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

February 3, 1998

UNITED STATES OF AMERICA, Complainant,	)
v.	) 8 U.S.C. §1324c Proceeding) OCAHO Case No. 96C00004
MARIA SOUROVOVA, Respondent.	)

ORDER DENYING COMPLAINANT'S MOTION FOR SUMMARY DECISION

I. *Procedural History*

This is an action pursuant to the Immigration and Nationality Act, as amended, 8 U.S.C. §1324c (INA). The Immigration and Naturalization Service (INS or Complainant) initially served a Notice of Intent to Fine upon Maria Sourovova (Sourovova or Respondent) on August 7, 1995, alleging that she used and attempted to use a forged, counterfeit, altered, or falsely made document, namely a letter dated January 2, 1995 confirming her employment with the Indianapolis Ballroom Co. (IBC), for the purpose of satisfying a requirement of the Immigration and Nationality Act (INA). After Sourovova made a timely request for a hearing, the INS filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO). The complaint alleged that Sourovova possessed, used, and attempted to use the letter after November 29, 1990, knowing it to be forged, counterfeit, altered, and falsely made. All jurisdictional prerequisites have been satisfied. Respondent's answer denying the allegations was timely filed. On July 8, 1996, the motion of Richard Loiseau for leave to withdraw as Sourovova's counsel was granted, with new counsel, Stanley J. Horn, appearing in his stead.

After receiving no response to its subsequent discovery requests, INS filed motions pursuant to applicable procedural rules [1] to deem its requests for admission admitted, to compel discovery, and for sanctions. A telephonic pre-hearing conference was held, during which Respondent's attorney reported that he had had no contact with Sourovova since she returned to Russia after unsuccessfully attempting re-entry into the United States. He agreed to undertake efforts to contact her in order to respond to discovery. Subsequently, after no response was made to the discovery requests and no request for an extension of time was made, I issued an order deeming the requests for admission admitted and compelling responses to interrogatories and the production of documents.

No further responses were made and ultimately complainant filed a motion for summary decision or in the alternative, for sanctions. No response was made to the motion.[2] The only subsequent submission was the motion of Stanley J. Horn to withdraw as counsel, on the grounds that Sourovova is now residing in Russia and has made no contact with him since leaving the United States. The motion to withdraw was taken under advisement, pending the submission of additional information as to the specific efforts made by counsel to contact her. The period for response to the motion for summary judgment has lapsed without further filings and the motion is ripe for ruling. No further report has been made by Mr. Horn as to his efforts to contact Sourovova, nor has her last known address been reported. The motion to withdraw will be continued under advisement until the required report is made; the motion for summary judgment will be denied based on the record as it currently exists.

II. *Applicable Law*

OCAHO rules provide for the entry of a summary decision where 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). The party seeking a summary decision has the initial burden of demonstrating to the trier of fact the ab-

[1]Rules of Practice and Procedure for Administrative Hearing, 28 C.F.R. Pt. 68 (1997).

[2]28 C.F.R. §68.11(b) provides that a party has ten (10) days after service of a written motion to file a response. 28 C.F.R. §68.8(c)(2) provides that where service is had by ordinary mail, five (5) days shall be added to the prescribed period.

sence of genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).

It is well established in OCAHO jurisprudence that matters deemed admitted by a party's failure to respond to a request for admissions can form a basis for granting summary judgment. *United States v. Primera Enters., Inc.*, 4 OCAHO 615, at 261 (1994), *United States v. Sea Pine Inn, Inc.*, 1 OCAHO 87, at 581 (1989).[3] However, in determining whether there is a genuine issue of 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. Anchor Seafood Distributors, Inc.*, 5 OCAHO 742, at 160 (1994), citing *Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574, 587 (1986). All doubts must also be resolved in favor of the non-moving party. *United States v. Harran Transp. Co.*, 6 OCAHO 857, at 3 (1996). Even in the absence of a response, a summary decision may issue only if it is clear that the moving party is entitled to judgment as a matter of law.

In order to establish the violation of §1324c here alleged, the INS must establish that respondent: (1) possessed, used, or attempted to use a forged, counterfeit, altered, or falsely made document; (2) knowing the document 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 70–71 (1995) (Modification by the Chief Administrative Hearing Officer of the Administrative Law Judge's Decision).

