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

February 20, 1997

UNITED STATES OF AMERICA Complainant,	)	8 U.S.C. § 1324c Proceeding
v.	)	OCAHO Case No. 95C00154
JULIO CARPIO-LINGAN Respondent.	)	
UNITED STATES OF AMERICA Complainant,	)	8 U.S.C. § 1324c Proceeding
v.	)	OCAHO Case No. 95C00155
ISRAEL VELASQUEZ-TABIR Respondent.	)	

FINAL DECISION AND ORDER GRANTING SUMMARY DECISION

I. PROCEDURAL BACKGROUND

These are companion cases arising under the Immigration and Nationality Act, as amended, 8 U.S.C. § 1324c (INA or the Act). Complainant Immigration and Naturalization Service (INS) alleges in Case No. 95C00154 that respondent Julio Carpio-Lingan a/k/a Julio R. Carpio and Julio Rodolfo Carpio knowingly used, attempted to use, and possessed a forged, counterfeited, altered, and falsely made alien registration card (Form I-151)[1] A090 587 208 bearing the name Julio Rodolfo Carpio after November 29, 1990 for the purposes of satisfying a requirement of the Act. In Case No. 95C00155, complainant alleges that respondent, Israel

[1] The document is also referred to in the Notice of Intent to Fine (NIF) as Form I-551. There are numerous versions of both Forms I-151 and I-551, depending upon the date of issue. The document is also known as a resident alien card, an alien registration receipt card, and, more colloquially, as a "green card," although most versions are not green.

Velasquez-Tabir a/k/a Israel Velasquez and Isrrael Velasquez, knowingly used, attempted to use, and possessed a forged, counterfeited, altered, and falsely made alien registration card (Form I-151) A34 621 489 bearing the name Isrrael Velasquez after November 29, 1990 for the purposes of satisfying a requirement of the Act.

Both respondents are former employees of Texas Arai, Inc. who were arrested under similar circumstances at or near the worksite premises on June 22, 1994, together with several other employees. They are represented by the same attorney and raise similar issues. On January 10, 1997, I issued a consolidated order in both cases denying respondents' motions in limine to exclude the subject alien registration cards as evidence. OCAHO rules[2] provide:

> When two or more hearings are to be held, and the same or substantially similar evidence is relevant and material to the matters at issue at each such hearing, the Administrative Law Judge assigned may, upon motion by any party, or on his or her own motion, order that a consolidated hearing be conducted. Where consolidated hearings are held, a single record of the proceedings may be made and the evidence introduced in one matter may be considered as introduced in the others, and a separate or joint decision shall be made at the discretion of the Administrative Law Judge.
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> 28 C.F.R. § 68.16.

That same authority by implication permits consolidation for preliminary matters as well; accordingly, I issued a single order addressing both motions.

Because the cases are again in the same procedural posture, pose common questions, and arise from a common nucleus of operative fact, these final decisions are consolidated as well for the purpose of ruling upon complainant's motions for summary decision, which are fully briefed and ripe for decision. While the facts and evidence differ somewhat for the two respondents, the governing standards are the same.

II. STANDARDS GOVERNING THE ENTRY OF SUMMARY DECISION

OCAHO rules provide for the entry of 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 summary decision. 28 C.F.R. § 68.38(c). 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 cases, and accordingly it is appropriate to look to federal caselaw interpreting that rule for guidance in determining when

[2] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. Pt. 68 (1996).

summary decision is appropriate. See United States v. Candlelight Inn, 4 OCAHO 611, at 10 (1994) and cases cited therein. The party seeking a summary decision has the initial burden of demonstrating to the trier of fact the absence of genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).

The OCAHO rules further provide that when a motion for summary decision is made and supported as provided by rule 68.38(a), the opposing party may not rest upon the mere allegations or denials in a pleading, but must "set forth specific facts showing that there is a genuine issue of fact for the hearing." 28 C.F.R. § 68.38(b). Affidavits submitted must set forth such facts as would be admissible in evidence, and must show affirmatively that the affiant is competent to testify to the matters stated therein.

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

The purpose of summary adjudication is to avoid an unnecessary hearing when there is no genuine issue as to any material fact, as shown by the pleadings, affidavits, discovery, and any judicially noticed matters. United States v Anchor Seafood, 5 OCAHO 742, at 4 (1995); United States v. Goldenfield Corp., 2 OCAHO 321, at 3 (1991). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp., 477 U.S. at 327 (1986).

