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

UNITED STATES OF AMERICA, Complainant,	)	
	)	8 U.S.C. §1324c Proceeding
v.	)	OCAHO Case No. 96C00031
ROBERTO C. DAVILA, Respondent.	)	

ORDER BY THE CHIEF ADMINISTRATIVE HEARING OFFICER DENYING RESPONDENT'S MOTION FOR RECUSAL OF THE ADMINISTRATIVE LAW JUDGE

On May 28, 1997, the Honorable Robert L. Barton, the Administrative Law Judge (hereinafter the ALJ) assigned to the above styled proceeding, entered an Order Granting Complainant's Motion for Summary Decision. On May 29, 1997, Respondent filed a Motion for Recusal. Respondent's Motion for Recusal is accepted as a written request for review by the Chief Administrative Hearing Officer pursuant to 28 C.F.R. §68.53(a)(1).

I have administratively reviewed the record of proceeding and the ALJ's order of May 28th and find no basis for Respondent's motion. Accordingly, the CAHO hereby denies Respondent's Motion for Recusal.

It is so ordered, this *16th* day of June, 1997.

JACK E. PERKINS
Chief Administrative Hearing Officer

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UNITED STATES OF AMERICA, Complainant,	)	8 U.S.C. § 1324c Proceeding
v.	)	OCAHO Case No. 96C00031
ROBERTO C. DAVILA, Respondent.	)	Judge Robert L. Barton, Jr.

ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION

(May 28, 1997)

I. PROCEDURAL HISTORY

Complainant alleges in a one count complaint filed on April 2, 1996, that Respondent used, and attempted to use, a forged, counterfeit, altered and falsely made social security card, with the number SSN1, bearing the name Robert Carlos Davila, after November 29, 1990, knowing that such document was forged, counterfeit, altered and falsely made, for the purpose of satisfying a requirement of the Immigration and Nationality Act (INA). Complainant seeks a civil money penalty in the amount of $1,000 and an order to cease and desist from violating section 274C(a)(2) of the INA, 8 U.S.C. § 1324c(a)(2). On May 31, 1996, Respondent filed its answer to the complaint, stating that "[r]espondent neither admits nor denies [Count I's allegations], and demands strict proof thereof." Answer at 1. Respondent also raised his Fifth Amendment privilege against self-incrimination. Id.

On June 14, 1996, I issued an Order Governing Prehearing Procedures (OGPP), which, among other things, provided for a period of discovery. As part of prehearing discovery, Complainant deposed Respondent on August 22, 1996. The deposition was particularly acrimonious. Counsel for the Respondent made numerous gratuitously insulting comments and repeatedly left the deposition to confer with Mr. Davila while a question from Complainant was

pending. Such actions resulted in the *sua sponte* issuance of an Order warning that further misconduct and deleterious tactics would not be tolerated. See United States v. Davila, 6 OCAHO 895 (1996),[1] 1996 WL 762114.

During the deposition, the Respondent invoked his Fifth Amendment privilege against self-incrimination numerous times, prompting the Complainant to file a Motion to Compel. See Complainant's First Motion to Compel at 2-3 (detailing instances where the Respondent invoked his Fifth Amendment privilege). In his response to the Motion, Respondent failed to follow the tenets of Fed. R. Civ. P. 26(b)(5), which states that a party withholding information pursuant to a claim of privilege must at least describe the information contained so as to enable other parties to assess the applicability of the privilege. Fed. R. Civ. P. 26(b)(5); see also United States v. Davila, 6 OCAHO 903, at 2 (1996), 1996 WL 785006 at *1-2. However, Respondent correctly cited numerous cases supporting his argument that the Fifth Amendment's privilege applies to administrative proceedings where an identifiable risk of future prosecution lies. See Respondent's Answer to Complainant's First Motion to Compel at 1-2. On November 21, 1996, I ruled that the Respondent should be compelled to answer only five of nineteen certified questions. Davila, 6 OCAHO 903, at 4-7.

