfeit, altered, or falsely made,

3) after November 29, 1990,

4) for the purpose of satisfying any requirement of the INA.

Respondent contends that the Complaint fails to state a sufficient claim because, on its face, it states that the document was "issued in

[2] The Federal Rules of Civil Procedure provide general guidance to this Office on matters not provided for or controlled by OCAHO rules of practice. 28 C.F.R. §68.1.

the name of Jorge V. Rodriguez." He suggests that the phrase "issued in the name of" is a term of art meaning that the document was genuinely issued or legally issued by the INS. And, if the document was validly issued, then it was not forged, counterfeit, or falsely made, since those terms, as defined by the INS, mean "no genuine original was issued," whether to respondent or to any other person. For that reason, and since there is no allegation that the document was altered, counsel claims that the complainant cannot meet one or more elements of its evidentiary burden.

Respondent has not provided any OCAHO precedent, federal case law, INS ruling, or otherwise, that would support his assertion that the INS defines "issued in the name of" in the restrictive manner he claims. If the Complaint read "lawfully issued in the name of," his argument may have had significant weight.

Complainant argues that the disputed language is used by the INS only for purposes of identifying the underlying document. In this sense, the words "issued in the name of" are equivalent to the words "bearing the name of." Because complainant's interpretation of that language is more credible and supported by legal precedent, and mindful of the obligation to construe the Complaint liberally and in the light most favorable to the complainant, the Complaint is found to have stated a claim for which relief can be granted.

Moreover, even assuming respondent's interpretation is correct, complainant could easily remedy such defect by way of amendment to the Complaint. *See* 28 C.F.R. §68.9(e) (amendments granted whenever a determination of a controver . . . will be facilitated . . .). In federal courts, amendments are usually granted unless there is a demonstrable showing of prejudice to an opposing party, produce undue delay in litigation or result in futility for lack of merit. *See Forman v. Davis*, 371 U.S. 178 (1962); *Jackson v. Bank of Hawaii,* 902 F.2d 1385 (9th Cir. 1990); Fed. R. Civ. P. 15(a). Furthermore, the Federal Rules reject the approach that "pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson*, 355 U.S. at 48.

Accordingly, respondent's Motion to Dismiss for Failure to State a Claim Upon Which Relief Can Be Granted is hereby denied.

III. *Complainant's Second Motion to Amend Complaint*

On May 2, 1996 complainant filed a pleading captioned Second Motion to Amend Complaint. In that motion, complainant requests that the Complaint be amended by striking from Count I, paragraph A.1, the words "Form I–151" and "issued in the name of Jorge v. Rodriguez."

The pertinent procedural rule governing amendments, 28 C.F.R. §68.9(e), provides, in pertinent part, that:

> If and whenever a determination of a controversy on the merits will be facilitated thereby, the Administrative Law Judge may, upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties, allow appropriate amendments to complaints and other pleadings at any time prior to the issuance of the Administrative Law Judge's final order . . . such amendments may be made as necessary to make the pleading conform to the evidence.

As noted earlier, this rule, as well as the Federal Rules of Civil Procedure, reflect a generally liberal policy in the area of amending pleadings. The legal standard is whether the public interest or the respondent is prejudiced by the allowance of a proposed amendment.

In support of this motion, complainant states that the determination of this matter on the merits will be facilitated; because, if the amendment is allowed, complainant would no longer need to rely on the evidence obtained as a result of the INS agents' search of respondent's residence to establish all the elements of a section 274C document fraud violation, thereby rendering respondent's motion to suppress moot.

Respondent has objected to this motion on the grounds that it is merely an attempt to avoid the fourth amendment issue. Moreover, respondent asserts that "without the card itself," there is no other evidence from which the government can meet its evidentiary burden. This statement is unexceptional.

A word about the allocation of the burden of proof in this administrative proceeding is in order. In the posture of a summary decision motion, it is the initial responsibility of the moving party to point to evidence which, if uncontradicted, would entitle that party to a directed verdict at trial. At a hearing on the merits, a complainant's burden is to prove the factual allegations in the complaint by a preponderance of the admissible and credible evidence. In all events,

the complainant bears the burden of proof at all times in this case. The alien registration receipt card which was allegedly used by respondent to gain employment, is only one item of evidence, among many, that may be presented by complainant in order to satisfy its evidentiary burden.