III. THE EVIDENTIARY SUBMISSIONS OF THE PARTIES

A. Complainant's Evidence

In support of its motion for summary decision in Case No. 95C00154, complainant filed the following exhibits: A) an I-9 form dated May 23, 1993 bearing the signature of Julio R. Carpio (Exhibit A to Complainant's Motion for Summary Decision); B) copies of three documents: 1) a resident alien card number A090587208 bearing the name Julio Rodolfo Carpio, 2) a Texas Department of Public Safety Identification Card in the name Julio Rodolfo Carpio, and 3) a social security card with the number SSN1, bearing the name Julio Rodolfo Carpio (collectively Exhibit B to Complainant's Motion for Summary Decision); C) Form I-213, a Record of Deportable Alien, showing the file number A 72 820 903 (Exhibit C to Complainant's Motion for Summary Decision); D) a Central Index Systems (CIS) check dated June 2, 1994 indicating that number A90 587 208 is assigned to Pablo Valerio Ruiz born June 3, 1944 in Honduras (Exhibit D to Complainant's Motion for Summary Decision); and E) a records

certification dated November 20, 1995 and Form CO-230, Certificate of Nonexistence of Record, attesting that after diligent search, no evidence was found of a Service file number A-90 587 208 relating to Julio Rodolfo Carpio also known as Julio R. Carpio and Julio Carpio-Lingan, born May 5, 1950, or May 6, 1950 in Peru (Exhibit E to Complainant's Motion for Summary Decision).

In support of its motion for summary decision in Case No. 95C00155, complainant filed the following exhibits: A) an I-9 form dated January 7, 1991 bearing the signature of Israel Velasquez (Exhibit A to Complainant's Motion for Summary Decision); B) copies of three documents: 1) a social security card SSN2 bearing the name Isrrael Velasquez, 2) a resident alien card number A 34 621 489 bearing the name Isrrael Velasquez, and 3) a Texas Department of Public Safety Identification Card in the name Israel Velasquez (collectively Exhibit B to Complainant's Motion for Summary Decision); C) Form I-213, Record of Deportable Alien showing the name Isreal Velasquez-Tabira and the file number A 72 820 906 (Exhibit C to Complainant's Motion for Summary Decision); D) a Central Index Systems (CIS) check indicating that number A 34 621 489 is assigned to Susana D. Wiskus Barrios (Exhibit D to Complainant's Motion for Summary Decision); and E) a Form CO-230, Certificate of Nonexistence of Record, attesting that after diligent search, no evidence was found of a service file number A 34 621 489 relating to Israel Velasquez, Israel Velasquez-Tabir, Israel Velasquez-Tabira, or Isrrael Velasquez born July 19, 1970 in Mexico (Exhibit E to Complainant's Motion for Summary Decision).

Complainant thereafter in each case in addition subsequently filed the affidavit of Mike Murphy in response to respondent's submissions.

B. Respondents' Evidence

Carpio-Lingan filed an affidavit in Case No. 95C00154 in opposition to the motion for summary decision, as did Velasquez-Tabir in Case No. 95C00155.

Neither respondent has challenged the relevancy, accuracy, or authenticity of the complainant's evidence, nor did complainant challenge the respondents' affidavits.

IV. ADMISSIBILITY OF THE EVIDENCE

A. Standards Governing Admissibility

Administrative agencies are not strictly bound by the technical requirements of the federal rules of evidence. The Administrative Conference of the United States (ACUS), in fact, adopted recommendations in 1986 stating that it would be improper to require agencies to apply those rules. Recommendation 86-2, 1 C.F.R. § 305.86-2. The Administrative Procedure Act, 5 U.S.C. § 551 et seq. (APA), which governs administrative hearings, directs only that agencies

should, as a matter of policy, exclude evidence which is irrelevant, immaterial, or unduly repetitious. 5 U.S.C. § 556(d). Agencies are otherwise given wide discretion in adopting their own rules of evidence. OCAHO has not adopted specific rules of evidence. The OCAHO rules of practice and procedure, while looking to the federal rules of evidence as a general guide, provide instead in accordance with APA's direction that all relevant and material evidence is admissible, but a particular item may be excluded if, inter alia, its probative value is substantially outweighed by unfair prejudice or confusion of the issues. 28 C.F.R. § 68.40(b). The rules further provide material and relevant evidence should not be excluded because it is not the best evidence, unless its authenticity is challenged. 28 C.F.R. § 68.40(b).

This lower standard for admissibility of documentary evidence in administrative proceedings nevertheless does not obviate the requirement of authentication: the proponent of documentary evidence must still authenticate a document by evidence sufficient to demonstrate that the document is what it purports to be, even in administrative proceedings. Woolsey v. National Transportation Safety Board, 993 F.2d 516, 519 (5th Cir. 1993), reh. denied, 3 F.3d 441 (5th Cir. 1993), cert. denied, ___U.S.___, 114 S. Ct. 1829 (1994); Gallagher v. National Transp. Safety Bd., 953 F.2d 1214, 1218 (10th Cir. 1992). The requirement is not an onerous one and it may be satisfied in a variety of ways, but it is still incumbent upon the proponent of a document to provide some foundation from which its identity, relevance, and provenance may be established. OCAHO rules in addition further specify that affidavits in support of a motion for summary decision should show affirmatively that the affiant is competent to testify to the matters contained 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. 28 C.F.R. § 68.38(b). The evidence must at least meet these threshold tests and must be examined to see that the minimal criteria are satisfied.

B. Complainant's Evidence

1. The Documents

Ordinarily in OCAHO proceedings, authentication of exhibits in support of a motion for summary decision is accomplished by an accompanying affidavit of the investigating agent, setting forth the circumstances under which the evidence was obtained. See, e.g., United States v. Kumar, 6 OCAHO 833, at 5-7 (1996), United States v. Tinoco Medina, 6 OCAHO 890, at 16 (1996). This is only one of many ways in which documents may be authenticated; it is, however, a preferred manner because the statement of an individual with personal knowledge simultaneously establishes the origin and chain of custody as well as the identity of the document. This procedure was not followed here. The exhibits submitted by complainant were simply attached to the motions for summary decision.

