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

July 10, 1998

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

FINAL DECISION AND ORDER

Appearances: John Donovan, Esq.
Immigration and Naturalization Service for complainant

Adan Vega, Esq.
Law Offices of Adan Vega for respondent

Before: Honorable Ellen K. Thomas

PROCEDURAL HISTORY

Felipe DeLeon (Valenzuela) entered the United States on April 5, 1989 as a tourist visitor from Mexico. Although he was without authorization to work in the United States, he nevertheless got a job as a machine operator on the night shift at Texas Arai, Inc. on January 11, 1991, and on June 22, 1994 the Immigration and Naturalization Service (INS) arrested him while he was still working there without their authorization. INS issued him a notice of intent to fine (NIF) charging him with possession and use of a falsified alien registration card (green card) number A34 786 904, a falsified social security card number ###-##-#### and a falsified I-9 form. DeLeon made a timely request for a hearing. INS thereafter filed a complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) which alleged possession and use of the alien registration card only.

Respondent DeLeon filed a timely answer, and thereafter an amended answer, denying the material allegations of INS' complaint and asserting various affirmative defenses including violations of his Fourth and Fifth Amendment rights and his right to equal protection of the laws; waiver and/or estoppel; and violation by INS of its own policies. Discovery and motion practice followed, and those defenses were stricken in a series of orders. A hearing was ultimately set for March 17, 1998.

On March 10, 1998 INS filed its supplemental motion for summary decision, which I denied on March 12, 1998.[1] United States v. DeLeon Valenzuela, 7 OCAHO 993 (1998). DeLeon also filed a motion for summary decision on March 10, 1998, on the grounds that this action is barred by the statute of limitations contained in 28 U.S.C. § 2462 (1994). This motion was taken under advisement, and on March 16, 1998 DeLeon filed a motion seeking leave to amend his answer to assert the statute of limitations as an affirmative defense.

A hearing was thereafter conducted on March 17, 1998 in Houston, Texas. Witnesses were sworn, evidence was heard, 18 exhibits were introduced (JX1, CX1-14, RXA-C) and a transcript was prepared consisting of 161 pages, exclusive of the exhibits. The witnesses who testified in the case were the respondent Felipe DeLeon (Valenzuela) (Tr.14-51), Beth Henley, formerly the secretary to the Vice President of Texas Arai, Inc. (Tr.52-80), Samuel Reyes, formerly a supervisor at Texas Arai, Inc. (Tr.81-94), INS Supervisory Agent Robert Lee Montgomery (Tr.99-108), INS Special Agent Samuel C. Brown (Tr.109-116), INS Special Agent Mike Murphy (Tr.117-134), and Vickie DeLeon, wife of the respondent (Tr.135-139). The parties thereafter filed their posthearing submissions. On June 25, 1998 I issued an order making certain corrections to the transcript and the record was closed.

DELEON'S MOTIONS FOR LEAVE TO AMEND AND FOR SUMMARY DECISION

DeLeon's motion for leave to amend asserted that he should be allowed to amend his answer "in the interests of justice" but advanced no explanation for his delay in filing his motion until the day before the hearing. No showing was made or offered as to whether the attempted last minute amendment was the result of a strategic decision, oversight, excusable neglect, or the failure to do the necessary research until the eve of trial. Ordinarily the failure to raise an affirmative defense in the first responsive pleading constitutes a waiver of the defense. Davis v. Huskipower Outdoor Equip. Corp., 936 F.2d 193, 198 (5th Cir. 1991).

The proposed second amended answer submitted by DeLeon contains, moreover, not only the newly asserted affirmative defense of limitations upon which he had predicated his motion for summary decision, but also the three other affirmative defenses which were already ruled upon and stricken in previous orders: violations of DeLeon's constitutional rights, waiver and/or estoppel, and violation of INS' own policies. DeLeon's request for leave to amend makes no reference to these already adjudicated defenses; they are simply reasserted in the proposed

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[1] OCAHO rules codified at 28 C.F.R. Part 68 (1997) provide that motions for summary decision will not be entertained within twenty days prior to a hearing unless the ALJ decides otherwise. 28 CFR § 68.38(a). I decided otherwise with respect to this motion, and issued a written order denying it, in the interests of clarifying in advance of the hearing what the disputed factual issues were.

amended answer. These defenses were addressed at length in prior orders. No explanation has been offered as to why they should be reconsidered here, and they will not be. I therefore consider only the proposed amendment relating to the limitations defense which has not been previously addressed.