The complainant filed his motion for summary decision on January 11, 1996 and the respondent filed his opposition and cross-motion on March 12, 1996. Complainant then filed his response to respondent's cross-motion on April 19, 1996. Thus the issues and arguments were developed with respect to the first amended Complaint. At this juncture, it cannot be said with any certainty that this proposed amendment, filed two months after respondent filed his opposition and cross-motion, is not prejudicial to respondent. In any event, if an amendment shall eventually be needed to conform to the evidence, complainant may renew his motion to amend at that time.

Accordingly, complainant's Second Motion to Amend Complaint is hereby denied.

IV. *Respondent's Motion to Suppress*

On March 5, 1996, respondent moved to suppress the introduction of certain material as evidence against him on the ground that the material had been acquired through an unconstitutional search and seizure.[3] Respondent invokes the exclusionary rule, arguing that this fourth amendment violation should result in suppression of the allegedly tainted evidence obtained as a result of the search of his residence and his dresser on April 22, 1994.

It is well-settled that the fourth amendment protections extend to administrative searches, including investigation by the INS. *U.S. v. Kuo Liu,* 1 OCAHO 235, at 2 (1990); *U.S. v. Widow Brown's Inn*, 2 OCAHO 399, at 23 (1992); *see also Pearl Meadows Mushroom Farm, Inc. v. Nelson,* 723 F. Supp. 432 (N.D. Calif. 1989). Less clear is

[3] The Fourth Amendment to the U.S. Constitution reads: "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The Supreme Court has never specifically decided whether illegal aliens are entitled to fourth amendment protection. *United States v. Verdugo-Urguidez*, 494 U.S. 259, 272 (1990).

whether, given a fourth amendment violation, the exclusionary rule[4] applies in document fraud cases brought pursuant to section 274C of IRCA. In *Widow Brown's Inn,* the ALJ held that the exclusionary rule was applicable in a 274A case.

Because the law of the United States Court of Appeals for the Ninth Circuit will apply in the event an appeal is taken there, that law will be followed in this case. The Ninth Circuit has suggested that "[a]s a general rule, the exclusionary rule does not attach to civil or administrative proceedings." *In Re Establishment Inspection of Hern Iron Works,* 881 F.2d 722, 729 (9th cir. 1989).

Nonetheless, in *INS v. Lopez-Mendoza*, the Supreme Court, while holding that the exclusionary rule does not apply in civil deportation proceedings, expressly left open the possibility that the exclusionary rule might still apply in civil proceedings involving "egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." 468 U.S. 1032, 1050–51 (1984). Following the Supreme Court's lead, in *Adamson v. C.I.R.*, the Ninth Circuit held that egregious Fourth Amendment violations warrant the application of the exclusionary rule in civil proceedings. 745 F.2d 541, 545–46 (9th Cir. 1984); *Gonzalez-Rivera v. INS*, 22 F.3d 1441, 1448 (9th Cir. 1994).

Under Ninth Circuit law, all "bad faith violations" of an individual's fourth amendment rights are considered "sufficiently egregious" to warrant application of the exclusionary sanction, 22 F.3d at 1449, and a "bad faith" violation occurs when evidence is obtained by deliberate violations of the fourth amendment, or by conduct a reasonable officer should have known is in violation of the Constitution. *Id.; see also Orhorhaghe v. INS*, 38 F.3d 488, 493 (9th Cir. 1994). Under such circumstances, the probative value of that evidence cannot outweigh the need for a judicial sanction. Egregious violations are not limited to conduct that "shocks the conscience" or involves physical brutality.

[4] Evidence obtained in violation of the Amendment is subject to exclusion in state criminal proceedings, *Mapp v. Ohio,* 367 U.S. 643 (1961), as well as in federal criminal proceedings, *Weeks v. U.S.,* 232 U.S. 383 (1914), and in certain civil proceedings. The Ninth Circuit has stated that deterrence is not the only purpose of the exclusionary rule, since it also serves the function of preserving judicial integrity.

Based on the foregoing legal principles, this factual scenario must be examined in order to determine whether the INS agents violated respondent's fourth amendment rights. If that question is affirmatively decided, it then must be determined, as a matter of law, whether the agents committed the violations deliberately or by conduct a reasonable officer should have known would violate the Constitution. *Orhorhaghe,* 38 F.3d at 493.