Although the federal rules of evidence are not binding in this forum, I look at the evidence submitted in light of the general purposes and requirements of those rules and of the federal rules of civil procedure to see if those general purposes are satisfied by the submissions

here. Examination of the complainant's evidence shows that Exhibits A-E in each case bear on their reverse sides the certification of the Assistant District Counsel of the INS Houston Office that each is a true and correct copy of the original document. Exhibit E, the Certificate of Nonexistence of Record, in each case bears the additional certification of the Director of Records Operations attesting to both the authenticity of the signature and the authority of the signer to execute the Certificate of Nonexistence of Record. Exhibit E thus would appear to fully satisfy all the requirements of Rule 44(b) of the Federal Rules of Civil Procedure for authentication which provides in relevant part:

> A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, authenticated as provided in subdivision (a)(1) of this rule in the case of a domestic record, . . . is admissible as evidence that the records contain no such record or entry.

Rule 44(a)(1) further states that:

> An official record kept within the United States or any state, district, or commonwealth, or within a territory subject to the administrative or judicial jurisdiction of the United States or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by the officer's deputy, and accompanied by a certificate that such officer has the custody. (emphasis supplied).

This standard is similar to those set forth in evidentiary rules 902(2) and 902(4) for self-authentication of public records not under seal.

This exacting standard is not satisfied here with respect to Exhibits A-D because while the copies are attested, there is no certificate. It is, moreover, not self evident that I-9 Forms and supporting documents or Forms 213, even if obtained or generated in the course of an investigation, could qualify as public records. See, e.g., United States v. Dubois Farms, Inc., 2 OCAHO 376 at 9 (1991). The Central Index Systems (CIS) check, Exhibit D, in all probability could so qualify. The somewhat more relaxed standard adopted for authentication of evidence in immigration proceedings by 8 C.F.R. § 287.6(a) (1996),[3] although not strictly applicable in

[3] It should be noted, however, that an analogous regulation, 46 C.F.R. § 4.07-1(b), was recently invalidated by the Third Circuit to the extent that it purported to affect the admissibility of evidence in the federal courts ("[T]he Coast Guard may not, through its regulations, limit the authority of Congress to prescribe and enforce rules for the admissibility of evidence in federal courts.") In re Complaint of Nautilus Motor Tanker Co., Ltd., 85 F.3d 105, 111 (3d Cir., 1996).

OCAHO proceedings, would be satisfied as to Exhibit D:

> In any proceeding under this chapter, an official record or entry therein, when admissible for any purpose, shall be evidenced by an official publication thereof, or by a copy attested by the official having legal custody of the record or by an authorized deputy.

Exhibits A - C, the I-9s, supporting documents, and Forms 213, while not fully satisfying all the technical requirements for authentication, do appear to be generally within the boundaries of Rule 901(b)(4) because, when considered together with the information contained in the subsequently filed affidavit of Special Agent Murphy, the origins of these exhibits becomes more apparent, even though not specifically spelled out.

2. The Murphy Affidavit

The Murphy affidavit is dated October 17, 1996 and was filed in response to respondent's submission. It asserts under oath that the affiant is a Special Agent in the Houston District Investigations Unit of the INS, and has been assigned to the Worksite Enforcement Unit for three and one-half years. The matters described are clearly within his personal knowledge. Murphy asserts that INS received complaints on May 2 and May 16, 1994 that illegal aliens were using counterfeit documents at Texas Arai. He was assigned on May 16, 1994 to investigate, and he visited Texas Arai himself on May 27, 1994 to review their I-9 Forms and photocopies of the accompanying documents. Upon review, seventy-nine employees were found to have used counterfeit documents. The employer was notified and on June 22, 1994, an employer survey was done at Texas Arai and 30 illegal aliens, including respondents, were arrested. In each case, Murphy's signature appears also on Exhibit C, Form I-213, Record of Deportable Alien, which provides details of the respective respondent's arrest and interview. While Murphy's signature does not appear on Exhibits A or B, the I-9's and supporting documents, the affidavit itself refers to his examination of the I-9's and their accompanying documents on the premises at Texas Arai. Exhibit D, the Central Index Systems (CIS) check is not mentioned in the Murphy affidavit.

The characteristics of Exhibits A-E, considered in light of the circumstances, demonstrate that they are the kinds of documents which are routinely obtained in the course of INS investigations. While it is by far the better procedure to authenticate them by the affidavit of the investigating officer, I find there is at least a prima facie showing that the documents are what

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See also Romero v. United States, 153 F.R.D. 649, 652 (D. Colo. 1994) (federal rules of evidence override Army regulation 32 C.F.R. § 516.42 purporting to limit Army doctor's expert testimony).

they purport to be. Cf. Espinoza v. INS, 45 F.3d 308, 309 (9th Cir. 1995). In each case with respect to Exhibits A-C, the respondent has such a relationship to the document proffered that he is most likely to know the facts as to its genuineness and has posed no challenge to it. In the absence of any challenge to the authenticity of the complainant's evidence, I am unwilling to assume that these documents were not obtained in the ordinary course of the investigation or that the chain of custody was compromised in some manner. Gallagher, 953 F.2d, at 1218; Veg-Mix, Inc. v. United States Dept. of Agriculture, 832 F.2d 601, 606 (D.C. Cir. 1987). Complainant's evidence will therefore be admitted.