OCAHO rules provide for amendments to the pleadings if and whenever a determination of a controversy on the merits will be facilitated thereby. 28 C.F.R. § 68.9(e). This rule is analogous to and is modeled upon Rule 15 of the Federal Rules of Civil Procedure, and accordingly it is appropriate to look for guidance to the case law developed by the federal district courts in determining whether to permit requested amendments under that rule. OCAHO jurisprudence has long followed the guidance provided by the federal rules, as is directed by 28 C.F.R. § 68.1. See, e.g., United States v. Mr. Z Enters., 1 OCAHO 162, at 1129 (1990).[2]

In ruling on a motion for leave to amend, the Supreme Court has directed that a liberal approach should be taken:

> In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should, as the rules require, be "freely given."

Foman v. Davis, 371 U.S. 178, 182 (1962). See generally, 6 Charles Alan Wright et al., Federal Practice and Procedure §§ 1486-87 (2nd ed. 1990).

Here the reason to deny leave to amend is apparent: the proposed amendment would be futile. The statute of limitations in question provides:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is

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[2] Citations to OCAHO precedents reprinted in the bound Volumes 1 and 2, Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Practices Laws of the United States, and Volumes 3 through 6, Administrative Decisions Under Employer Sanctions, Unfair Immigration-Related Employment Practices and Civil Penalty Document Fraud Laws of the United States, reflect consecutive pagination within those bound volumes; pinpoint citations to Volumes 1-6 are to the specific pages, seriatim, of the entire volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 6, however, are to pages within the original issuances.

> found within the United States in order that proper service may be made thereon.

28 U.S.C. § 2462 (1994).

It is undisputed that the alleged violation in this case occurred on or about January 11, 1991. This action was commenced by the filing of a complaint on November 3, 1995, thus any violation occurring prior to November 3, 1990 would theoretically be barred [3] by the five-year limitations period, assuming arguendo that the statute applies to these proceedings. Because it is undisputed that the violation here occurred less than five years prior to the filing of the complaint DeLeon does not allege that this action itself was not timely filed, or "commenced within five years from the date first accrued," in the statutory language. Rather, he argues that any penalty I might impose upon him in this action will be uncollectible on the authority of United States v. Core Lab., Inc., 759 F.2d 480 (5th Cir. 1985), relying also upon dictum in United States v. Davila, 7 OCAHO 936 at 14 n.17 (1997), to the effect that "the Fifth Circuit's opinion [in Core] also carries the implication that a proceeding to set a civil penalty must be completed and that the penalty must be assessed before the expiration of five years after the violation in order for the government also to have time to initiate an enforcement action within that five year window."

In Core, a penalty had previously been imposed in an administrative proceeding brought under the antiboycott provisions contained in the Export Administration Act, 50 U.S.C. § 2401 et seq. (1984). When the defendant subsequently declined to pay the penalty, the agency commenced an action to collect it. The precise question before the court in Core was whether, for purposes of the Export Administration Act's anti-boycott provisions, the statutory language of 28 U.S.C. § 2462, "the date when the claim first accrued," referred to the date of the underlying violation or to the date of the final administrative order imposing the penalty. The Core court held that for those purposes the date of the underlying violation was controlling and that, because the claim had first accrued more than five years prior to the date the action was filed, the collection action was barred by § 2462. DeLeon extrapolates from this reasoning to predict that should he decline to pay any penalty imposed upon him in this action, a subsequent proceeding to collect it would similarly be barred. Based on the dictum in Davila, he then further suggests that imposition of the penalty, and by implication this action too, should be barred. His post-hearing brief asserts:

> In light of the holding in Core, an [a]ppellate court may very well conclude that if a judicial action to enforce a penalty already assessed must be brought within five (5) years from the date of the violation, then it follows, logically, that the initial administrative action to impose the penalty also would have to meet the five (5) year limitations period of Section 2462, thus, barring the Complainant from collecting

[3] The bar is theoretical because 8 U.S.C. 1324c only became effective on November 29, 1990. Any events occurring prior to that date would not give rise to proceedings under its provisions because by its own terms it applies only after its effective date.

> any penalty.
> . . .
> These citations should be strong assurances to this Court that the Fifth Circuit will apply Section 2462 as a bar to administrative actions seeking the initial assessment of civil penalties that could not be judicially enforced under Section 2462. (emphasis added).