III. *Discussion*

In order to establish the required elements, complainant relies on the deemed admissions and the exhibits appended thereto, but does not elaborate. The record as presently constituted establishes that Sourovova possessed and used the subject document on January 5, 1995 by presenting it to an INS Examiner at an interview regarding her application for adjustment of status to that of permanent resi-

[3]Citations to OCAHO precedents reprinted in bound Volumes 1 through 5, *Administrative Decisions Under Employer Sanctions and Unfair Immigration-related Practices Laws of the United States*, reflect consecutive pagination within those bound volumes; pinpoint citations to those volumes are to the specific pages, seriatim, of the *entire* volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 5, however, are to pages within the original issuances.

dent. The record as presently constituted, however, fails to establish that the subject document is forged, counterfeit, altered, or falsely made. Additionally, INS does not disclose what particular requirement of the INA it contends the letter was used to satisfy.

For the purposes of this analysis, I accept the factual allegations contained in the deemed admissions and the validity of the exhibits attached thereto. I do not accept conclusions of law, even if characterized as facts. For example, complainant's request for admission No. 30 states that Sourovova knew that the letter of employment she presented was falsely made or altered. The terms "altered" and "falsely made" [4] necessarily require conclusions of law. This office is not bound by conclusions of law made by either party, even where those conclusions are contained in stipulations of fact or admissions. *Cf. United States v. Noorealam*, 5 OCAHO 797, at 614 (1995). In *Noorelam* the parties had entered a stipulation of facts that included certain admissions by the respondent. In rejecting the stipulation, the Chief Administrative Hearing Officer observed that he "cannot be bound by a stipulation of conclusions of law made by a party in any proceeding."

In this case, another of the deemed admissions is troubling too, in that it also requires a finding that Sourovova had personal knowledge of matters as to which the record fails to demonstrate any foundational basis for her having personal knowledge. The admission that Sourovova knew that Daniel Rutherford had not prepared and signed a letter on January 2, 1995 confirming her employment at IBC (No. 31) is not supported by allegations of specific facts establishing a basis for Sourovova's personal knowledge. Were such testimony offered at trial without some showing of the witness' competence to testify as to the matter or to form such a conclusion it would be afforded minimal value if admitted at all.

The following facts are established by the deemed admissions and exhibits:

Sourovova is a native and citizen of Russia. (No.2). She last entered the United States in January of 1993 (No.3), and was admitted as a non-immigrant temporary worker with authorization for employment at the Arthur Murray Dance Studio in Sarasota, Florida until December of 1993. (No.4,5). However, Sourovova failed to remain

[4]Although the complaint includes allegations that the employment letter may have been forged or counterfeit, complaint's request for admissions limits its scope of inquiry to alteration and false making. The scope of this discussion is limited accordingly.

employed by Arthur Murray for the entire period of her authorized stay in the United States. (No.6).

In July of 1993, Sourovova began working at IBC in Indianapolis, Indiana. (No.7). Sourovova was not granted permission by INS to change employers. (No.8). Thus, in August of 1993, her permission to remain in the United States was revoked, although she was granted permission to voluntarily depart by August of the following year (1994). (No.9,10). She did not so voluntarily depart. (No.11).

In November of 1993, IBC filed a visa petition on behalf of Sourovova seeking to have her approved as a skilled ballroom dance instructor. (No.12). That petition was approved in April of 1994. (No.13). However, in October of 1994, Sourovova was terminated from her employment at IBC. (No.14). On November 28, 1994, IBC withdrew its previously approved visa petition filed on behalf of Sourovova. (No.15). The following day, Sourovova filed an I–485 application with the INS for adjustment of status to that of a permanent resident based on that visa petition. (No.16).

On January 5, 1995, Sourovova was interviewed by an INS Immigration Examiner, under oath and with the benefit of counsel, regarding her application for permanent residence. (No.22). This interview was videotaped. (No.32).[5] Konstantine Antonov was also interviewed, along with Sourovova, about adjustment of status based on an approved visa petition filed by IBC on his behalf. (No.23,24). Like Sourovova, Antonov had also been terminated from employment with IBC prior to the interview. (No.25).

