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

October 29, 1997

UNITED STATES OF AMERICA, Complainant, v. PEDRO DOMINGUEZ, Respondent.	)))) 8 U.S.C. §1324c Proceeding) OCAHO Case No. 96C00027)))

ORDER DENYING COMPLAINANT'S MOTION TO CERTIFY INTERLOCUTORY ORDER PARTIALLY GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION

I. *Background*

On October 17, 1997, I issued an Order Partially Granting Complainant's Motion for Summary Decision (hereinafter sometimes referred to as "Order" or "October 17 Order"), in which I concluded that, with respect to count I of the Complaint, Respondent violated 8 U.S.C. §1324c(a)(1) by counterfeiting ninety-seven I–94 documents referenced in paragraphs 1–23, 25–51, 53–59, 61–74, 76–87, and 90–103, in violation of 8 U.S.C. §1324c(a)(1). 7 OCAHO 972, at 26. Also, I found that Respondent forged the documents listed at count I, paragraphs 2–3 and 25–28. *Id.* I denied Complainant's motion as to all paragraphs with respect to the allegations that the documents were altered or falsely made. *Id.* Nevertheless, Complainant prevailed on the liability issue with respect to all but six of the documents referenced in count I. *See id.*

As to the count II allegations, I found that, with respect to the I–94 documents referenced in paragraphs 3, 8, 12–13, 18–19, 25–26, 29–37, 43–49, 53–59, 64–67, 70–72, 76–77, 80, 83, 87, 90, 93–95, 98–100, and 103, Complainant had shown that the Respondent ille-

gally provided the counterfeit (and, as to paragraphs 2–3 and 25–28, forged as well) documents in violation of 8 U.S.C. §1324c(a)(2), and, therefore, summary decision as to liability was granted with respect to the allegations of count II referencing those documents. *Id.* Although I did not grant Complainant's motion with respect to the allegations that Respondent used, attempted to use, or possessed the documents, judgment was not rendered for Respondent on these charges, and Complainant may attempt to prove these allegations at trial.[1]

Finally, because I found that there are genuine disputed issues of material fact with respect to the civil money penalty issue, I denied Complainant's motion with respect to penalty as to both counts of the complaint. *Id.* at 27.

Apparently not satisfied with a ruling that found liability as to the majority of the documents referenced in the Complaint, on October 23, 1997, Complainant filed a motion to certify the October 17 Order to the Chief Administrative Hearing Officer (CAHO) for review pursuant to 28 C.F.R. §68.53(d)(1). The nexus of Complainant's motion is that Complainant, which succeeded on a motion for summary decision in proving 97 of the alleged 103 violations in count I of the Complaint, and 50 of the 103 violations in count II of the Complaint, nevertheless wants me to stay this proceeding and certify two issues on which it has not been successful. The two questions on which Complainant seeks interlocutory review are as follows:

> *Question 1*
>
> Do the CAHO's decisions in *United States v. Remileh*, 5 OCAHO 724 (1995) and *United States v. Noorealam*, 5 OCAHO 797 (1995), bar Section 274C liability for falsely making docu-

[1]I had previously denied Complainant's motion as to "possession" during the July 30, 1997, prehearing conference. PHC(2) Tr. at 51. However, in the October 17, 1997, Order I did not reject Complainant's theory that retention, custody and control would constitute "possession" within the meaning of section 1324c(a)(2). Rather, I emphasized that "[m]y ruling should not be construed as a finding that Respondent did not possess the documents, only that Complainant has failed to produce evidence at this stage of the case proving the allegation in the Complaint." Order at 20 n.23. Thus, Complainant may seek to prove possession by adducing further evidence, either prior to trial or at trial. Similarly, Complainant remains free to attempt to prove that Respondent "used" or "attempted to use" the I–94 forms, as those terms are used in section 1324c.

ments on the part of an individual who counterfeited INS entry and employment authorization documents (Forms I–94)?

Question 2

Should a civil money penalty be imposed against an individual who has violated Section 274C(a)(2) by providing a counterfeit document in order to satisfy a requirement of the Immigration and Nationality Act?