DeLeon cites no direct authority for the novel proposition that a timely filed administrative proceeding is rendered moot if not completed within the limitations period, and I find no necessity in this case either to depart from or to expand Core. I decline to extend it unnecessarily because Core is simply too slender an analytical reed to support the implication advanced.

First, it appears that Core made no distinction between cases where recourse to administrative procedures is mandatory and those where it is merely permissive.[4] Indeed, the case which Core described as "persuasive" and "the only case which we have found in which the Supreme Court construed a limitations statute in the context of a suit brought by the government", 759 F.2d at 484, is one in which the administrative proceedings were wholly optional, Unexcelled Chem. Corp. v. United States, 345 U.S. 59 (1953). That very distinction is the one relied upon in Crown Coat Front Co. v. United States, 386 U.S. 503, 511-512 (1967), an action by a government contractor against the United States, to hold that where completion of the administrative adjudicatory proceedings was a prerequisite to filing in federal court, the contractor's cause of action accrued at the conclusion of the administrative proceedings. The particular limitations statute in question there, 28 U.S.C. § 2415, was described as "a statute aimed at equalizing the litigative opportunities between the Government and private parties" 386 U.S. at 521; thus the Court appeared to take for granted that the same rule would apply to actions by the government. Extending Core in the manner suggested by DeLeon would be contrary to the principles expressed in Crown Coat that where exhaustion of administrative remedies is required as a prerequisite to a civil action the right of action only accrues upon completion of the administrative remedies, and that the rule is the same whether the government is the plaintiff or the defendant. Once DeLeon chose to invoke the administrative adjudicatory process by filing his timely request for hearing in this matter, completion of that process became a requirement for and a condition precedent to the imposition of a penalty.

The result in Core, moreover, is substantially based upon a construction of the statutory language of the Export Administration Act. It relies heavily on various excerpts from the legislative history of the 1965 amendments adding that Act's penalty provisions, and in particular on language in S. Rep. No. 363, 89th Cong., 1st Sess. 7, reprinted in 1965 U.S.C.C.A.N. 1826,

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[4] The court in Core did note that at the time when Core had refused to pay the penalty other sanctions were available to the government, 759 F.2d at 481, n. 1, but did not discuss what effect, if any, this fact had upon its reasoning.

1832. Core, 759 F.2d at 482. The application of its reasoning and the relevance of the legislative history of the Export Administration Act to this case are not self-evident. Moreover, it is by no means clear in light of the intervening legislative history of the Export Administration Act that the Fifth Circuit would necessarily even decide Core the same way today. After the ruling in Core, a subsequent legislative committee criticized both the reasoning and the result in that case, and stated its own expressly contrary intent and construction of the Export Administration Act. See Conference Report on the 1985 amendments to the Export Administration Act, P.L. 99-64, 99 Stat. 120:

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> The intent of the committee of conference is that the Commerce Department must bring its administrative case within 5 years from the date the violation occurred. Thereafter, if it is necessary for the Government to seek to enforce collection of the civil penalty, the complaint must be filed in Federal court with 5 years from the date the penalty was due, but not paid. Any other interpretation would have the Commerce Department discover, investigate, prosecute, and file a complaint in the U.S. District Court to collect the penalty imposed, but not paid, in the administrative proceeding all within 5 years from the date of the violation. In many instances . . . such a task would be impossible.

H.R. Rep. No. 180, 99th Cong., 1st Sess., reprinted in 131 Cong. Rec. H4905, H4923 (daily ed. June 26, 1985).

Lower courts in the Fifth Circuit have not applied Core mechanically to all actions for civil penalties without examination of the particular regulatory statute violated. Thus in an action for civil penalties under the Clean Water Act (CWA), a district court in Texas observed:

> The United States Court of Appeals for the Fifth Circuit has not explicitly addressed the issue of whether a claim for civil penalties accrues upon the actual occurrence of the violation of a provision of an environmental statute such as the CWA, or upon the subsequent report of that violation. [footnote omitted] However, several other courts have considered the purposes and legislative history of such acts and have held that such a claim accrues when the appropriate agency receives the statutorily mandated report. (citing cases).

United States v. Aluminum Co. of Am., 824 F. Supp. 640, 645 (E.D. Tex. 1993).