3. Respondents' Affidavits

Carpio-Lingan's affidavit states that his employer, Texas Arai, called INS on June 23,[4] 1994 with the hope of dissolving a union recently formed by employees, and on that same date at 5:30 p.m., he was stopped by an INS agent and taken by bus to a detention station. He stated that he signed many documents at the detention center, the contents of which he does not know, that he remained in jail for several days, and that his identification card and driver's license were never returned to him. Velasquez-Tabir's affidavit states that his A number is A72-820-906, that he was arrested outside the fence at Texas Arai a few days after the results of the union election were certified by NLRB, that he was questioned without an attorney, and that he signed an unidentified document.

There are several deficiencies in the Carpio-Lingan affidavit. First, it is not made entirely on personal knowledge and does not show affirmatively that the affiant is competent to testify as to some of the matters stated therein. It sets forth some "facts" which would not be admissible as evidence. In particular, there is no explanation of the source of Carpio-Lingan's knowledge of how INS came to arrive at Texas Arai in June 23 (or June 22), how he knew "the company" called INS that day, how he came to know that the company's "hope" was, or who acted or hoped for the company. A company can make a phone call or entertain a hope only by or through an individual agent. The Velasquez-Tabir affidavit is unobjectionable. Both affidavits will be admitted with minimal weight attached to those portions of Carpio-Lingan's affidavit addressed to matters beyond his personal knowledge.

Both respondents argue that there is a genuine issue of fact in this proceeding as to whether the raid at their worksite was illegal, but identified no other disputed factual issue. The same issue was raised by the motions to exclude the resident alien cards as evidence which were denied on January 10, 1997.

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[4] This date appears to be a typographical error inasmuch as the parties have stipulated that the date of Carpio-Lingan's arrest was June 22, 1994. The remainder of the record is consistent with the June 22 date.

V. SUFFICIENCY OF COMPLAINANT'S PRIMA FACIE CASE

A. The Burden of Proof

Complainant's burden in these document fraud cases is to show that respondents knowingly used, attempted to use, and possessed forged, counterfeited, altered, and falsely made alien registration cards after November 29, 1990 for the purposes of satisfying a requirement of the Act.

The amended Act provides for a system of employment eligibility verification. 8 U.S.C. § 1324a(b)(1). It specifies that in order to obtain lawful employment in this country, a person must show a prospective employer evidence of his or her identity and employment authorization. An alien registration card (Form I-151 or I-551) is proof of both identity and employment eligibility.

Regulations implementing the Act require the employee to complete Section 1 of Form I-9 at the time of hire and to present documentation establishing identity and eligibility, and require the employer to examine the documentation and complete Section 2 of the form within three days of hire. Employers are required to examine physically the documents verifying a new employee's identity and eligibility to work in the United States. 8 C.F.R. § 274a.2(b)(ii) (1996). In order to be legally employed in the United States, an alien must be authorized to work, and must provide valid documents to an employer to verify his or her eligibility. See 8 C.F.R. § 274a.12.

1. Use of the document after November 29, 1990

To support its contention in Case No. 95C00154 that Carpio Lingan used, attempted to use, and possessed the subject document after November 29, 1990, complainant has presented the Murphy affidavit of October 17, 1996; Exhibit B, a copy of the resident alien card A 090 587 208 bearing the name Julio Rodolfo Carpio; and Exhibit A, a copy of the pertinent I-9 Form which was filled out and signed by Julio Rodolfo Carpio on May 25, 1993, and which shows that Carpio-Lingan presented Texas Arai with the resident alien card A90 587 208 reflecting work eligibility until September 28, 2000, as proof of his identity and employment eligibility. Julio Rudolfo Carpio then signed an attestation in Section 1 stating under the penalty of perjury that he was an alien authorized to work in the United States until September 28, 2000. Form I-9 shows further that Beth Henley, "Secretary to V. P.," examined the document on behalf of Texas Arai on May 26, 1993, and attested to the fact that it appeared to be genuine and appeared to relate to the individual.

To support its contention in Case No. 95C00155 that Velasquez-Tabir used, attempted to use, and possessed the subject document after November 29, 1990, complainant has presented the Murphy affidavit of October 17, 1996, Exhibit B, a copy of the resident alien card bearing the

name Isrrael Velasquez, and Exhibit A, a copy of the pertinent I-9 Form which was filled out and signed by Israel Velasquez on January 8, 1991, and which shows that respondent presented Texas Arai with alien registration card A 34 621 489 as proof of identity and employment eligibility. The I-9 form states further under the penalty of perjury that the signer is an alien authorized to work in the United States. It shows that Beth Henley, "Sec. to V. President," examined the resident alien card on behalf of Texas Arai and attested to the fact that it appeared to be genuine and to relate to the individual.