As to question 1, Complainant argues that my ruling is not in accord with the CAHO's rulings in *Remileh* and *Noorealam* and that, although Complainant has already succeeded in proving a violation with respect to 97 allegations, it wants to obtain judgment as to each applicable ground![2] Further, it states that obtaining summary decision as to false making would prevent a possible need to appeal question 1 after a final decision and seek remand for further proceedings regarding liability. Complainant does not enlighten us as to why a remand would be necessary.

By a letter response dated October 23, 1997, Respondent opposes the Complainant's motion. Respondent observes that there is no reason for an interim certification of question 1 because, but for six I–94 documents, I already have concluded that the I–94 documents were counterfeit and found for Complainant on the liability issue. Thus, even if the ruling on falsely make is reversed, it is a redundant finding. Respondent states that it does not expect to appeal the Judge's construction of the statutory meaning of the word "counterfeit." Even if Complainant appeals the ruling on falsely make after the issuance of a final decision, no retrial will be necessary.

As to question 2, Respondent argues that Complainant's stated basis for appeal is conclusory and it fails to show why or how its trial strategy will be impacted by a reversal of the disputed ruling, particularly since it only pertains to penalty and not liability.

Finally, Respondent opposes the interim appeal because it will delay this proceeding and will necessarily increase his cost. Respondent states that these two disputed issues are not outcome

[2]However, I note that Complainant is not seeking interlocutory review of my ruling with respect to "alter" or "forge," even though I denied the motion as to all the documents with regard to the former and all but six of the latter.

determinative, and they can be handled efficiently, along with other issues that may arise, at the conclusion of the case after a final decision is issued. Even if the government prevails on either or both issues, the controlling issues will have been tried, and the ALJ's final order can simply be modified in conformity with the CAHO's rulings without the necessity of a retrial. In the event that the government wishes to present evidence that is only relevant to the disputed issues, Respondent would not object to the presentation of such evidence by the government through a bill of exceptions at the time of trial so as to eliminate any possibility of the need for a retrial.

II. *The Applicable Rules Governing Interlocutory Appeal*

The OCAHO Rules of Practice and Procedure for Administrative Hearings (OCAHO Rules) provide in pertinent part with respect to review of interlocutory orders:

> In a case arising under section . . . 274C of the INA, the Chief Administrative Hearing Officer may, within thirty (30) days of the date of an Administrative Law Judge's interlocutory order, issue an order which modifies or vacates the interlocutory order. If the Chief Administrative Officer does not modify or vacate the interlocutory order within thirty (30) days, the Administrative Law Judge's interlocutory order is deemed adopted.

28 C.F.R. §68.53(d)(1) (1996). The OCAHO Rules also permit the Administrative Law Judge, within five days of the date of the interlocutory order, to certify the interlocutory order for review to the CAHO if the Judge determines that "the order contains an important question of law or policy on which there is substantial ground for difference of opinion; and where an immediate appeal will advance the ultimate termination of the proceeding or where subsequent review will be an inadequate remedy." *Id.* §68.53(d)(1)(i).

Although Complainant is asking that I certify the October 17 Order, apparently it is just the two questions that it wants reviewed on interlocutory appeal. Therefore, in this Order I will address only the issues raised by the request to certify those two questions.

III. *Timeliness of the Certification*

Complainant's motion must be denied because I have no authority at this time to certify the Order. The OCAHO Rules are quite explicit on this point, providing in pertinent part that the Administrative Law Judge, "**within five (5) days of the date of**

the interlocutory order," may certify the interlocutory order for review to the CAHO. 28 C.F.R. §68.53(d)(1)(i) (emphasis added). The Order Partially Granting Complainant's Motion was issued on October 17, 1997, and Complainant did not even file its motion to certify until October 23, 1997. Since the time period prescribed by section 68.53(d)(1)(i) is less than seven days, the intervening weekend days of October 18–19 are excluded from the five day computation. *Id.* §68.8(a) (providing in pertinent part that when a time period prescribed by the rules is seven days or less, intermediate Saturdays, Sundays, or holidays shall be excluded in the computation). Therefore, I only had one day, until October 24, 1997, to certify the Order. I did not receive Respondent's response to the motion, which was sent by FAX, until after business hours on October 23, 1997 (the FAX transmission was received at 17:10 hours). Although I reviewed the papers on October 24, and tentatively determined that the motion to certify should not be granted, given the press of other business, I was not able to issue a written order at that time. In any event, because the five day period now has passed, I could not certify the Order even if I believed I should.