In concurring with cases in other jurisdictions, the court clearly did not regard Core as controlling. It observed:

> [A] belief that the EPA should have in fact inspected the facility, or should have tested the effluent at the relevant outfall and discovered the August 1987

> violations, does not correspond with reality. Congress was fully aware of the agency's limited resources when it drafted the CWA provisions requiring the permittee to monitor and report its own effluent discharges. To allow the permittee to benefit from the EPA's failure to inspect and immediately discover violations would frustrate the purposes of the CWA.

Id. at 647.

Case law developing in the federal courts similarly reflects an individualized approach to the limitations question, reaching decisions in light of the particular statutory scheme underlying the alleged violation and the mandatory or permissive character of the administrative proceeding involved. United States v. Great Am. Veal, Inc., ___ F. Supp. ___, 1998 WL 135618 (D.N.J. 1998) (action to enforce civil money penalty for violation of Packers and Stockyards Act; where administrative proceeding is a prerequisite to initiation of an enforcement action, statute begins to run only when final administrative decision has been issued); Federal Election Comm'n v. National Republican Senatorial Comm., 877 F. Supp. 15 (D.D.C. 1995) (where prosecutorial determination rather than mandatory administrative adjudication is the only precondition to suit, claim accrues from date of violation); United States v. McIntyre, 779 F. Supp. 119 (S.D. Iowa 1991) (action to enforce civil money penalty assessed by Federal Deposit Insurance Commission (FDIC); claim did not accrue until assessment became final and unappealable); United States v. McCune, 763 F. Supp. 916 (S.D. Ohio 1989) (action to recover civil money penalty for violations of Surface Mining Control and Reclamation Act; claim cannot accrue until penalty is administratively imposed); Trafalgar Capital Assocs., Inc. v. Cisneros, 973 F. Supp. 214 (D. Mass. 1997) (where administrative proceeding is optional rather than mandatory, statute begins to run at the time of violation). Cf. Ocean Hill Joint Venture v. North Carolina Dep't of Env't, Health and Natural Resources, 426 S.E.2d 274 (N.C. 1993). Also see generally, Teresa A. Holderer, Note, Enforcement of TSCA [Toxic Substances Control Act of 1976] and the Federal Five-Year Statute of Limitations for Penalty Actions, 91 Mich. L. Rev. 1023 (1993).

Finally, I note that even as to the precise question involved in Core, there is a direct conflict between the circuits. In United States v. Meyer, 808 F.2d 912 (1st Cir. 1987), the court acknowledged its reluctance to create such a conflict but expressed at the same time its strong conviction that Core was wrongly decided. The Meyer court found that, as applied to the EAA, 28 U.S.C. § 2462 was designed to require that the administrative action aimed at imposing a civil penalty must be brought within five years of the alleged violation, and that, following the final administrative assessment of the civil penalty, the government has five year period in which to enforce the sanction. 808 F.2d at 914. This approach is consistent with the subsequent legislative history of the EAA. In the First Circuit's view, however, the statutory language of § 2462 was clear, unambiguous, and susceptible to but a single reasonable reading, so that resort to the legislative history of the EAA was "both inappropriate and ill-advised." Id. at 915.

This is the context in which DeLeon urges that I expand the holding in Core. I decline.

Nothing in this decision conflicts with Core and there is thus no reason to speculate here as to what the result might be if DeLeon at some point in the future were to become the target in a hypothetical collection case in a district court within the Fifth Circuit should he decide to resist payment of any penalty which might be imposed in this proceeding. My responsibility is to decide the case before me, not to predict what another body might do in a different case. This action was filed within five years of the date of the alleged violation; no other question as to timeliness is posed by or need be answered in this proceeding. The respondent's motions for leave to amend and for summary judgment are accordingly denied.

STATUTORY BACKGROUND

This case arises under the Immigration and Nationality Act (INA or the Act), as amended by the Immigration Act of 1990, Pub. L. No.101-649, § 544, 104 Stat. 4978, 5059-61 (1990) (codified at 8 U.S.C. § 1324c), which prohibits the use or attempted use of any forged, counterfeit, altered, or falsely made document by any person or entity after November 29, 1990 for the purpose of satisfying any requirement of the Act. 8 U.S.C. § 1324c.[5]

The Immigration Reform and Control Act of 1986 (IRCA), also enacted as an amendment to the INA, made it illegal for an employer to knowingly hire an undocumented alien 8 U.S.C. § 1324a(a)(1), or to hire any person without reviewing specified documents to verify the person's identity and work authorization. 8 U.S.C. § 1324a(b)(1). Regulations provide that employers are required to physically examine documents verifying a new employee's identity and eligibility to work in the United States. 8 C.F.R. § 274a.2(b)(ii) (1997). In order to be legally employed in the United States, an alien must be authorized to work, and must provide valid documents to a prospective employer to evidence his or her identity and employment eligibility. See generally 8 C.F.R. § 274a.2. An alien registration card is proof of both identity and employment eligibility. 8 U.S.C. § 1324a(b)(1)(B)(ii) (Supp. 1997) (formerly codified at § 1324a(b)(1)(B)(v) (1994)).

