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

March 12, 1998

UNITED STATES OF AMERICA, Complainant,	)
v.	) 8 U.S.C. §1324c Proceeding
	) OCAHO Case No. 95C00153
FELIPE DE LEON-VALENZUELA, Respondent.	)

ORDER DENYING COMPLAINANT'S SECOND MOTION FOR SUMMARY DECISION

This is an action arising under the Immigration and Nationality Act, as amended, 8 U.S.C. §1324c(a)(2) (INA), in which a hearing is scheduled for March 17, 1998. The respondent Felipe DeLeon-Valenzuela is a native of Mexico who initially entered the United States with a tourist visa. INS contends that in 1991 he presented a falsified alien registration card bearing the number A 34786904 in order to obtain employment at Texas Arai. He was hired there initially in January 1991 and worked until June 1994. He returned to work there in July 1994, and continued to work until early 1997.

On January 20, 1998 INS filed its second motion for summary decision, to which De Leon-Valenzuela made timely response. Accompanying the motion were portions of the respondent's deposition transcript. Exhibits accompanying an earlier similar motion were also reviewed and reconsidered in connection with that motion as were the earlier submissions of the respondent. The motion had not been ruled upon when, on March 10, 1998, INS filed "Complainant's Supplemental Motion for Summary Decision" together with a record of sworn statement by Samuel Reyes. On March 11, 1998, Respondent filed a reply.

Standards for Summary Decision

OCAHO rules[1] provide that motions for summary decision will not be entertained within twenty days prior to a hearing unless the Administrative Law Judge decides otherwise. 28 C.F.R. §68.38(a). I have decided otherwise in this case in the interest of disposing of the pending motion prior to the commencement of the hearing on March 17, 1998. OCAHO rules additionally provide that the Administrative Law Judge may enter a summary decision in favor of either party if the pleadings, affidavits, or other record evidence show that there is no genuine issue of material fact and that a party is entitled to judgment as a matter of law. 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.

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 261 (1994).[2] All doubts are therefore resolved in favor of the party opposing summary decision. *United States v. Harran Transp. Co.*, 6 OCAHO 857, at 3 (1996). A summary decision may issue only if it is clear that the moving party is entitled to judgment as a matter of law. 28 C.F.R. §68.38(c).

Discussion

The critical question in this proceeding is whether De Leon-Valenzuela knowingly used a falsified Alien Registration Card bearing the number A 34786904 to obtain employment at Texas Arai. I note initially that where the ultimate factual issue rests on an assessment of a party's subjective mental state, summary decision is seldom appropriate. *International Shortstop Inc. v. Rally's Inc.*, 939 F.2d 1257, 1265–66 (5th Cir. 1991), *cert. denied*, 502 U.S. 1059 (1992). The court in that case explained the reason this is so:

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

[2]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 Volumes 1 through 5 are to the specific pages, seriatim, of the specific *entire* volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 5, however, are to pages within the original issuances.

> [A] party's state of mind is inherently a question of fact which turns on credibility. Credibility determinations, of course, are within the province of the fact-finder. . . . Only through live cross-examination can the fact-finder observe the demeanor of a witness and assess his credibility. A cold transcript of a deposition is generally no substitute . . .

939 F.2d at 1265–66 (collecting cases).

INS urges that DeLeon-Valenzuela's statements lack credibility because he has himself given different versions of the facts at different times. My function at the summary judgment stage, however, is not to decide issues of credibility but rather to determine whether there is a genuine issue of material fact for hearing. Because credibility is not an appropriate issue at this stage, the nonmovant's evidence is accepted as true for purposes of the motion. *See generally* W. Schwartzer, A. Hirsch, and D. Barrans, *The Analysis and Decision of Summary Judgment Motions*, 139 F.R.D. 441, 479 (1992). It is not exclusively self-contradiction which creates an issue of fact here, or even solely the issue of knowledge, but rather a direct conflict in the parties' respective versions of the facts.

The record contains sworn statements by both Beth Henley and the respondent DeLeon-Valenzuela which demonstrate a factual dispute as to the circumstances under which respondent was hired at Texas Arai, as to who prepared and signed his I–9 form, and as to which, if any, documents he proffered on the occasion of his initial hire. Ms. Henley affirmed that on January 11, 1991 she prepared an I–9 form for Felipe De Leon-Valenzuela in the course of which she reviewed the allegedly fraudulent alien registration card at the heart of this dispute (Complainant's Exhibit G). De Leon-Valenzuela denied in his deposition that it was his signature on the I–9 (Deposition p.17, ll.19–23), denied that he presented any documents whatsoever to Beth Henley (Deposition p.34, ll.3–4), and denied that he even knew who she was (Deposition p.40, ll.13–27). His affidavit alleges that when he obtained employment at Texas Arai Samuel Reyes initiated the paperwork for him and that Beth Henley was not present (Respondent's Exhibit A). He did not know precisely what papers were completed because he did not know English, but he signed a form as requested by Reyes (Id.). He also asserted he spoke only to Samuel Reyes (Deposition p.41, ll.4–9) and that he presented no documents. They simply gave him a paper to sign and he signed it (Deposition p.30, ll.22–25, p. 31, ll.1–8).

The sworn statement of Samuel Reyes states that Reyes was a supervisor at Texas Arai in January 1991, but that he does not know DeLeon or remember supervising him, that he does not know if DeLeon showed any documents to establish employment eligibility, and that he did not ask DeLeon to sign an I–9 Form. Reyes states further that his own role involved only explaining the I–9 process to employees, not filling out the forms, which was done by the company's Vice President, Dieter Helrich.

Complainant states that the Reyes statement "refutes the respondent's contentions set forth in his affidavit." It is evident that the Reyes statement *contradicts* the respondent's affidavit. Whether or not Reyes' statement "refutes" the respondent's affidavit, however, is precisely the kind of question which is wholly inappropriate for resolution by summary decision. The summary decision process was not intended to substitute a trial by affidavit for a hearing. Far from supporting the complainant's request for summary decision, the Reyes statement simply demonstrates yet another instance of conflicting factual statements. Once the parties have submitted evidence of contested material facts, summary decision should not be granted.

In any event, and notwithstanding the Reyes statement, there still appears to be a genuine issue of material fact as to whether respondent presented the subject document to anyone at Texas Arai. I do not propose to resolve that conflict without an opportunity to observe the witnesses. The INS' motion for summary decision will accordingly be denied.

SO ORDERED.

Dated and entered this 12th day of March, 1998.

ELLEN K. THOMAS
Administrative Law Judge