I would add in passing that, because the deadline in the OCAHO Rules for certifying an interlocutory order is very stringent, it is incumbent on a party to act promptly to advise the Judge that it wants certification. A party does not have to wait until after the Order has been issued to request certification. Indeed, earlier in this proceeding, when I was considering Complainant's Motion to Strike Respondent's Defense of Double Jeopardy, prior to the ruling Respondent requested that, if I granted Complainant's motion, the order be certified to the CAHO pursuant to 28 C.F.R. §68.53(d)(1). On July 1, 1996, I granted Complainant's motion, and on July 2, 1996, I certified the order for interlocutory review. By contrast, here Complainant never indicated that it might want certification until one day before the deadline.[3] Complainant's delay is particularly unjustified because the motion has been pending for some time, several briefs have been filed, and two oral conferences have been held, during which the motion was discussed. The issues on which Complainant seeks certification previ-

[3]Complainant's counsel did not ask that my office notify them when the Order was issued, or that the Order be sent by any expedited service. Moreover, even though the motion to certify was only five pages in length, Complainant did not FAX it to my office on October 22, but, rather, sent it by Federal Express so that it was not received until October 23, leaving me only one day on which to make a ruling within the requisite time period.

ously were discussed either in the briefs or during the conferences or both. Moreover, my ruling on these two issues should not have come as a surprise. In fact, as discussed below, my ruling on question 1 is consistent with my final decision and order in *United States v. Davila*, 7 OCAHO 936 (1997), 1997 WL 602730, and my ruling on question 2 actually was made during the prehearing conference on July 30, 1997, not in the October 17, 1997, Order.

Nevertheless, although the time for certifying the order has passed, for the purpose of a full record I will address the merits of the motion with respect to the two questions on which certification is sought.

IV. *Question 1*

As noted previously, to justify certification the Judge must determine (1) that the order contains an important question of law or policy on which there is substantial ground for difference of opinion, and (2) that an immediate appeal will advance the ultimate termination of the proceeding or that subsequent review will be an inadequate remedy. As to the former, I would agree that the definition of the statutory term "falsely make" is an important question of law, but not that there is a substantial ground for difference of opinion. The language in section 68.53(d)(1)(i) cannot simply mean that a party does not agree with the judge's decision since that usually will be the case. There must be substantial independent grounds (e.g., contrary authority) to question the ruling. Here, just the opposite is true. The definition of falsely make applied in this proceeding is based on *Remileh* and *Noorealam*, decisions by the CAHO, not this Judge. Moreover, the definition of falsely make is consistent with my ruling in *United States v. Davila*, 7 OCAHO 936 (1997), 1997 WL 602730, which the INS did not appeal and which the CAHO did not review.

Moreover, it is not even clear whether Complainant seeks to challenge only my application of *Remileh* and *Noorealam* or the holdings of those decisions themselves. It is no secret that the INS was profoundly unhappy with the rulings in *Remileh* and *Noorealam*, and, indeed, it obtained a legislative override of the same in the 1996 amendments to the INA contained in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. No. 104–208, 110 Stat. 3009.[4]

[4]However, as explained in the October 17 Order, the 1996 Act generally does not make the application of the statutory definition of "falsely make" retroactive. 7 OCAHO 972, at 7.