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[1] The conduct included instances of the Respondent's counsel making the following statements:

> "I guess you've never taken a deposition before." Dep. Tr. of Roberto Davila, August 22, 1996, at 6 [hereinafter Dep. Tr.].
>
> "You haven't repealed the Seventh Amendment yet." Dep. Tr. at 38.
>
> "We can stay here all day if Paul [Complainant's counsel] wants." Dep. Tr. at 45.
>
> "Let the record reflect Mr. Hunker just left the room, went outside and came back with a stack of papers for God knows what nefarious purpose." (emphasis added) Dep. Tr. at 47.
>
> [I]t's a trap of the sort to, have you quit beating your wife, and we haven't even established that he ever beat her." Dep. Tr. at 57.
>
> Objection, fortunately we have a Fifth Amendment that guarantees the Gestapo can't force anybody to testify against himself, and I'm instructing him not to. (emphasis added). Dep. Tr. at 59.

See Davila, 6 OCAHO 895, at 2.

Despite my ruling rejecting Respondent's objection to these five deposition questions, when the deposition was resumed on December 2, 1996, Respondent refused, on advice of counsel, to answer the questions. See United States v. Davila, OCAHO Case No. 96C00031 at 2-3 (January 24, 1997) (Order Granting in Part and Denying in Part Complainant's Motion for Sanctions and Motion to Compel); Dep. Tr. at 94-9,[2] 97-13, 112-11, 113-2, 118-2[3]. Complainant then filed both a motion for sanctions as to the five questions that Respondent previously had been ordered to answer in the November 21, 1996 Order, and a motion to compel answers as to forty-four other questions posed during the reconvened deposition. See Complainant's Motion for Sanctions and Third Motion to Compel, dated December 12, 1996. After reviewing the deposition transcript, I concluded that Respondent had failed to comply with my prior Order, and I granted Complainant's motion for sanctions pursuant to 28 C.F.R. § 68.23(c) which provides, in pertinent part, that if a party fails to comply with an order, the Judge may infer and conclude that the admission, testimony, documents, or other evidence would have been adverse to the non-complying party. Therefore, I made adverse findings with respect to the five questions, including finding that the document marked as Deposition Exhibit 2 is the resume of Respondent Roberto Davila (see Dep. Tr. at 49-6, 94-5) and that in July 1991, Respondent worked for Bank of America Corporation (Bank of America) as a customer representative. See Dep. Tr. at 47-6, 112-11.[4] With respect to Complainant's motion to compel answers to the forty-four other questions as to which no prior ruling had been made, I denied the motion with respect to most of the questions, but I granted the motion as to four questions and ordered Respondent to serve written answers to the same not later than February 10, 1997.[5] See United States v. Davila, OCAHO Case No. 96C00031 (January 24, 1997) (Order Granting in Part and Denying in Part Complainant's Motion for Sanctions and Motion to Compel).

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[2] The numerical references are the page and line, respectively, of the deposition transcript.

[3] In response to the question at 97-13, Respondent and counsel specifically invoked the Fifth Amendment. Responding to two other questions, the Respondent and counsel referred back to the Fifth Amendment privilege as justification for a refusal to answer.

[4] I also made adverse inferences with respect to Respondent's employment prior to November 1990, finding that he worked as a field engineer for National Cash Register Company in 1988, as a dental technician for Jochin Chrome Lab Company in 1989, and for GMA Research beginning in 1990.

[5] Rather than resuming the deposition once again, Complainant requested that Respondent provide written answers to the deposition questions. Given Respondent's counsel's continued misbehavior during the deposition, including the renewed deposition on December 2, 1996, I ordered that written answers be served. I specifically noted in my January 24, 1997 Order that Respondent's counsel had continued to make gratuitous and insulting comments during the deposition in violation of my prior Orders. See January 24, 1997 Order at 5.

Complainant also served several sets of interrogatories on the Respondent during the discovery period. See United States v. Davila, OCAHO Case No. 96C00031 (December 9, 1996) at 1-2. In response to these interrogatories, Respondent, on November 3 and 4, 1996, filed two Motions. The first, a Motion for Summary Disposition, argued that in light of the Universal Declaration of Human Rights,[6] the instant Complaint should be dismissed. That motion was denied as the Declaration was found to bear no weight in these proceedings. United States v. Davila, OCAHO Case No. 96C00031 (December 4, 1996) (Order Denying Complainant's Motion for Judgment and Denying Respondent's Motion for Summary Disposition) at 3. The second Motion was apparently filed in anticipation of Complainant's Second Motion to Compel. Respondent's Motion, entitled a "Motion for Protective Order," sought to protect Respondent from having a duty to answer any further discovery from Complainant and prayed that the Judge would "resist the urgings [sic] of the administrative agency to repeal the United States Constitution [by not compelling the Respondent to testify against himself]."