At this interview, Sourovova presented to the Immigration Examiner a photocopy of a letter bearing the signature of Dan Rutherford, owner of IBC, and dated January 2, 1995, confirming her employment at IBC. (No.26). Sourovova presented this letter in order to establish eligibility for adjustment of status to lawful permanent residence in the United States as a skilled dance instructor with employment at IBC. (No.28). However, Sourovova knew at the time of the interview that her employment at IBC had been terminated. (No.29). She also knew that Daniel Rutherford had not prepared and signed a letter on January 2, 1995 confirming her employment at IBC (No.31).

[5]The record fails to disclose what transpired at the interview.

The record further shows that Sourovova's application for adjustment of status was denied on January 5, 1995. (Ex.1). The notation, "withdrawn presented fraudulent letter," was handwritten in the margin of the application, with an arrow referencing the section entitled "Eligibility Under Sec. 245 ... Approved Visa Petition." *Id.* The same day an order to show cause was issued. (Exhibit 6).[6] On January 9, 1995, IBC filed a complaint in the Marion (Indiana) Superior Court against Konstantine Antonov and Maria Sourovova alleging they violated a covenant not to compete by working as teachers of dance at Rainbow Plus, Inc., a competitor of IBC. On February 1, 1995, the court declined to enjoin Antonov and Sourovova from working at Rainbow Plus finding that the restrictive covenant was contrary to Indiana public policy. (Exhibit 5). On October 12, 1995, after conceding that she was subject to deportation, Sourovova was granted permission to voluntarily depart the United States by April 12, 1996. (Exhibit 7). When she actually departed is not altogether clear.

INS has not shown what feature of the letter was altered or falsely made, or in what manner the letter was altered or falsely made. The motion is altogether silent on this point. The record contains a photocopy of the allegedly falsified letter (Ex.4), but the photocopied letter contains no visible signs of alteration. The letter appears to be on IBC letterhead. It is dated January 2, 1995. It is signed "Daniel Rutherford." That signature is similar, if not identical, to the signature appearing on the complaint against Sourovova, filed by Daniel Rutherford on behalf of IBC in an unrelated action before the Marion (Indiana) Superior Court, also available in the record. (Ex.3). Thus, I cannot discern from the face of the letter in what manner it is altered or falsely made.

The letter states simply "this will confirm the employment of Maria Sourovova as a full time instructor of ballroom dance at an approximate annual income of eighteen thousand dollars." INS has filed no affidavits, and has not shown that Daniel Rutherford or someone authorized by him or IBC never prepared or issued such a letter. There is nothing in the record, not even an unsworn statement from Rutherford, upon which to base a finding that no such

[6]The certification states that the order to show cause was read to Sourovova in English and Spanish. The form indicates "which is his/her native language or a language which he/she understands." The accuracy of this statement cannot be ascertained from the record.

letter was ever issued. An admission by Sourovova that she "knew" that Daniel Rutherford had not prepared and signed the letter on January 2, 1995 (No.31) is without foundation and insufficient in the absence of some statement from Rutherford himself as to his relationship, if any, to the letter. Even if the admission is true that Sourovova knew Rutherford did not prepare the letter that day, it is possible that some other authorized person at IBC prepared the letter. Perhaps Rutherford prepared it on a different day. Perhaps it contains a typographical error. Sourovova's deemed knowledge of what someone else did or did not do is necessarily limited, and is a slender reed on which to support a finding that the letter must have been altered or falsely made, absent some corroboration.

INS' exhibits and deemed admissions do show that Sourovova was not employed by IBC at the time she applied for an adjustment of status or at the time she submitted the allegedly falsified letter to the INS. However, Sourovova's employment status at IBC is not precisely the issue. A finding that Sourovova was not employed at IBC does not necessarily require a conclusion that the letter she submitted was altered or falsely made; it simply shows that the letter Sourovova presented — wherever it came from — contained information which was true at one time, but not true as of the date on the letter.