Assuming that Complainant only challenges my application of *Remileh* and *Noorealam*, rather than the holdings of those decisions, Complainant's contentions are refuted by the very language of the CAHO's decisions. *Remileh* held that the inclusion of false information on an I–9 form does not constitute the creation of a "falsely made" document in violation of 8 U.S.C. §1324c. *Remileh*, 5 OCAHO 724, at 2–3. Rather, "[i]t is the underlying fraudulent document submitted to an employer to establish identity and/or work authorization, which is the proper basis of a section 1324c violation against an employee in the context of the employment eligibility verification system of 8 U.S.C. §1324a." *Id*. at 3. *Noorealam* further clarified *Remileh* by making it clear that the *Remileh* holding is not limited to the inclusion of false information on I–9 forms. Thus, the CAHO stated in *Noorealam* that "there is no substantive distinction between the inclusion of false information in completion of a Form I–9, a Form I–485, or a Form I–765." *Noorealam*, 5 OCAHO 797, at 3. Contrary to Complainant's suggestion, the I–94 form is an INS document, not an underlying document such as a social security card or drivers license.[5] Therefore, applying *Remileh* and *Noorealam*, I concluded that the supplying of false information on the I–94 forms is not a "false making" for the purpose of section 1324c.

Even were Complainant able to show that the first element for certification is met, i.e., that there is a substantial question of law or policy on which there is substantial ground for difference of opinion, it has not shown that an immediate appeal will advance the ultimate termination of the proceeding or that subsequent review will be an inadequate remedy. Indeed, as Respondent notes, there is no need for interlocutory review of this issue. As Respondent correctly

[5]As support for its position that *Remileh* and *Noorealam* do not apply here, Complainant contends that the I–94 form is an "underlying document" and cites *Remileh* as defining falsely make to mean the false execution of a document, not a valid document containing false information. I would note that Complainant's theory is advanced rather late in the day since it did not articulate this argument prior to the October 17, 1997, ruling, although it was permitted to file several briefs and was afforded two opportunities for oral argument. Moreover, in citing this one isolated sentence from *Remileh*, Complainant ignores the later decision in *Noorealam*, which states that "it is a misinterpretation of the reasoning behind the holding in that case to infer that the supplying of false information in the completion of a Form I–9 is not a 'false making' for purposes of section 1324c, but the providing of false information on a different INS form would constitute a false making." *Noorealam*, 5 OCAHO 797, at 4. I would remind Complainant of the admonition in *Remileh*, quoting Justice Scalia's dissent in *Moskal v. United States*, 498 U.S. 103, 132 (1990), that "[t]he temptation to stretch the law to fit the evil is an ancient one, and it must be resisted." *Remileh*, 5 OCAHO 724, at 8.

observes, finding that the documents were falsely made is no more than a redundant finding for 97 of the 103 allegations in count I because I already have found a violation of law based on the fact that the documents were counterfeit. Respondent states in its response to the motion that it does not currently intend to challenge my construction of the meaning of the term "counterfeit." Since I have found that 97 of the documents were counterfeit, any finding that they were "falsely made" as well would be redundant and certainly does not justify certification for interlocutory review, which should be used sparingly and be reserved for exceptional circumstances.[6]

Complainant also may be unaware of how the review mechanism operates within OCAHO. Every Judge's order, no matter how routine, is provided to Case Management (which serves, in essence, as OCAHO's docket section), and, thus, the order is available for review by the CAHO. Moreover, it is my understanding that the CAHO independently reviews every substantive final or interlocutory order issued by an Administrative Law Judge regardless of whether or not a party seeks review. Indeed, as provided by the OCAHO Rules, the CAHO may elect to review, and vacate or modify, a Judge's order, even if a party does not request such review, and has done so in the recent past.[7]

---

[6]On July 2, 1997, I certified the Order Granting Complainant's Motion to Strike Respondent's Double Jeopardy Defense because it not only involved an important question of law, but, if my ruling were erroneous, subsequent review would not protect Respondent from the burden of defending himself in a second prosecution. By contrast, Complainant has utterly failed to show that subsequent review will be inadequate, especially since it has already prevailed on the issue of liability as to almost all the alleged violations in count I. Complainant is merely piqued by the fact that it did not prevail on all its substantive assertions.