2. The fraudulent nature of the document

To support its contention that the document presented by Carpio-Lingan was fraudulent complainant has submitted Exhibit D, a copy of the INS Central Index System (CIS) printout for alien registration number A90 587 208 confirming that the number belongs to Pablo Valerio Ruiz, and Exhibit E, Certificate of Nonexistence of Record showing that the number was not issued to respondent under any name he has used. Exhibit C, Record of Deportable Alien, indicates that Carpio-Lingan entered the United States on March 12, 1993 in Miami with a visitor visa (B-1), that he was employed at Texas Arai, Inc. from April 1993 until his arrest on June 22, 1994, and that he refused to answer questions about how he obtained the document at issue in this proceeding.

To support its contention that the document presented by Velasquez-Tabir was fraudulent, complainant has submitted Exhibit D, a copy of the INS Central Index System (CIS) printout for alien registration number A34 621 489 confirming that the number A34 621 489 belongs to Susana D. Wiskus Barrios, and Exhibit E, a Certificate of Nonexistence of Record, showing that the number A 34 621 489 was not issued to respondent under any name he has used. Complainant's Exhibit C, Form I-213, Record of Deportable Alien, indicates EWI (entry without inspection) in October 1987 near Laredo, and reflects employment at Texas Arai, Inc. from 1990 to June 1994, stating further that the I-151 and social security card were purchased from an unknown vendor for $200.00. Respondent's own affidavit confirms that his actual number is A72-820-906, not A 34 621 489.

3. Satisfying a requirement of the INA

The 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 1324c(a)(2) violation, specifically that the documents were presented in order to satisfy a requirement of the INA. United States v. Morales-Vargas, 5 OCAHO 732, at 5-6 (1995) (CAHO modification of final decision and order).

4. The element of knowledge

The one element not directly shown on the face of the documentary evidence is the

element of "knowing" use, that is, the state of each respondent's mind when he used the subject document. "Knowingly" is defined as doing something "[w]ith knowledge; consciously; intelligently; willfully; intentionally." Black's Law Dictionary 603 (Abridged 6th ed. 1991). It thus does not encompass conduct which is engaged in unknowingly, unconsciously, without comprehension, by accident, or unintentionally.

Because it is extremely difficult to establish knowledge, motive, intent, and similar states of mind by documentary or direct evidence, courts have often held that subjective factors frequently are not susceptible to disposition on summary judgment. See, e.g., Geier v. Medtronic, Inc., 99 F.3d 238, 240 (7th Cir. 1996). However, as was made clear in United States Postal Service Board of Governors v. Aikens, 460 U.S. 711 (1983), the fact that there is no direct evidence does not mean there is no evidence: "As in any lawsuit, the plaintiff may prove his case by direct or circumstantial evidence." Aikens, 460 U.S. at 714 n.3. Thus the Aikens court held it to be error for the district court to have required direct evidence of discriminatory intent, because circumstantial evidence is often all that a party will be able to produce as to another person's knowledge or intent, even at trial.

Circumstantial evidence as to the element of knowledge has often been held sufficient even to sustain a criminal conviction under a reasonable doubt standard, United States v. Perlstein, 576 F.2d 531 (3d Cir. 1978). Cf. United States v. Fierros, 692 F.2d 1291, 1295 (9th Cir.) cert. denied, 462 U.S. 1120 (1983) (proof parties knew they were transporting aliens who had entered illegally may be based upon circumstantial evidence), United States v. Herrera-Medina, 609 F.2d 378, 380 (9th Cir. 1979) (indirect proof may also support an inference that parties knew the passengers to be illegal aliens). The Supreme Court too has stated with respect to proof of knowledge in a criminal case:

> Nor must the Government introduce any extraordinary evidence that would conclusively demonstrate petitioner's state of mind. Rather, as in any other criminal prosecution requiring mens rea, the Government may prove by reference to facts and circumstances surrounding the case that petitioner knew that his conduct was unauthorized or illegal. (Footnote omitted.)
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> Liparota v. United States, 471 U.S. 419, 434 (1985).

Circumstantial evidence is a fortiori sufficient to satisfy a party's burden in a civil case. It simply consists of all the surrounding facts and circumstances; logic and common sense lead to the inferences to be drawn. An example of circumstantial evidence used to prove knowledge in a civil case was recently given by the Seventh Circuit,

> Whether a prison official had the requisite knowledge of a substantial risk if (sic) a question of fact subject to demonstration in the usual ways, including inference from circumstantial evidence, . . . and a factfinder may conclude that a

> prison official knew of a substantial risk from the very fact that the risk was obvious.
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> Estate of Cole v. Fromm, 94 F.3d 254, 259 (7th Cir. 1996) (citing Farmer v. Brennan, 511 U.S. 825 (1994)).

An inference is no more than a logical deduction of one fact from other proven facts. As observed by the Court in Richards v. Nielson Freight Lines, 602 F. Supp. 1224, 1244 (E.D. Cal. 1985) aff'd 810 F.2d 898 (9th Cir. 1987), ". . . to draw an inference, two conditions must exist; first a proven fact, second, a logical deduction from that fact, drawn pursuant to ordinary rules of logic and reason."