The respondent concedes that a search conducted pursuant to a valid consent is constitutionally permissible. *Katz v. United States*, 389 U.S. 347, 358 (1967). The respondent also concedes that valid consent may be given by a third party who possesses common authority over or other sufficient relationship to the premises or effects sought to be inspected. *U.S. v. Matlock*, 415 U.S. 164, 171 (1973).

The burden is upon the complainant to prove that the consent was, in fact, voluntarily given, *Bumper v. North Carolina*, 391 U.S. 53, 548 (1968), and not the result of duress or coercion. Furthermore, voluntariness is a question of fact to be determined by the court from the totality of all the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1972). Finally, while the subject's knowledge of a right to refuse is a factor to be taken into account, the complainant is not required to demonstrate such knowledge as a prerequisite to establishing a voluntary consent. *Id.* at 249.

Consideration must now be given to the complainant's evidence supporting his allegation that consent was given voluntarily. Complainant has introduced the sworn affidavits of Agents Isenhart and Kimball, along with a copy of the Consent to Search Premises Form, I–214S, signed by Ms. Vasquez.[5]

Both of those affidavits relate substantially similar facts; that on April 22, 1994, the agents went to Ms. Vasquez's place of employment and asked for her assistance in locating a counterfeit immigration document that respondent had used. Ms. Vasquez assented to this request and accompanied the agents to her residence. During the ride to her residence, Ms. Vasquez said that she had

[5] Evidence concerning respondent's criminal charges will be considered in this motion. It is said that, even in criminal proceedings,"preliminary questions concerning admissibility are matters for the judge and that in performing this function he is not bound by the Rules of Evidence except those with respect to privileges." *U.S. v. Matlock,* 415 U.S. at 173–4.

signed the lease and paid the rent on the apartment. After arriving at the apartment, Agent Isenhart specifically asked Ms. Vasquez for permission to enter, to which she assented. After entering the apartment, Agent Isenhart then read to her the Consent to Search Premises Form, I–214S, and asked her whether she understood what it meant. Ms. Vasquez asserted that she understood, and signed the form.

After searching the apartment for a few minutes, Agent Isenhart asked Ms. Vasquez if she knew where the document might be. She verbally directed him to a dresser located in the living room area. After concluding that the dresser was a common piece of furniture, that all members of the household used and had access to, he assumed that Ms.

Vasquez could allow him to search it. Within the top drawer Agent Isenhart found a small, thin, unzipped plastic bag containing a alien registration receipt card, bearing the number A34 567 897 and the name Jorge V. Rodriguez.

After concluding their search, the agents took Ms. Vasquez back to her employer's place of business. The agents also stated that at no time did they tell Ms. Vasquez that they had a search warrant or any other order allowing a search of the apartment, and that all of the conversations were conducted in English.

The respondent alleges that Ms. Vasquez's consent was not voluntary, but coerced. Furthermore, he claims that, even if she consented to a general search of the apartment, because he had a heightened expectation of privacy in the dresser, she could not have validly authorized a search of it. In support of his allegations, respondent presents the two (2) sworn declarations of Ms. Vasquez, dated March 4, 1996 and July 17, 1996, and his own sworn declaration, dated July 17, 1996.

Ms. Vasquez states that two INS agents came to her place of employment in East Palo Alto, California. The agents told her that they had an order allowing them to search her apartment and asked her to accompany them. After arriving at her apartment, she states that they told her to read and sign a paper (Form 214–S) written in English, and, since she could not read English very well, she did not understand its import and felt compelled to sign it. The agents did not provide an advisement of rights.

She also maintains that after she signed the form, the agents told her to open all the dresser drawers, including the one her husband used exclusively. She contends that she did not then have joint access to her husband's dresser, and that on April 22, 1994, the dresser could easily have been identified as a man's dresser since there was men's cologne on top of it. Finally, she states that she did not give them permission to take any documents or other items with them.

In his sworn declaration, respondent provides testimony to the effect that the dresser was clearly a man's dresser because cologne was kept on top of it, and only men's clothes and some papers were in it. He also states that the dresser was located in the living room area because the apartment was very small, and that his wife did not have joint access to it.

For purposes of ruling on this motion, respondent's factual allegations are accepted as true. It is therefore assumed that the conduct of the agents violated respondent's constitutional rights. It must be determined then whether that violation was egregiously occasioned.