SUMMARY OF THE EVIDENCE

Beth Henley testified that she was the secretary to the Vice President of Texas Arai, Inc. from March 1990 to June 1993 (Tr.52,58). As such, she was responsible for examining documents presented by prospective employees of the company to establish their identity and employment eligibility and for seeing that their I-9 forms were properly completed (Tr.54). She testified about her customary procedures for completing the forms during her employment there (Tr.53-55), and the circumstances under which she signed the attestation portion of the I-9s on the

[5] This provision was subsequently amended by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 212, 110 Stat. 3009, 3570-71, codified at 8 U.S.C. § 1324c (IIRIRA). The amendment became effective on September 30, 1996 and has no application to this case.

company's behalf. She said she routinely made copies of the documents which the employees presented, and stapled the copies to the I-9 forms (Tr.53).

She recognized her handwriting on DeLeon's I-9 (CX2) which she completed on behalf of Texas Arai, Inc. on January 11, 1991 (Tr.56) and testified that in order to do so she examined his alien registration card (green card) number A34 786 904 and his social security card number ###-##-####, and completed the attestation section of the form (Tr.55-56). Then she made copies of the two documents DeLeon had presented and put them with the form (Tr.56). She said that many employees could not speak English and that there were three Spanish speaking supervisors who sometimes translated, Alberto Cruz, Miguel Garza and Samuel Reyes (Tr.59). When an employee did not speak English, one of the three would come in and translate (Tr.61-63). If an employee needed a translator, the I-9 form would be completed in Henley's office in her presence (Tr.63). The translator would ask the employee for his name and address, then ask the questions on the I-9 form (Tr.66). No employee began work at Texas Arai, Inc. without an I-9 form being filled out (Tr.74).

Samuel Reyes testified that in January, 1991 he was a supervisor on the night shift at Texas Arai, Inc. (Tr.82,85). His responsibilities did not include preparing I-9 forms, he just gave the employment package to new employees (Tr.82). Sometimes he would help an employee read the instructions or translate (Tr.83), but he did not fill out DeLeon's I-9, and did not remember ever filling out an I-9 form for anyone other than himself (Tr.86). He left Texas Arai, Inc. at the end of January 1991 and had no specific recollection of DeLeon (Tr.82).

Felipe DeLeon admitted that he had no INS authorization to work in January 1991 (Tr.22). He denied any recollection of ever having used the social security number ###-##-#### (Tr.31) or the alien number A34 786 904 (Tr.36). He testified that the signature on the I-9 form bearing his name was not his signature (Tr.34) and that he did not know whether or not the picture on the fraudulent green card (CX3) was a picture of him or not (Tr.35). He also testified that when he began work at Texas Arai, Inc. Samuel Reyes brought him a paper to sign, but he does not remember what the paper was (Tr.48).

INS agents testified about the details of their investigation of Texas Arai, Inc. and the reports they obtained or made.

DISCUSSION

INS's burden in this document fraud case is to show by a preponderance of the evidence that respondent DeLeon knowingly used, attempted to use, and possessed a forged, counterfeited, altered, and falsely made alien registration card after November 29, 1990 for the purposes of satisfying a requirement of the INA. That burden was met.

A. The Fraudulent Nature of the Document

The allegedly fraudulent green card, Form I-151 (CX3) bears the name Felipe DeLeon, and contains respondent's date of birth and photograph. To support its contention that the document is fraudulent, complainant points first to the fact that DeLeon specifically admitted that he had no authorization from INS to work in 1991 (Tr.22), and second to the fact that a copy of the INS Central Index System (CIS) printout for alien registration number A34 786 904 confirmed that the number A34 786 904 has never been issued at all by the Immigration and Naturalization Service (CX5). A Certificate of Nonexistence of Record (CX6) also shows that the number A 34 786 904 was not issued to DeLeon under any name he has used. There being no lawful source for an alien registration card other than INS, the card is clearly not a valid one. DeLeon did not contend that the card is genuine or that it is not fraudulent; rather, he simply denied any recollection of ever having possessed, used, or attempted to use it.