Absent direct evidence, complainant's proof as to the element of knowledge depends upon logical inferences to be drawn from the undisputed facts. The strengths of those inferences in turn depends upon the natural probative force of the circumstantial evidence. Cf. Sheridan v. E.I. DuPont de Nemours, 100 F.3d 1061, 1084 (3d Cir. 1996) (dissenting opinion).

B. Facts Established By Complainant's Evidence

In the absence of objection to complainant's evidentiary submissions, and in the absence of contravening evidence, the facts which complainant's evidence establish are uncontradicted. Credibility thus is not a factor in assessing this evidence because, whatever inferences may be drawn from them, no disputed issue has been raised with respect to these facts.

The facts established by complainant's evidence in Case No. 95C00154 are: Julio Carpio-Lingan, born May 6, 1950, a citizen and national of Peru, entered the United States at Miami, Florida, on March 12, 1993 with a B-1 visitor visa. On May 26, 1993 he got a job at Texas Arai and presented a resident alien card with the number A090587208 in the name of Julio Rodolfo Carpio, to demonstrate his identity and work eligibility. The card he presented stated that he was eligible to work in the United States. In completing Form I-9 at Texas Arai, he signed a statement in Section 1 of the form stating under the penalty of perjury that he was an alien authorized to work in the United States until September 28, 2000, and that his resident alien number was A090587208, a number which is in fact assigned to Pablo Valerio Ruiz, born June 3, 1944, in Honduras. He also presented a social security card number SSN1. Carpio-Lingan worked at Texas Arai from May, 1993 until his arrest on June 22, 1994. INS agents estimated that at the time of his arrest he had been in the United States illegally for one to six months. He did not have a resident alien card or social security card in his possession at the time of his arrest[5], and he refused to answer any questions about how he obtained the documents he used to

[5] 8 U.S.C. § 1304(c) requires that an alien over the age of 18 must carry his alien registration card with him at all times and have it in his personal possession.

obtain employment.

The facts established by the evidence in Case No. 95C00155 are as follows: Israel Velasquez-Tabir, a citizen of Mexico, was born July 19, 1970, and entered the United States without inspection near Laredo sometime in October, 1987. On or about January 7, 1991, he got a job at Texas Arai and presented an alien registration card with the number A34 621 489 and the name Isrrael Velasquez to Texas Arai as evidence of his identity and employment eligibility. The alien registration card stated that the bearer had been duly registered according to law and had been admitted to the United States as an immigrant on October 23, 1976. Velasquez-Tabir completed Section 1 of Form I-9 stating that he was an alien authorized to work in the United States and that his alien number was A34 621 489, and also presented a social security card numbered SSN2 in the name of Isrraeal Velasquez. His own alien number, according to his affidavit, is A72-820-906. He worked at Texas Arai until he was arrested at or near his workplace on June 22, 1994, at which time he did not have either a resident alien card or a social security card in his possession. In response to questioning he admitted that he entered the United States without inspection in October 1987 near Laredo, Texas and that he purchased the subject documents from an unknown vendor for $200 and used them to obtain employment illegally. The number A 34621489 is assigned to Susana D. Wiskus Barrios, born December 21, 1950 in Colombia.

C. Reasonable Inferences to be Drawn from the Undisputed Facts

The question is first, what reasonable inferences may be drawn from these facts in each case respecting the issue of knowing use of fraudulent documents, or, put another way, whether this circumstantial evidence would be sufficient in the absence of any contradiction, to support a judgment as a matter of law[6] for the complainant on the same evidence had the case proceeded to trial.

I find that it would in each case because no reasonable fact finder could conclude on the evidence presented here in either case that the use of the subject document occurred by mistake, accident, or for some other innocent reason. The only logical common sense inference is that the behavior was conscious and intentional, unless otherwise explained.

Summary decision does not require that the moving party's prima facie evidence be unrebuttable; simply that it be unrebutted and sufficient to support a verdict. It is not required that every possible hypothesis be excluded before a summary decision may issue. Were these cases submitted on a stipulated record, a reasonable fact finder would have to find for

[6] Since the 1991 amendments to the Federal Rules of Civil Procedure, Rule 50 now employs the term "judgment as a matter of law" for the procedures formerly known as the directed verdict and judgment notwithstanding the verdict (JNOV).

complainant by a preponderance of the evidence because human behavior, unless otherwise explained, is ordinarily knowing and voluntary, not unconscious, involuntary, or accidental. People ordinarily know what they are doing. As the court in Federal Deposit Ins. Corp. v. St. Paul Fire and Marine Ins. Co., 942 F.2d 1032, 1035 (6th Cir. 1991) observed regarding "intent," the word

> is really shorthand for a complicated series of inferences all of which are rooted in tangible manifestations of behavior. For us, the external behavior ordinarily thought to manifest internal mental states is all that matters. We need
>
> not concern ourselves with the question of whether mental states actually exist, as an ontological matter.
>
> Id. (citation omitted).