[7]Earlier this year the CAHO took review on his own initiative of my interlocutory order in *United States v. Corporate Loss Prevention*, 6 OCAHO 908 (1997), 1997 WL 131365, an employer sanctions case in which I granted in part and denied in part the INS' motion for summary decision. Even though the INS had not requested review, the CAHO modified my ruling in part concerning the application of the "substantial compliance" defense. Substantial time and effort would have been required to attempt to prove the defense, which, based on the CAHO's ruling, would have been legally insufficient in any event. Thus, interlocutory review in that case was appropriate and necessary to facilitate the litigation process. The procedure followed in *Corporate Loss* demonstrates that the CAHO carefully reviews interlocutory rulings on substantive issues and acts on his own initiative to correct errors. Therefore, I am confident that if I have misinterpreted or misapplied *Remileh* and *Noorealam*, the CAHO will act to correct my ruling, whether or not I certify this Order.

In this case I believe that my ruling is not only consistent with *Remileh* and *Noorealam*, but is dictated by those cases. Moreover, my interpretation of the CAHO's rulings in *Remileh* and *Noorealam* and the definition of "falsely make" is not a case of first impression or the first time such ruling has been made. Indeed, as I noted in the October 17 Order, I adopted the reasoning and language in my decision in *United States v. Davila*, 7 OCAHO 936 (1997), 1997 WL 602730. Although *Davila* involved a social security card, rather than an I–94 form, I applied the same interpretation of the case law and definitions in *Dominguez* as in *Davila*. However, I do not claim to be omnipotent, and, if I have misinterpreted or misapplied the holdings in *Remileh* or *Noorealam*, I am sure that the CAHO will correct my mistake through the normal review process at the conclusion of this case. In any event, there is no need for an interlocutory appeal by a prevailing party on a matter that would constitute a redundant finding.

Finally, I agree with Respondent that the ruling should not affect the government's prosecution of its case. I already have ruled that 97 documents were counterfeit, and, thus, Complainant has proven a minimum of 97 violations with respect to count I. Complainant does not explain in its motion how its evidentiary presentation will be affected by my ruling that it has not shown that the documents were falsely made.[8] Indeed, my ruling as to "falsely make" is based on an interpretation of the statute and case law. If, in reviewing the case upon appeal, the CAHO disagrees with my ruling, a reversal would not require new evidence, a new trial, or even a remand. The CAHO would simply rule that the I–94 documents in question were not only "counterfeit" but also "falsely made." The ultimate conclusion in either event is the same: Respondent violated section 1324c(a)(1)![9]

V. *Question 2*

A. *Timeliness of Certification and Review*

In addition to seeking certification of the ruling concerning falsely make, Complainant also asks for certification on the issue of

[8]Since I have found violations with respect to those 97 documents, I would expect that Complainant will limit its evidentiary presentation as to count I to those allegations concerning the six I–94 forms that are unadjudicated.

[9]Moreover, Complainant does not argue, and I would find little merit in any argument, that the penalty should be enhanced because the documents were not only counterfeit but also "falsely made." Thus, that determination has nothing to do with the only remaining issue as to the 97 violations of count I, namely the appropriate penalty.

whether a civil money penalty may be imposed against an individual who has violated 8 U.S.C. §274C(a)(2) by providing counterfeit documents. Aside from the fact that Complainant has not demonstrated the need for interlocutory review of this issue, its request is not timely. As discussed previously, the OCAHO Rules of Practice clearly state that the Administrative Law Judge may, **within five days of the date of the interlocutory order**, certify the interlocutory order for review to the Chief Administrative Hearing Officer. Moreover, the OCAHO Rules specify a thirty day review period, whether or not a party seeks certification. *See* 28 C.F.R. §68.53(d)(l) (1996). If the CAHO does not modify or vacate the interlocutory order within thirty days, **the Administrative Law Judge's order is deemed adopted**. *Id.*

In this instance, the order that a civil money penalty may not be imposed for "possessing" or "providing" a counterfeit document was made during the July 30, 1997, prehearing conference, not in the October 17 Order. At that time I specifically ruled, that while the INA prior to the 1996 amendments contained in IIRIRA made it unlawful to possess or provide a forged, counterfeit, altered or falsely made document, and authorized the issuance of a cease and desist order to prohibit that conduct, the statute did not authorize imposition of a civil money penalty for that offense.[10] PHC(2) Tr. at 52. That ruling was hammered home during the conference when I invited further briefing on other issues but stated the following with respect to penalty:

> I do not want to get briefings from the parties at this point on the question of whether or not the statute provides civil penalties for **providing or possessing because my reading of the statute is it does not**, but if you can show me that he *used* the documents in question within the meaning of the statute, that does provide for a civil penalty for the *use* of such documents.