B. DeLeon's Use of the Document after November 29, 1990

To support its contention that DeLeon used, attempted to use, and possessed the subject document after November 29, 1990, complainant relies upon the testimony of Beth Henley, former secretary to the Vice President of Texas Arai, Inc., who testified about its presentation to her there on January 11, 1991. Henley testified that anyone who was hired at Texas Arai, Inc. would have had to present documents in order to be hired and that no prospective employee who failed to present documents could work there (Tr.74). She also testified that the copies of the social security card and green card with DeLeon's I-9 were made by her on January 11, 1991 and attached to the I-9. Although DeLeon denied presenting any documents to obtain employment at Texas Arai, Inc., and denied any memory of possessing either the green card or the social security card, his testimony was not persuasive or even credible.

DeLeon's testimony was lacking in credibility in light of the fact that the social security number he denied any recollection of ever having used appears on both his 1993 tax return and his 1993 W-2 form from Texas Arai, Inc. (CX11). He provided no explanation of how this could have occurred if he had not used the number. He had previously given several different accounts at different times as to the circumstances of his hire. In responses to INS' discovery requests, DeLeon had admitted that he signed an I-9 form for Texas Arai, Inc. in 1991 and that he used both the social security card number ###-##-#### and an unidentified I-151 form to gain employment (CX8 Interrogatories 5,9; CX9 Admissions 4,6,7). He subsequently denied these facts, claiming that he never signed an I-9 form or provided any documents at all to obtain employment. He had also previously executed an affidavit opposing INS' motion for summary decision (RXA) in which he stated that Samuel Reyes was the only person present during the time that his I-9 form was filled out. DeLeon denied signing the I-9 form (Tr.34), although the signature appearing on it closely resembles the signature on both his affidavit (RXA) and his 1993 tax return (CX11).

DeLeon made no attempt to reconcile the contradictions in other shifting and inconsistent answers he has given at different times. For example, in response to discovery DeLeon

originally indicated that he had primary and some secondary education (CX8 Interrogatory 14). His testimony at the hearing, however, was first that he did not even go to school (Tr.24), then that he went only to the third year and attended only one day a week (Tr.47), that he did not know how to read Spanish (Tr.26), and that he was unable to read or write (Tr.39). He repeatedly responded to other questions by testifying that he did not know, did not remember, or did not understand. In one instance he declined on the advice of counsel to respond to a question on the ground that the answer might expose him to criminal prosecution (Tr.17). The manner of his testimony in general was vague and evasive, and I found it unworthy of credence. I therefore credit instead Henley's testimony that DeLeon presented the alien registration card to her at Texas Arai, Inc. on or about January 11, 1991 to obtain work there as a machine operator.

C. To Satisfy a Requirement of the INA

The act of presenting a fraudulent document to prove one's identity and employment eligibility in order to gain employment is sufficient to satisfy this element of a § 1324c(a)(2) violation, specifically that the document was presented in order to satisfy a requirement of the INA. United States v. Morales-Vargas, 5 OCAHO 732, at 72-73 (1995) (CAHO modification of final decision and order). Accord Villegas-Valenzuela v. INS, 103 F.3d 805, 810 (9th Cir. 1996).

D. Knowledge

To support its contention that DeLeon knew the document he presented was fraudulent, complainant relies upon the circumstantial evidence, including DeLeon's own shifting and inconsistent versions of events at different times during this proceeding, and his general lack of credibility.

"Knowingly" is defined as doing something "[w]ith knowledge; consciously; intelligently; willfully; intentionally." BLACK'S LAW DICTIONARY 872 (6th ed. 1991). It thus does not encompass conduct which is engaged in unknowingly, unconsciously, without comprehension, by accident, or unintentionally. I conclude by a preponderance of the evidence that DeLeon knew perfectly well that the alien registration card he used to obtain his job at Texas Arai, Inc. was fraudulent. There is no evidence which even suggests that he could have used it unconsciously, accidentally, or unknowingly, and all the circumstantial evidence suggests otherwise.