In assessing circumstantial evidence it is universally observed that the fact finder is required to construe it in the light most favorable to the non-moving party, and to give that party the benefit of all favorable inferences that can be drawn from it. There is one exception to that maxim which is recognized in all circuits:[7]

> In spite of the usual rule that all doubts are resolved against the moving party, there is one inference to which he is entitled by virtue of the last sentence in Rule 56(e). If the movant presents credible evidence that would entitle him to a directed verdict if not controverted at trial, this evidence must be accepted as true on a motion for summary judgment where the party opposing the motion does not offer counter-affidavits or other evidentiary material supporting his contention that an issue of fact remains, or does not show a good reason, in accordance with Rule 56(f), why he is unable to present facts justifying his opposition to the motion. (Citations omitted).
>
> 10A C. Wright, A. Miller & M.K. Kane Federal Practice and Procedure: Civil § 2727, at

[7] The Fifth Circuit has further qualified this maxim by directing that the evidence will be viewed and factual controversies will be resolved in favor of the nonmoving party, but the favorable presumption will be drawn only when the nonmoving party presents an actual controversy of fact; that is, when both parties have submitted evidence of contradictory facts. Guillory v. Domtar Industries Inc., 95 F.3d 1320, 1326 (5th Cir. 1996), Little v. Liquid Air Corp., 37 F.3d 1069, 1075 (5th Cir.1994), Liberty County Officers Ass'n v. Stewart, 903 F. Supp. 1046 (E.D. Tex. 1995). Once the parties have submitted evidence of contradictory facts, justifiable inferences are to be drawn most favorably to the non-movant. Falk v. Axiam, Inc., 944 F. Supp. 542,545 (S.D. Tex. 1996).

133-37 (2d ed. 1983).

While the evidence is more compelling in Velasquez-Tabir's case because of his own admissions,[8] it is not required that a full confession be obtained before a summary decision may issue. The record as a whole could not in either case persuade a rational fact finder that the use of the false documents was unknowing. Common sense tells us that an alien with an expired B-1 visa would necessarily know, absent extraordinary circumstances, that he is not a lawful resident alien authorized to work in the United States until the year 2000, and that a document so stating is necessarily a fraudulent document. Similarly, absent extraordinary circumstances, an alien who entered the country illegally without inspection in 1987, whose own number was A 72-820-906, who admitted that he purchased documents from an unidentified vendor for $200 which had a different number and which said he was admitted as an immigrant in 1976, would know that he is not a resident alien, that his number is not A 34 621 489, that he was not admitted as an immigrant in 1976, and that any document so stating is necessarily a fraudulent document.

Metaphysical doubt does not create an issue of fact. While it is possible to imagine circumstances under which an individual could unknowingly use a fraudulent alien registration card, no such scenarios arise as reasonable inferences from the undisputed facts here. If there are facts from which inferences more favorable to respondents could reasonably be drawn, respondents have failed to set them forth. It is axiomatic that "[i]nferences. . . must be grounded on more than flights of fancy, speculations, hunches, intuitions, or rumors. . .." Cusson-Cobb v. O'Lessker, 953 F.2d 1079, 1081 (7th Cir. 1991). Inferences are drawn from facts, not from the air, and it is the obligation of a party resisting summary decision to produce a factual predicate from which other inferences may be drawn. Richards, 602 F.Supp., at 1244. There is no factual predicate here in either case upon which to draw an inference that the conduct was the result of a mistake or accident, or that it occurred for some other innocent reason.

VI. SHIFTING THE BURDEN OF PRODUCTION

Accordingly, complainant has satisfied the initial burden of demonstrating the absence of a genuine issue and a prima facie case as to each of its allegations. Prima facie evidence is "evidence which, if unexplained or uncontradicted, is sufficient to sustain a judgment in favor of the issue which it supports, but which may be contradicted by other evidence." Black's Law Dictionary 825-26 (Abridged 6th ed. 1991). In order to avoid a summary decision, respondents

[8] Cf. Villegas-Valenzuela v. INS, 103 F.3d 805, 1996 WL 729585, at 7 (9th Cir. 1996) ("Petitioners admitted to Agent Borup that they bought the alien registration and social security cards from Los Angeles street vendors in order to establish employment eligibility. Petitioners never disputed that they made these statements. In light of Petitioners admissions, a reasonable person would have to conclude that Petitioners knew the documents were not genuine.")

would have to set forth specific facts showing that there is a genuine issue of material fact for the hearing. This they have failed to do.

Once a motion has been made and supported as provided in the rules, the adverse party may create a question of fact by setting forth specific facts showing that there is a genuine issue. The burden of the non-moving party is not a heavy one; he is required only to show specific facts, as opposed to general allegations, that present a genuine issue worthy of trial. Posey v. Skyline Corp., 702 F.2d 102, 105 (7th Cir.), cert. denied, 464 U.S. 960 (1983). Assumptions or conclusory claims cannot take the place of specific facts. Schroeder v. Copley Newspaper, 879 F.2d 266, 269 n.1 (7th Cir. 1989).