Complainant, on November 5, 1996, filed its Second Motion to Compel. An ancillary portion of Complainant's Motion was in response to Respondent's Motion for a Protective Order. This ancillary portion stated that the Respondent's Motion was an attempt to avoid answering two sets of interrogatories served on the Respondent. Respondent's Motion was disposed of in the form of yet another discussion of OCAHO jurisprudence regarding the Fifth Amendment. United States v. Davila, OCAHO Case No. 96C00031 (November 25, 1996) at 1-2. Furthermore, it was noted that while the Respondent was not entitled to complete relief from discovery, the Respondent would be entitled to a protective order from irrelevant material upon proper application to the Court. Id. at 2.

The main portion of Complainant's filing was its Second Motion to Compel answers to the interrogatories. The substance of the interrogatory sets were as follows:

> Set (a): Interrogatories served on September 16, 1996--Two questions querying whether Respondent had reason to believe or suspect that he did not knowingly use a forged or otherwise altered counterfeit social security card for the purpose of obtaining employment from GTE Corporation (GTE).
>
> Set (b): Interrogatories served on September 30, 1996--Four questions querying whether Respondent has reason to believe or suspect that he did not knowingly use a forged or otherwise altered counterfeit social security card for the purpose of obtaining employment from GMA Research Corporation (GMA) and Bank of America. Three questions concerning basis for Respondent's suggestions that Special Agent James J. Pokorney engaged in illegal or dishonest conduct.

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[6] The declaration is a United Nations document adopted by the General Assembly on December 10, 1948. See G.A.Res. 217, 3 U.N.GAOR, U.N.Doc. 1/777 (1948).

In an order dated December 9, 1996, I ruled that Respondent's Motion for a Protective Order, referenced above, validly served as an objection to the interrogatories at Set (b), above. United States v. Davila, OCAHO Case No. 96C00031 (December 9, 1996) at 2. With respect to the first four interrogatories of Set (b), above, I upheld Respondent's Fifth Amendment privilege, determining that the four interrogatories could potentially give rise to future criminal prosecution. Id. at 3-5. With respect to the remaining interrogatories that concerned the Special Agent, I instructed the Respondent either to answer the interrogatories that requested Respondent's basis of belief that the Special Agent had engaged in illegal conduct, or to abandon that defense entirely. Id. at 3. Respondent never answered the interrogatories concerning the Agent, so I therefore rule at this time that Respondent has abandoned any defense suggesting the Special Agent engaged in misconduct towards the Respondent. See 28 C.F.R § 68.23(c)(3).

Regarding Respondent's Motion for a Protective Order, I ruled that the Respondent's objection in the form of its Motion was not timely as to the interrogatories at Set (a), above. United States v. Davila, OCAHO Case No. 96C00031 (December 9, 1996) at 2. However, "in light of the delicate nature of the information sought, and in an effort to insure that the Respondent's Fifth Amendment rights are given every effort to be heard and considered," I allowed Respondent the opportunity to show "good cause" as to why an objection should be heard. Id. Respondent filed nothing to this effect. I, therefore, compelled Respondent's answer to the two interrogatories referenced in Set (a), above. United States v. Davila, OCAHO Case No. 96C00031 (January 7, 1997) at 2. An answer to the interrogatories was due by February 7, 1997.[7] Id. The Respondent's answers to the interrogatories, late filed on March 31, 1997, are Delphic at best and patently unresponsive doublespeak at worst.

On February 24, 1997, Complainant filed a Motion for Summary Decision, supported by several affidavits and other extrinsic documents. Respondent did not timely answer the Motion, the response to which was due March 10, 1997. Instead, on March 26, 1997, Respondent filed a Motion to Extend Time for Answering Complainant's Motion for Summary Decision (Motion for Extension), claiming medical exigencies.[8] Complainant opposed the motion for an extension of time. Respondent's motion for an extension was not timely submitted since it was filed after the due

[7] Respondent, on February 19, 1997, filed a Motion for Reconsideration of my Order Granting Complainant's Second Motion to Compel. The Motion was filed almost two weeks after the answers to the interrogatories were due. Respondent's Motion was denied on February 27, 1997. United States v. Davila, OCAHO Case No. 96C00031 (February 27, 1997).