Agents Isenhart and Kimball informed Ms. Vasquez that they were seeking documents relating to the respondent. She was never told that she was a subject of any criminal or civil investigation. Since Ms. Vasquez had been assaulted by the respondent a few days earlier, the agents could reasonably have expected her cooperation in their investigation when they arrived at her place of employment, a McDonald's restaurant. That encounter was in a nonthreatening public setting and there appears to be no evidence of unfair surprise.

Moreover, the officers could reasonably expect that Ms. Vasquez would be nervous and noncommunicative, as she relates in her affidavits. Such behavior does not necessarily impart to the agents an unwillingness to cooperate. Her failure to communicate would not reasonably give notice to the agents that she did not understand the consent form which she read and signed. Ms. Vasquez admits that the agents had not drawn their weapons.

Furthermore, respondent states that the dresser was in the living room area because the apartment was very small. Under those circumstances, it would not be unreasonable for the agents to expect that the dresser was then used by respondent and by Ms. Vasquez as well, and that after asking for her further assistance, that she was authorized to allow them to search it.

Taking into account all of the foregoing facts and circumstances surrounding Ms. Vasquez encounter with Agents Isenhart and Kimball, and applying an objective standard to their conduct, it is determined that the agents did not intentionally violate the fourth amendment and could not have reasonably known that their conduct was in violation of the Constitution. Accordingly, application of the "egregious violation" exception to require the suppression of the alien registration receipt card found during the agents' search is not warranted.

Accordingly, respondent's Motion to Suppress is hereby denied.

V. *Cross-Motions For Summary Decision*

On January 11, 1996, the complainant filed a pleading captioned Motion for Summary Decision. On March 12, 1996, the respondent filed a pleading captioned Respondent's Opposition to Complainant's Motion for Summary Decision and Cross-Motion for Summary Decision. On April 19, 1996, complainant filed a pleading captioned Response to Respondent's Cross-Motion for Summary Decision. On May 2, 1996, complainant filed a pleading captioned Supplement to Motion for Summary Decision (Supplement).

Respondent has objected to the filing of complainant's Supplement introducing an additional item of evidence, an application for a waiver on Form I–601, on the grounds that this evidence should have been submitted with complainant's original motion or as soon thereafter as it became available, and, in any event, the pertinent procedural rule, 28 C.F.R. §68.11(b), clearly prohibits the supplemental submissions or rebuttal without the leave of an ALJ.

As there is no evidence to indicate that respondent is prejudiced in any way by introduction of this evidence, and since motions and other requests in this proceeding have been liberally granted, complainant's Supplement is hereby allowed. Moreover, because the I–601 was properly authenticated, and appears to be reliable and trustworthy, it is admissible relevant evidence.

A. *Standards of Decision*

The rules of practice and procedure for administrative hearings before administrative law judges in cases involving allegations of document fraud provide for the entry of a summary decision if the

pleadings, affidavits, material obtained by discovery or otherwise, show that there is no genuine issue as to any material fact and that the movant is entitled to summary decision as a matter of law. 28 C.F.R. §68.38(c).

Because this rule 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, it has been held that case law interpreting Rule 56(c) is instructive in determining whether summary decision under section 68.38 is appropriate in proceedings before this office. *Alvarez v. Interstate Highway Construction*, 3 OCAHO 430, at 17 (1992).

As to materiality, only disputes over facts which might affect the outcome of the suit under the governing law will properly preclude the entry of summary decision. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242 (1986). 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 Elec. Indus. Co. V. Zenith Radio*, 475 U.S. 574 (1986); *U.S. v. Lamont St. Grill,* 3 OCAHO 442, at 9 (1990).

One of the principal purposes of the summary decision rule is that of isolating and disposing of factually unsupported claims or defenses. However, a party seeking summary decision always bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, which it believes demonstrates the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

Once the movant has carried its burden, the party opposing must "go beyond the pleadings and by [introduction of] affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Id*. at 322; Fed. R. Civ. P. 56(c). This evidence need not be in a form that would be admissible at trial.

It is the applicable substantive law which identifies the material facts. 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),

2) knowing the document(s) to be forged, counterfeit, altered, or falsely made,

3) after November 29, 1990,

4) for the purpose of satisfying any requirement of the INA.