PHC(2) Tr. at 56 (emphasis added). Thus, that ruling was made on the record and is reflected in the transcript of the conference.[11] At the conclusion of the conference I asked the parties if either had anything additional. PHC(2) Tr. at 76–77. Since Complainant did not

[10]As an aside, I would note that it was Complainant which strongly argued against retroactive application of section 1324c(d), as modified by the 1996 amendments, even though the amended statute appears to authorize the imposition of a civil money penalty for all section 1324c(a) violations. *See* Complainant's Brief Proving Respondent Has Violated §274C(a)(2) and PHC(2) Tr. at 35, 38–42.

[11]A copy of the transcript was delivered to Case Management on August 6, 1997.

ask for clarification of the ruling, it is reasonable to conclude that counsel understood the ruling.

Moreover, Complainant did not have to rely on its memory or notes of the conference because Complainant placed an accelerated order for the transcript to Heritage Reporting Corporation, and the transcript was delivered to Complainant on August 1, 1997, two days after the ruling was made.[12] Thus, Complainant had the opportunity to review the written record and study the rulings that were made during the conference. If Complainant believed that the ruling was erroneous, or, that it was "an important question of law or policy on which there is substantial ground for difference of opinion" and that an immediate appeal would advance the ultimate termination of the proceeding or that subsequent review would be an inadequate remedy, it could have and should have sought certification at that time. Instead, it waited almost three months to request that action.

Complainant's request for certification is particularly inappropriate because it is well aware that the ruling on possess and provide was made during the July 30, 1997, conference. In Complainant's Supplemental Memorandum of Law (SUM) served on August 19, 1997, Complainant attempted to reargue the issue of whether a civil money penalty could be imposed for possessing or providing an altered, counterfeit, forged or falsely made document. In my September 9, 1997, Order Striking in Part Complainant's Supplemental Memorandum of Law, I again made my ruling very clear by stating as follows:

> In Section II [of the SUM] Complainant also continues to argue that a civil money penalty for possession alone should be imposed, **even though I had already ruled during the conference that the pre-September 30, 1996 version of Section 1324c did not authorize imposition of a civil money penalty for possessing or providing**. . . .
>
> . . . .

[12]Heritage Reporting Corporation informed my office that INS was very anxious to receive a copy of the transcript of the conference, and, thus, on August 1, 1997, Heritage sent copies of the transcript to Complainant by FAX transmission as well as by Federal Express. Absent any contrary evidence, it appears that Complainant received the written transcript sent by FAX on August 1, 1997, and the copy sent by Federal Express by August 2. Thus, Complainant had the transcript within the five day time period and could have timely requested certification pursuant to 28 C.F.R. §68.53(d)(l)(i).

> . . . . I specifically instructed the parties that I did not want any further briefing from the parties on the question of whether the statute provides civil penalties for providing or possessing because I had ruled during the conference that the statute did not impose civil penalties for possessing or providing (PHC Tr. 56). Once a ruling is made, I do not want further argument on that issue unless I specifically request or grant leave to a party to file additional briefing on the issue. Despite those clear rulings, Complainant continued to argue that issue in the SUM.

Order Striking in Part Complainant's SUM at 2, 4 (emphasis added). If for some reason my ruling during the July 30 conference was not clear to Complainant, any doubt was resolved on September 9, 1997. Complainant did not seek review of the September 9 Order, and, in fact, the order was not vacated or modified.

Finally, in the Procedural History of the October 17 Order Partially Granting Complainant's Motion, I state as follows with respect to the July 30 ruling:

> I . . . ruled that, even assuming that Complainant can show that Respondent "possessed" and/or "provided" the I–94 forms referenced in the complaint, the pre-September 30, 1996, version of section 1324c only authorized imposition of a civil money penalty for each document used, accepted, or created and each instance of use, acceptance or creation. It does not empower the imposition of penalties for "possessing" or "providing" documents.[13] PHC(2) Tr. at 52, 54.