[8] Respondent's counsel stated that he was experiencing chest pains "resembling the sensation of . . . a crocodile inside that is trying to claw and gnaw its way out [which have] significantly impaired counsel's ability to perform his duties." Respondent's Motion for Extension at 1.

date for the answer to the pending Motion for Summary Decision.[9] Further, Respondent's counsel did not accompany his Motion with a doctor's certificate or offer any reasons why the request for an extension was untimely submitted. Nevertheless, to give the Respondent an opportunity to respond to the Motion for Summary Decision, I granted the Motion and gave Respondent until April 18, 1997, to file a response.

On April 18, 1997, Respondent filed, combined in one pleading, an answer to the Complainant's Motion for Summary Decision and a counter motion for summary judgment (the combined pleading is hereinafter referred to as Respondent's Answer to Complainant's Motion).[10] Respondent argues that Complainant's Motion was untimely filed, and that Complainant's Motion is insufficient to demonstrate the absence of any material issue.

The detailed nature of the above-discussed procedural history in this case is intended to show the patience this Court has extended the Respondent in this matter. This includes the careful consideration given the Respondent's various claims and defenses, even in the face of inadequate briefing by Respondent's counsel, and the often vituperative and unprofessional nature of his filings and deposition behavior. Respondent has been given every available opportunity to proffer a meritorious defense and has been given leeway in his filings to this Court. Having received Respondent's Answer to the Motion, Complainant's Motion for Summary Decision is now ripe for adjudication.

II. STANDARDS FOR SUMMARY DECISION

The rules governing motions for summary decision contemplate that the record as a whole will provide the basis for deciding whether to grant or to deny that motion. See 28 C.F.R. § 68.38(c) (1996) (authorizing the ALJ to grant a motion for summary decision "if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision"); United States v. Tri Component Product Corp., 5 OCAHO 821, at 3 (1995), 1995 WL 813122 at *2 (Order Granting Complainant's Motion for Summary Decision) (noting that "[t]he purpose of summary adjudication is to avoid an unnecessary hearing when there is no genuine issue as to any material fact, as shown by the pleadings, affidavits, discovery, and any other judicially noticed matters").

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[9] Complainant's Motion for Summary Decision was served on February 20, 1997, and Respondent's answer, therefore, was due within fifteen days, or not later than March 7, 1997. See 28 C.F.R §§ 68.8(c) and 68.11(b). Respondent's counsel did not file his request for an extension until almost three weeks later. The OGPP requires that a request for an extension of time be filed prior to an answer's due date.

[10] I denied Respondent's counter motion for summary judgment in a separate order issued May 15, 1997.

The Rules of Practice and Procedure that govern this proceeding permit the Administrative Law Judge (ALJ or Judge) to "enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c) (1996). Although the Office of the Chief Administrative Hearing Officer (OCAHO) has its own procedural rules for cases arising under its jurisdiction, the ALJs may reference analogous provisions of the Federal Rules of Civil Procedure and federal case law interpreting them for guidance in deciding issues based on the rules governing OCAHO proceedings. The OCAHO rule in question is similar to Federal Rule of Civil Procedure 56(c), which provides for summary judgment in cases before the federal district courts. As such, Rule 56(c) and federal case law interpreting it are useful in deciding whether summary decision is appropriate under the OCAHO rules. United States v. Aid Maintenance Co., 6 OCAHO 893, at 3 (1996), 1996 WL 735954 at *3 (Order Granting in Part and Denying in Part Complainant's Motion for Partial Summary Decision) (citing Mackentire v. Ricoh Corp., 5 OCAHO 746, at 3 (1995), 1995 WL 367112 at *2 (Order Granting Respondent's Motion for Summary Decision) and Alvarez v. Interstate Highway Constr., 3 OCAHO 430, at 7 (1992)); Tri Component, 5 OCAHO 821, at 3 (citing same).