United States v. Morales-Vargas, 5 OCAHO 732, at 4 (1995).

B. *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. The pertinent OCAHO rule provides that "[a]ll relevant material and reliable evidence is admissible, but may be excluded if its probative value is substantially outweighed by unfair prejudice or confusion of the issues, or by considerations of undue delay, waste of time, immateriality, or needless presentation of cumulative evidence." *See* 28 C.F.R. §68.40(b).

Affidavits submitted in support of a summary decision motion 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." *See* §68.38(b). With these standards in mind, a consideration is now given to the admissibility of complainant's evidence.

The sworn affidavits of Timothy Isenhart, dated December 11, 1994, and Dan Kimball, dated December 11, 1994, set forth facts which are clearly within the affiants' personal knowledge and thus are admissible. Likewise, the Record of Sworn Statement of Dennis E. Robison, dated April 22, 1994, and the affidavit of counsel for INS, Andrew Arthur, dated April 30, 1996, meet those same standards and are also admissible.

The Form I–151, alien registration receipt card, bearing the name of "Rodriguez=V, Jorge" and the number A34 567 897, is authenticated by the Isenhart affidavit and is admissible. The Notice of Inspection served on Safeway, the Form I–9, and Safeway employment application completed by respondent are authenticated in the Kimball affidavit, and are therefore not only admissible, but sub-

stantially probative. The Form I–9 is also referenced in the Robison affidavit. The I–601 waiver application is authenticated by the Arthur affidavit and is also admissible.

Respondent has objected to the introduction of several documents pertaining to the criminal charges filed against him on the grounds of relevance and prejudice. Those criminal charges led directly to the discovery of evidence which gave rise to the civil document fraud charges. Moreover, this evidence is relevant for the purpose of assessing an appropriate civil money penalty in the event that the respondent is found to be in violation of 1324c(a)(2). *See U.S. v. Remileh*, 6 OCAHO 825, at 17 (1995). There is some merit in respondent's argument that this evidence is prejudicial. Accordingly, the evidence relating to the criminal charges is being admitted only for the purpose of identifying the circumstances giving rise to the civil document fraud charges and, if it becomes necessary, of determining an appropriate civil money penalty.

The respondent has objected to the introduction of his sworn declaration of April 19, 1994, taken while he was in custody in the San Mateo County jail, on the grounds that he could not understand those English portions of the document which advised him of his right not to answer any questions and also his right to counsel. On the date respondent's statement was taken he was not in the custody of the INS. Under these circumstances, there was no requirement on the part of the INS to have provided him with an advisement of rights. Respondent also argues that because the interview with the INS agents could have resulted in a criminal prosecution, Miranda warnings should have been given. In *United States v. Galeas*, the ALJ held that "[i]t is well settled that constitutional claims . . . including Miranda-type warnings against self-incrimination . . . are applicable to criminal, but not civil proceedings like §274C." 5 OCAHO 790, at 4–5 (1995). Accordingly, respondent's sworn statement is admissible.

With respect to the I–213 Form, Record of Deportable Alien, the Ninth Circuit has held that such a document is admissible in deportation proceedings, 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). In this case, the I–213 is a report of finding of an investigation made pursuant to authority granted by

law, completed contemporaneously with the investigation by one of the INS investigating agents, Dan Kimball. It appears to have been prepared in accordance with normal record keeping requirements and demonstrates substantial indicia of reliability. Nonetheless, because respondent has denied most of the substance of that evidence and more reliable evidence is available, the I–213 is being accorded considerably less weight. In *U.S. v. Mester Mfg. Co.,* the ALJ held "a substantial portion, though not all" of an I–213 admissible noting that, with respect to INS forms, they were often "at the margin of trustworthiness for evidentiary purposes." 1 OCAHO 18, 79 n.20 (1988).

In support of his cross–motion for summary decision, respondent has provided two (2) sworn declarations of Ms. Vasquez, dated March 4, 1996 and July 17, 1996, and two (2) of his sworn declarations, dated March 4, 1996 and July 17, 1996.

C. *Discussion, Findings and Conclusion*

The complainant bears the burden of proof at all times in this case. Based on a review of the admissible evidence, it is found that the complainant has successfully provided a sufficiency of probative evidence which supports each element of its prima facie case.