Applying the previously discussed principles of summary judgment, I must conclude that respondents' submissions are insufficient to create a triable issue of fact as to any of the matters raised in complainant's case-in-chief because they don't address those issues at all; rather they address only the question of whether the resident alien cards should be suppressed. Respondents' only evidentiary submissions are directed to the legal status of the so-called "raid" on June 22, 1994, not to the complainant's case-in-chief. I have taken the factual allegations in both respondents' affidavits as true for purposes of this motion, but because the company's motivation for cooperating with the INS is not relevant to the outcome of the case, no material issue is raised by these submissions. To be material, a fact must be outcome determinative under the governing law. Pritchard v. Rainfair, Inc., 945 F.2d 185, 191 (7th Cir. 1991).

At the heart of this case is the fact that both respondents deliberately used resident alien cards showing someone else's number and immigration information to get jobs and to work illegally at Texas Arai. They have offered nothing to counter complainant's evidence of this fact.

VII. FINDINGS AND CONCLUSIONS

I have considered the record in Case No. 95C00154 in its entirety, including the Complaint, Answer, Amended Answer, Motion for Summary Decision and response thereto, Motion in Limine and response thereto, Stipulations of Fact, and all accompanying documentary materials including affidavits and exhibits, and I make the following findings:

1. Julio Carpio-Lingan, also known as Julio R. Carpio and Julio Rodolfo Carpio was born May 6, 1950 and is a citizen and national of Peru.

2. Julio Carpio-Lingan entered the United States at Miami, Florida on March 12, 1993, with a B-1 visitor visa.

3. On or about May 23, 1993, Carpio-Lingan presented Texas Arai with a social security card and an alien registration card numbered A090587208 bearing the name Julio Rodolfo Carpio as evidence of his identity and employment eligibility.

4. Carpio-Lingan signed an I-9 Form dated May 23, 1993 stating under the penalty of perjury that he was an alien authorized to work in the United States until September 28, 2000, with the alien number A090587208.

5. The number A090587208 is assigned to Pablo Valerio Ruiz, born June 3, 1944 in Honduras.

6. Julio Carpio-Lingan was hired and thereafter worked at Texas Arai until June 22, 1994.

7. On June 22, 1994 Carpio-Lingan was arrested by INS agents together with a number of other employees on or near the premises of Texas Arai.

8. INS agents estimated in June 1994 that Carpio-Lingan had been in the United States illegally for one to six months.

On the basis of these facts I conclude that Julio Carpio-Lingan, after November 29, 1990, knowingly used, possessed, and provided a forged, counterfeited altered, and falsely made alien registration card bearing the name Julio Rodolfo Carpio for the purpose of satisfying a requirement of the INA in violation of 8 U.S.C. § 1324c(a)(2), and the complainant's motion for summary decision should be granted.

I have considered the record in Case No. 95C00155 in its entirety, including the Complaint, Answer, Amended Answer, Motion for Summary Decision and response thereto, Motion in Limine and response thereto, Stipulations of Fact, and all accompanying documentary materials including affidavits and exhibits, and I make the following findings:

1. Israel Velasquez-Tabir, also known as Israel Velasquez, Isreal Velasquez-Tabira, and Isrrael Velasquez was born July 19, 1970 and is a citizen and national of Mexico.

2. Israel Velasquez-Tabir entered the United States without inspection in October, 1987 near Laredo, Texas.

3. On or about January 8, 1991, Velasquez-Tabir presented Texas Arai with a social security card and an alien registration card numbered A34 621 489 bearing the name Isrrael Velasquez, as evidence of his identity and employment eligibility.

4. On January 8, 1991, Velasquez-Tabir filled out and signed an I-9 form dated January 7, 1991 stating under penalty of perjury he was an alien authorized to work in the United States, with the alien number A34 621 489.

5. The number A 34 621 489 is assigned to Susana D. Wiskus Barrios, born December

21, 1950 in Colombia.

6. Israel Velasquez-Tabir is assigned the alien number A 72-820-906.

7. Israel Velasquez-Tabir was hired and thereafter worked at Texas-Arai until June 22, 1994.

8. On June 22, 1994, Velasquez-Tabir was arrested by INS agents, together with a number of other employees on or near the premises of Texas Arai.

9. Israel Velasquez-Tabir admitted to INS agents that he purchased the alien registration card and a social security card from an unknown vendor of $200.

On the basis of the foregoing facts I conclude that Israel Velasquez-Tabir, after November 29, 1990, knowingly used, possessed, and provided a forged, counterfeited, altered, and falsely made alien registration card bearing the name Isrrael Velasquez for the purpose of satisfying a requirement of the INA in violation of 8 U.S.C., and that complainant's motion for summary decision should be granted.

VIII. CIVIL MONEY PENALTIES

In each case, complainant has requested the statutory minimum civil money penalty of $250 and I find that to be reasonable because the records reflect no basis on which to increase it and I am without authority to decrease it. Julio Carpio-Lingan shall pay a civil money penalty in the minimum statutory amount of $250, and shall cease and desist from violating 8 U.S.C. § 1324c(a)(2). Israel Velasquez-Tabir shall pay a civil money penalty in the minimum statutory amount of $250, and shall cease and desist from violating 8 U.S.C. § 1324c(a)(2).

SO ORDERED.

Dated and entered this 20th day of February, 1997.

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Ellen K. Thomas
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.