In determining whether or not to grant summary decision in this case, all facts and reasonable inferences there from must be viewed in the light most favorable to Sourovova, and all doubts resolved in her favor. Conclusory allegations unsupported by factual data are not sufficient. Where the facts allow plausible contradictory inferences to be drawn, summary decision is inappropriate. Such is the case here.

United States v. Davila, 7 OCAHO 936 (1997), provides a helpful comparison. In *Davila*, the respondent was accused of using a falsely made social security card, free of employment restrictions. Although INS was unable to show exactly in what manner the social security card had been falsified, it was successful in establishing that the card must have been falsely made. INS submitted extrinsic evidence showing that the only social security card ever issued to Davila was one marked "not valid for employment." One unrestricted card which Davila had presented to an employer "bore obvious signs of erasure and overwriting." A second more sophisticated card he presented to another employer did not contain the restriction "not valid for em-

ployment." Extrinsic evidence demonstrated that the social security administration had never issued Davila an unrestricted card, so the only reasonable inference from those facts was that the card he presented was not genuine because there *is* no lawful source for a genuine social security card other than the Social Security Administration. In contrast, there is nothing in the record in this case to verify that Rutherford did not issue Sourovova a letter of employment. Neither does the letter in evidence bear any "obvious signs" of falsification. It might reasonably be inferred that the letter submitted by Sourovova was an alteration of an existing document, but it could equally well be inferred that it is a genuine letter created by Daniel Rutherford or his authorized agent containing a typographical error in the date.

It is, moreover, not self-evident that INS would be entitled to judgment as a matter of law as to the fourth element in this case. The complaint alleges and INS must show that Sourovova possessed, used, or attempted to use the employment letter "for the purpose of satisfying a requirement of this chapter."[7] INS has not addressed any particulars as to what requirement of the Act it alleges the letter satisfies.

INA was amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, §212(b), 110 Stat. 3009 (IIRIRA) enacted on September 30, 1996, subsequent to the events alleged in the complaint. New language was added to the activities prohibited by 1324c(a) so that the provision now applies not only to the use of a document "for the purpose of satisfying a requirement of this chapter," but also to the use of a document "to obtain a benefit under this chapter." As noted in *Davila*, 7 OCAHO 936, at 21, section 212(e) of Division C of Public Law No. 104–208 provides that §1324c(f) applies to the preparation of applications "before, on, or after the date of the enactment of this Act," but does not provide that it applies to the preparation of all documents that occurred prior to September 30, 1996.

The new definition of the term "falsely make" now provides:

> to prepare or provide an application or document, with knowledge or in reckless disregard of the fact that the application or document contains a false, fictitious, or fraudulent statement or material representation, or has no basis in

[7]The term, "this chapter," refers to Title 8 of the U.S. Code, Chapter 12, the Immigration and Nationality Act (INA). *See Morales-Vargas*, 5 OCAHO 732, at 71.

> law or fact, or otherwise fails to state a fact which is material to the purpose for which it was submitted.

8 U.S.C. §1324c(f) (Supp. 1997).

INS has not disclosed to what extent, if any, it relies on the new language or the new definition for purposes of its motion. If it does so rely, difficult questions of first impression related to the application of the amendments would make this case singularly inappropriate for summary resolution by default on this comparatively barren record and without the benefit of any briefing.

While I would not hesitate in a proper case to reach a summary decision based upon deemed admissions, this is not such a case. My unwillingness to do so here is because, in the absence of affidavits or other corroborating evidence, the motion rests entirely on deemed admissions which not only call for conclusions of law but also require an admission as the ultimate issue of personal knowledge where the record does not establish any foundational basis for personal knowledge. This is not a case in which a party has willfully failed to respond to interrogatories. It is not clear from the record that Sourovova ever even saw the interrogatories. Absent some corroboration in the record, summary decision will be withheld.

IV. *Conclusion and Order*

The proponent of a motion for summary decision has the burden of showing that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law. INS has failed at this juncture to carry that burden. The Motion for Summary Decision is, therefore, denied. A telephonic prehearing conference will be set at the earliest mutually convenient date to establish a timetable for further proceedings.

SO ORDERED.

Dated and entered this 3rd day of February, 1998.

ELLEN K. THOMAS
Administrative Law Judge