The sworn affidavit of Timothy A. Isenhart discloses that in April 1994 he was employed as a Special Agent with the investigations branch of the U.S. Department of Justice, Immigration and Naturalization Service, and that on April 15, 1994, he was contacted by the San Mateo County Sheriff's Office concerning Nicholas Tinoco-Medina (respondent), who had been arrested for spousal abuse. Isenhart states that he interviewed the respondent and that the latter admitted that he was in possession of counterfeit alien registration and social security cards which he had used to gain employment. Affiant also states that the respondent said he was employed at Safeway, Inc., 525 El Camino Real, Menlo Park, California.

On April 19, 1994, Isenhart further attested that he and Agent Dan Kimball obtained a sworn statement from the respondent, in which the latter admitted that he had purchased counterfeit alien registration cards and social security cards, and that he had used a counterfeit alien registration card green card to gain employment. On April 19, 1994, he and Agent Kimball went to the Safeway in Menlo Park, California and spoke with the store manager and

learned that the store's Forms I–9 are maintained at the Safeway Division Office located in Fremont, California.

On April 21, 1994, Isenhart states that Agent Kimball received respondent's Form I–9 from Safeway and after reviewing that form it was apparent that the alien registration receipt card and social security card numbers on that form did not match the documents which the respondent furnished to the San Mateo County Sheriff's Office. On April 22, 1994, he and Agent Kimball again interviewed the respondent, whereupon he admitted that he had other documents at his residence. When he and Agent Kimball attempted to take another sworn statement from him, respondent requested an attorney.

On April 22, 1994, he and Agent Kimball went to the McDonald's restaurant in Menlo Park, California, where respondent's girlfriend, Ms. Vasquez, was employed. Ms. Vasquez agreed to accompany him and Agent Kimball to the residence she shared with the respondent, at 2000 Cooley Avenue, Apt. 81, East Palo Alto, California. Once there, Ms. Vasquez executed a 214–S, Consent to Search form. During the search that followed, Isenhart states that an alien registration receipt card, Form I–151, bearing the name "Rodriguez=V, Jorge," and the number A34 567 897, was discovered. That document matched the information provided by respondent on his completed Form I–9.

On April 10, 1995, Isenhart sent that Form I–151 to the INS Forensic Laboratory for analysis. He received a letter dated April 14, 1995, from Lurline A. Trizna (Trizna letter) of the Forensic Document Laboratory, stating that the Form I–151 had been determined to be counterfeit.

To further show that the document named in the Complaint was counterfeit, complainant has submitted a copy of the Immigration and Naturalization Service Central Index System (CIS) printout for alien registration number A34 567 897. The CIS illustrates that the number has not been validly issued. Complainant also introduced a copy of the Trizna letter into evidence.

The sworn affidavit of Dan Kimball relates that in April 1994 he was a Special Agent with the investigations branch of the U.S. Department of Justice. On April 21, 1994, in connection with an investigation into possible document fraud by Nicolas Tinoco-Medina,

a.k.a. Jorge R. Verduzco, he served a Notice of Inspection on Toni Cameron, human resources clerk for Safeway, Inc., in Fremont, California. Ms. Cameron provided him with the Form I–9 and employment application which were completed by respondent.

On April 22, 1994, Agent Kimball contacted Dennis E. Robison, assistant manager of the Fremont, California Safeway, who had certified section 2 of the Form I–9 pertaining to respondent. He showed Mr. Robison a picture of respondent, and he identified that individual as Jorge R. Verduzco. Mr. Robison further stated that he recognized the Form I–9, bearing the name "Jorge R. Verduzco," which Kimball had obtained from Safeway on April 21, 1994. Mr. Robison averred that he had verified the information in section 1 of that Form I–9 as that of Jorge R. Verduzco, and that he had verified the alien registration number in section 2 of that Form I–9 as that presented to him by respondent on or about August 18, 1991.

Complainant has provided a copy of respondent's Form I–9, which is authenticated in the affidavits of Isenhart and Kimball. That Form I–9 was filled out and signed by respondent on August 18, 1991, and illustrates that respondent presented Safeway, Inc., with the counterfeit alien registration card (A34 567 897) as proof of identity and employment eligibility.