The circumstances here include the fact that DeLeon entered the United States in 1989 with a tourist visitor visa, and that when his visa expired he knew he was both unlawfully present in the United States and without authorization to work in the United States. He knew on January 11, 1991 when he first became employed at Texas Arai, Inc. and during the whole time he worked there until his arrest on June 22, 1994, that INS had not issued him an alien registration card and that the Social Security Administration had not issued him a social security card. He refused to answer questions when he was arrested and at all times subsequent to that about how he obtained the fraudulent documents. He refused both at his deposition and at the hearing to answer some

questions posed to him on the grounds that the answers might expose him to criminal prosecution. The number of demonstrably false or self-contradictory or evasive statements he made diminishes the possibility that his use of the fraudulent document could have been an innocent mistake.

DeLeon argues that neither his lack of memory, nor his refusal to answer questions about the alien registration card A34-786-904 should lead to adverse inferences. I did not compel him to answer the question to which he interposed a Fifth Amendment objection, but did advise him that inferences could be drawn from his refusal to answer, and I drew those inferences because they were wholly consistent with the remainder of the evidence. The Fifth Amendment does not bar adverse inferences against parties in a civil action who refuse to testify in response to probative evidence offered against them. Baxter v. Palmigiano, 425 U.S. 308, 318 (1976). I emphasize, however, that my determination that DeLeon acted knowingly is based upon all the evidence presented and would be the same with or without the adverse inference.

PENALTY

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.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

I have considered the record in Case No. 95C00153 in its entirety, including the complaint, the answer, the amended answer, the testimony and the evidentiary materials including the exhibits. All motions not previously ruled upon are denied. I make the following findings:

1. Felipe DeLeon (Valenzuela) was born May 24, 1968 and is a citizen and national of Mexico.

2. Felipe DeLeon (Valenzuela) entered the United States on April 5, 1989, as a tourist visitor from Mexico.

3. On or about January 11, 1991, Felipe DeLeon (Valenzuela) presented to Texas Arai, Inc., an alien registration card numbered A34 786 904 bearing the name Felipe DeLeon, as evidence of his identity and employment eligibility.

4. On January 11, 1991, Felipe DeLeon (Valenzuela) presented to Texas Arai Inc., a social security card numbered ###-##-####.

5. On January 11, 1991, Felipe DeLeon (Valenzuela) signed an I-9 form attesting under penalty of perjury that he was an alien authorized by the Immigration and

Naturalization Service to work in the United States, with the alien number A34 786 904.

6. The number A34 786 904 has never been issued by the Immigration and Naturalization Service to Felipe DeLeon (Valenzuela) or to anyone.

7. The social security number ###-##-#### was never assigned to Felipe DeLeon (Valenzuela) by the Social Security Administration.

8. On January 11, 1991 Felipe DeLeon (Valenzuela) was hired by Texas Arai, Inc. as a night shift machine operator and he continued to work there until at least June 22, 1994.

9. Felipe DeLeon (Valenzuela) knew on January 11, 1991 and at all pertinent times thereafter through June 22, 1994 that he was unlawfully present in the United States.

10. Felipe DeLeon (Valenzuela) knew on January 11, 1991 and at all pertinent times thereafter through June 22, 1994 that he was without authorization to work in the United States.

11. Felipe DeLeon (Valenzuela) knew on January 11, 1991 that the alien registration card he presented to Texas Arai, Inc. was not genuine and had not been issued to him by the INS.

12. Felipe DeLeon (Valenzuela) knew on January 11, 1991 that the social security card he presented to Texas Arai, Inc. was not genuine and had not been issued to him by the Social Security Administration.

13. On June 22, 1994, Felipe DeLeon (Valenzuela) was arrested by INS agents, together with a number of other employees on or near the premises of Texas Arai, Inc.

14. On June 29, 1994 Felipe DeLeon (Valenzuela) was issued a Notice of Intent to Fine (NIF) by INS.

15. Felipe DeLeon (Valenzuela) was subsequently assigned the alien number A72 818 596 in 1994.

16. All jurisdictional prerequisites to this action have been satisfied.

On the basis of the foregoing I conclude that Felipe DeLeon (Valenzuela) knowingly used, possessed, and provided a forged, counterfeited, altered, or falsely made alien registration card bearing the name Felipe DeLeon after November 29, 1990, for the purpose of satisfying a requirement of the INA in violation of 8 U.S.C. § 1324c(a)(2).

ORDER

Felipe DeLeon (Valenzuela) 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 10th day of July, 1998.

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.