Order at 3 (footnote appears in original, but numbered as footnote four). Thus, while I referenced the earlier ruling in the discussion of the procedural history, in the October 17 Order, I did not rule on the issue stated in question 2 on which Complainant now seeks certification because, as was made clear in both the September 9 Order and the October 17 Order, I already had decided that issue during the July 30 prehearing conference. Thus, it is highly inappropriate for Complainant to seek certification of the October 17 Order to review an issue that was not decided in that Order but, in fact, was decided on July 30 and was reiterated in a September 9 Order.

Complainant also asserts that the statements in the October 17 Order "lead Complainant to believe that the Court did not reach the question whether material issues of fact remain as to the appropriate penalty as to Count II because it held as a matter of law that no penalty could be assessed." Motion at 4 n.1. Complainant is wrong in concluding that I did not grant summary decision as to penalty only because no penalty could be assessed for providing counterfeit docu-

[13]The Act does authorize imposition of a cease and desist order for such violations.

ments. In fact, as explained in the October 17 Order, I denied summary decision as to penalty because I concluded that there are genuine issues of material fact regarding the penalty assessment and thus summary decision is not an apposite method of adjudicating the dispute. Hence, even if I had concluded that a penalty could be assessed for "providing" a counterfeit document, I would have denied summary decision as to penalty in count II (as I did with count I) until the disputed factual issues were resolved.

Finally, I would note that, not only is certification pursuant to section 68.53(d)(1)(i) untimely, the time period for interlocutory review of both the July 30 and September 9 orders has passed. The OCAHO Rules of Practice provide in pertinent part that, in a case arising under section 1324c, the CAHO, within thirty days of the date of the Administrative Law Judge's interlocutory order, may issue an order that modifies or vacates the interlocutory order. 28 C.F.R. §68.53(d)(1) (1996). If the CAHO does not modify or vacate the interlocutory order within thirty days, the Judge's interlocutory order is deemed adopted. *Id*. The thirty day period has passed, and, thus, the interlocutory order ruling that the pre-September 30, 1996, version of section 1324c of the INA did not authorize imposition of a civil money penalty for possessing or providing a counterfeit or forged document is not appropriate for interlocutory review at this time.[14] Moreover, aside from the ruling reflected in the transcript, as noted previously, in the September 9, 1997, Order Striking in Part Complainant's SUM, I reiterated my ruling that the pre-September 30, 1996, version of section 1324c did not authorize imposition of a civil money penalty for possessing or providing. Again, Complainant did not seek review of this written order, and the order was not vacated or modified.

For all the above reasons, it is inappropriate for Complainant to seek certification of the October 17 Order because the ruling on

[14]Although the original order was rendered orally during the conference, since a transcript was prepared, there is a written record of the ruling, and the transcript was delivered to Complainant on August 1, 1997 and to OCAHO on August 6, 1997. In any event, the OCAHO Rules do not limit a party to seeking certification of only written interlocutory orders. Moreover, a written order encompassing that ruling was issued on September 9, 1997. As noted, Complainant did not seek review of that order. If the INS believed that my construction of the statute is contrary to the Congressional intent, and that it is an important question of law and policy that must be immediately resolved, one must question why INS did not seek certification and review immediately after receiving the transcript of the conference.

which Complainant seeks certification in question 2 was not made in the October 17 Order. Rather, the ruling was made in the orders issued on July 30 and September 9, and, thus, any certification of those orders would be untimely. Finally, the thirty day period of interlocutory review of both the July 30, 1997, and September 9, 1997, orders has passed.

B. *Standards for Certification of Interlocutory Order*

Aside from the untimeliness and inappropriateness of Complainant's request, Complainant has failed to show that all the requisite criteria for certification set forth in 28 C.F.R. §68.53(d) have been met. First, as to whether the ruling is an important question of law or policy on which there is substantial ground for difference of opinion, the statute is quite straightforward. Section 1324c(d)(3) states that, with respect to violations of 1324c(a), the order shall require the person to cease and desist from such violations, but it provides for imposition of a civil money penalty "for each document used, accepted, or created" and "each instance of use, acceptance, or creation." The statutory language is clear and unambiguous; it does not authorize imposition of a civil money penalty based on possession or provision of a document. Thus, I ruled with respect to count II, which alleges that Respondent used, attempted to use, provided and possessed the I–94 documents, that a civil money penalty is authorized only if Complainant can prove that Respondent "used" or "attempted to use" the I–94 documents referenced in the complaint.