In a Record of Sworn Statement, Dennis E. Robison stated under oath that in August 1991 he was employed as a store manager at Safeway, Inc., at 525 El Camino Real, Menlo Park, California. He also stated that he recognized the Form I–9 shown to him by Agent Kimball and that he had verified the information in section 1 of that form as that of respondent. He also examined the alien registration card presented by respondent and attested to the fact that it appeared to be genuine and that to the best of his knowledge respondent was eligible to work in the United States.

The Chief Administrative Hearing Officer ruled in his Modification of *United States v. Morales-Vargas* that a respondent's act of presenting 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. 5 OCAHO 732, at 5–6 (1995); *United States v. Chavez-Ramirez*, 5 OCAHO 774, at 6 (1995); *see also United States v. Remileh*, 5 OCAHO 724, at 9 (1995). In his cross-motion for sum-

mary decision, respondent has argued that *Remileh* and *Morales-Vargas* were erroneously decided, and should be reconsidered. Whatever merits his argument may have, it is my duty to apply settled law to these disputed facts.

The sworn affidavit of Andrew A. Arthur relates that he is employed as an Assistant District Counsel with the San Francisco District Counsel's Office of the U.S. Department of Justice, Immigration and Naturalization Service, and that he has served in that position since September 1994. On or about April 15, 1996, he reviewed the alien file pertaining to respondent, Nicolas Tinoco-Medina, A–72–985–985. In that file, he discovered an Application to Register Permanent Residence or Adjust Status (Form I–495), which was prepared by respondent's counsel of record in his deportation case and signed by respondent. The Form I–485 was date-stamped as having been received by the San Francisco District Counsel's Office on December 26, 1995. Attached to that I–485 application was an Application for Waiver of Grounds of Excludability (Form I–601), prepared by respondent's counsel of record in his deportation case and signed by respondent.

Complainant has provided a copy of the Form I–601 referenced in his affidavit. That evidence contains an admission by respondent that he "used a false ARC [alien registration card] to obtain employment with Safeway Stores, Inc." Complainant has also provided respondent's statement given under oath to Agents Isenhart and Kimball on April 19, 1994. In that document, respondent admitted that his true and correct name is "Nicolas Tinoco-Medina," that he is a citizen of Mexico, the he has used the alias "Jorge R. Verduzco," and that he had showed the manager at the Safeway in Menlo Park, California, a "fake green card." These admissions illustrate that respondent had knowledge that the alien registration receipt card he presented to gain lawful employment was counterfeit.

In his answer, respondent denied all of the substantive allegations of document fraud in the Complaint. That responsive pleading does not raise any affirmative defenses nor does it relate any facts or offer evidence in support of those denials. A party resisting summary decision may not rest on the mere allegations in the pleadings, 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 that raises a dispute of material fact that

only a trial on the merits could resolve. Respondent has clearly failed to do so.

In addition, respondent has unsuccessfully challenged the relevancy and admissibility of complainant's evidence. He claims that due process requires that he be given an opportunity to cross-examine those individuals who have provided statements under oath and that the variance between the wording of the Notice of Intent to Fine (NIF) and the Complaint failed to give him sufficient notice of the charges against him. The purpose of summary decision is to avoid an unnecessary trial where there is no genuine issue as to any material fact. *United States* v. *Villages-Valenzuela,* 5 OCAHO 784, at 9 (1995). To defeat a summary decision motion, respondent may not rest on an allegation that an opportunity for cross-examination at trial will result in a dispute of material fact. *Id.*

Furthermore, respondent's allegation that he had insufficient notice of the charges against him is also lacking in merit. An examination of the NIF shows that it contained two (2) Counts, alleging that respondent knowingly forged documents (Count I), and knowingly used or possessed a forged document (Count II), and sought a civil money penalty of $1700.00. The Complaint contains one Count, alleging that respondent knowingly used or possessed a forged document, which is the same allegation found in Count II of the NIF, and seeks to impose a civil money penalty of $800.00. Accordingly, respondent was given adequate notice of the charges filed against him.

The two (2) declarations of Ms. Vasquez, sworn to under oath on March 4, 1996 and July 17, 1996, respectively, and a single declaration of respondent, sworn to under oath on July 17, 1996, were offered in support of respondent's motion to suppress evidence. That motion was ruled upon previously and those declarations have not raised an issue of material fact.