Complainant also has not shown that an immediate appeal will advance the ultimate termination of the proceeding or that subsequent review will be an inadequate remedy. First, the issue raised in question 2 only relates to penalty, not liability. Moreover, although Complainant states that it needs to know before the evidentiary hearing whether a penalty for the count II offenses is statutorily authorized, and that such a ruling affects its witness and exhibit lists and strategy, it does not explain why that is so. Since a civil money penalty is authorized for the count I violations and the documents involved in both counts are the same, and the factual issues with respect to penalty are essentially the same for both counts, the available remedy should not affect the type of evidence presented by Complainant in support of its case. The disputed factual issues with respect to penalty discussed in the October 17 Order apply to both count I and count II. Finally, if Complainant can show Respondent

"used" or "attempted to use" the documents, a civil money penalty for the count II violations would be justified as well. If Complainant is displeased with the ultimate penalty assessed in this case, it can then appeal that ruling to the CAHO. Thus, Complainant has failed to show that an immediate appeal will advance the ultimate termination of the proceeding or that subsequent review will be an inadequate remedy.[15]

VI. *The Request for a Stay and/or Postponement of the Proposed Procedural Schedule*

In the October 17 Order, I required the parties to file, by November 3, 1997, a proposed procedural schedule for the completion of the prehearing events in this case. The filing of such a schedule would not seem to be unduly onerous, but Complainant seeks remission from that requirement.

The OCAHO Rules provide that interlocutory review of a Judge's order, with or without certification, will not stay the proceeding unless the Judge determines that the circumstances require a postponement. *See* 28 C.F.R. §68.53(d)(2) (1996). Since certification is not appropriate, and the CAHO has not indicated that he will review the October 17 Order, there is no reason to stay this proceeding at this time. The Complaint in this case was filed on March 4, 1996, and it is the oldest case on my docket. Even if Complainant is in no hurry to advance to trial, I do not intend to let this case wither on the vine. Moreover, I see no reason why the filing of a proposed procedural schedule should constitute a hardship for either party. The parties are expected to file the procedural schedule on November 3, 1997, as required by the October 17 Order.[16]

---

[15]Of course, if Complainant is concerned about the precedential impact of the October 17 Order, it should remember that an unreviewed interlocutory order issued by an Administrative Law Judge is binding neither on the CAHO nor on other judges. *See United States v. Corporate Loss Prevention Assocs., Ltd.*, 6 OCAHO 908, at 4 n.7 (1997), 1997 WL 131365 (Modification by the CAHO of ALJ's Order).

[16]Complainant seems to be in no hurry to get to trial in this case. Normally, one would expect that delay would be sought by the party resisting the requested relief (i.e., a defendant), but in this case the delay consistently has been occasioned by Complainant, which continues to want to reargue adjudicated issues, so that we are left in a situation akin to the scenario in the movie *Groundhog Day*, forced to relive the same events over and over again. Or, as the noted popular philosopher Yogi Berra is reputed to have said, "its *deja vu* all over again."

VII. *Conclusion*

For the reasons stated above, an order certifying the October 17 Order Partially Granting Complainant's Motion is not timely. Moreover, Complainant has failed to show that the Order is appropriate for certification pursuant to 28 C.F.R. §68.53(d). Specifically, with respect to Question 1, Complainant has failed to show that there is a substantial ground for difference of opinion, that an immediate appeal will advance the ultimate termination of the proceeding, or that subsequent review will be an inadequate remedy. With respect to Question 2, in addition to failing to establish the criteria for certification contained in section 68.53(d)(1), it is particularly inappropriate to certify the Order because the ruling on which Complainant seeks review was not made in the October 17 Order, but rather was made during the July 30 conference and was reiterated in a written order on September 9, 1997, and Complainant did not seek review of either order.

ROBERT L. BARTON, JR.
Administrative Law Judge