Respondent's other declaration, sworn to on March 4, 1996, was offered in support of his cross-motion for summary decision. In that declaration, respondent states that he did not understand the advise ment of rights that were written in English on the Record of Sworn Statement document he signed on April 19, 1994. That argument was ruled upon previously, and that declaration does not raise a genuine issue of material fact.

Respondent has not offered any documentary evidence in support of his argumentation, and instead has chosen to rely on challenges to complainant's probative evidence and urged reinterpretation of well-settled law. The burden was effectively shifted to respondent to provide some evidence from which a rational fact finder could find in his favor, but he has not done so.

Hence, complainant has shown that respondent knowingly used and possessed the forged, counterfeit, altered and falsely made document, namely an alien registration receipt card, INS Form I–151, bearing the number A34 567 897 and the name of Jorge V. Rodriguez, and did so after November 29, 1990, for the purpose of satisfying a requirement of the Immigration and Nationality Act.

Because complainant has established that there is no genuine issue of material fact regarding the violation alleged in the single Count of the Complaint, and has also shown that it is entitled to summary decision as a matter of law with respect to that violation, and because respondent has failed to offer specific facts showing that there is a genuine issue of material fact with regard to his liability in the single violation set forth in the Complaint, complainant's January 11, 1996 Motion for Summary Decision is hereby granted.

VI. *Civil Money Penalty*

Because liability has been established and the respondent is on notice that a motion addressing the issue of civil money penalty is pending, it is not necessary to conduct a hearing on that issue. *Villages-Vargas*, 5 OCAHO 784, at 10. The statute provides penalties for a first offense violation consisting of a cease and desist order and a civil money penalty of not less than $250.00 and not more than $2000.00. 8 U.S.C. §1324c(d)(3); 8 C.F.R. §270.3.

The statute does not provide any factors to be considered in aggravation or mitigation of this civil money penalty. The statute does, however, provide for an increased range of fines for persons previously subject to a final order, but that is not applicable under these facts.

In determining the appropriate amount of civil money penalty, a consideration shall be given to factors set forth by complainant, any mitigating factors provided by respondent, and any other relevant

information in the record. *See U.S. v. Oscar Eduardo Villatoro-Guzman*, 4 OCAHO 652, At 15 (1994); *U.S. v. Orlando Diaz Rosas*, 4 OCAHO 702, at 7–8 (1994).

Complainant has requested a fine of $800.00 and applied the following factors in setting that penalty: 1) the respondent's age; 2) the seriousness of the violation; 3) history of previous criminal/civil violations; 4) immigration status; 5) purpose of document fraud; and 6) other aggravating factors. A discussion of those criteria, and respondent's rebuttal, is in order.

First, respondent was a 27-year old male at the time of the violation. This is a neutral factor. Second, respondent's use of the counterfeit alien registration card to unlawfully obtain employment frustrated the purpose of IRCA's employment eligibility verification system. However, because all violations of IRCA are serious, this is also a neutral factor. Third, at the time respondent was encountered by the INS, he was under arrest for spousal abuse, and subsequently convicted of that charge. Respondent's counsel advises that respondent received probation. Because there is no evidence of prior or subsequent immigration or criminal activity, this factor is also neutral. Fourth, respondent was an undocumented alien at the time of the violation and he has indicated that he previously made three other unlawful entries into the United States. Those are aggravating factors. Fifth, respondent committed document fraud to gain employment, resulting in the displacement of an American worker. This is an aggravating factor.

At the time of his arrest by the San Mateo County Sheriff's Office, respondent was carrying other forms of identification, which were allegedly counterfeit, also. Moreover, respondent admitted that he had purchased forged documents from a vendor in Los Angeles. These are aggravating factors. Finally, respondent advises that he is the beneficiary of an approved immediate relative petition, is now married to Ms. Vasquez, and has two children, one of whom is a U.S. citizen. Since his wife is a naturalized citizen, respondent may adjust his status. Although respondent's conduct subsequent to his arrest and conviction indicate a genuine effort to comply with U.S. laws and are to be commended, such factors are not considered mitigating.

After a careful consideration of the foregoing mitigating and aggravating factors, the assessment of a fine in the amount of $800, as recommended by the INS, is found to be reasonable.

Order

It is ordered that the appropriate civil money penalty assessment for the single violation alleged in the Complaint is $800.

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

All motions and requests not previously disposed of are hereby denied.

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.