Only facts that might affect the outcome of the proceeding are deemed material. Aid Maintenance, 6 OCAHO 893, at 4 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)); Tri Component, 5 OCAHO 821, at 3 (citing same and United States v. Primera Enters., Inc., 4 OCAHO 615, at 2 (1994) (Order Granting Complainant's Second Motion for Summary Judgment)); United States v. Manos & Assocs., Inc., 1 OCAHO 877, at 878 (Ref. No. 130) (1989),[11] 1989 WL 433857 at *2-3 (Order Granting in Part Complainant's Motion for Summary Decision). An issue of material fact must have a "real basis in the record" to be considered genuine. Tri Component, 5 OCAHO 821, at 3 (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986)). In deciding whether a genuine issue of material fact exists, the court must view all facts and all reasonable inferences to be drawn from them "in the light most favorable to the non-moving party." Id. (citing Matsushita, 475 U.S. at 587 and Primera, 4 OCAHO 615, at 2).

The party requesting summary decision carries the initial burden of demonstrating the absence of any genuine issues of material fact. Id. at 4 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). Additionally, the moving party has the burden of showing that it is entitled to judgment as a matter of law. United States v. Alvand, Inc., 1 OCAHO 1958, at 1959 (Ref. No. 296) (1991), 1991 WL 717207 at *1-2 (Decision and Ordering [sic] Granting in Part and Denying in Part

[11] Citations to OCAHO precedents in bound Volume I, Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Laws, reflect consecutive decision and order reprints within that bound volume; pinpoint citations to pages within those issuances are to specific pages, seriatim, of Volume I. Pinpoint citations to OCAHO precedents in volumes subsequent to Volume I, however, are to pages within the original issuances.

Complainant's Motion for Partial Summary Decision) (citing Richards v. Neilsen Freight Lines, 810 F.2d 898 (9th Cir. 1987)). After the moving party has met its burden, "the opposing party must then come forward with 'specific facts showing that there is a genuine issue for trial.'" Tri Component, 5 OCAHO 821, at 4 (quoting Fed. R. Civ. P. 56(e)). The party opposing summary decision may not "rest upon conclusory statements contained in its pleadings." Alvand, 1 OCAHO 1958, at 1959 (citing Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec, 854 F.2d 1538 (9th Cir. 1988)). The Rules of Practice and Procedure governing OCAHO proceedings specifically provide:

> [w]hen a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing.

28 C.F.R. § 68.38(b) (1996).

Under the Federal Rules of Civil Procedure, the court may consider any admissions as part of the basis for summary judgment. Tri Component, 5 OCAHO 821, at 4 (citing Fed. R. Civ. P. 56(c)). "Similarly, summary decision issued pursuant to 28 C.F.R. Section 68.38 may be based on matters deemed admitted." Id. (citing Primera, 4 OCAHO 615, at 3 and United States v. Goldenfield Corp., 2 OCAHO 321, at 3-4 (1991), 1991 WL 531744 at *2-3 (Order Granting in Part and Denying in Part Complainant's Motion for Summary Decision)).

III. FINDINGS AND CONCLUSIONS

A. Timeliness of Complainant's Motion For Summary Decision

Respondent contends that Complainant's Motion ought to be denied because it was not timely filed. See Respondent's Answer to Complainant's Motion at 2-3. Respondent states that this Court "mandated the deadline in this case, unambiguously." Id. at 3. Thus, Respondent argues that because of the Complainant's failure to adhere to the "clearly mandated" deadline for filing a motion for summary decision, the Complainant's Motion must be denied. Id.

Respondent's contention that Complainant's motion should be denied because Complainant violated the Court's mandatory deadline for filing dispositive motions is not well founded. The OGPP stated that the "following [discovery] schedule is tentatively adopted" (emphasis added), and listed November 4, 1996, as the tentative date for filing all motions for summary decision. However, on October 28, 1996, Complainant moved to extend the deadline for filing exhibit and witness lists and motions for summary decision, and noted that Respondent agreed that an extension was appropriate. I granted Complainant's motion for an extension since discovery was not yet completed and stated that "I expect[ed] the parties to act diligently with respect to discovery" and

that the parties should complete discovery no later than December 2, 1996.[12] See United States v. Davila, OCAHO Case No. 96C00031 (October 29, 1996) (Order Granting Complainant's Motion for an Extension of Time) at 1. Despite that warning, Respondent continued to delay and engage in dilatory tactics during the discovery period, thus preventing Complainant from completing its discovery with alacrity. Thus, although I did not specifically provide a new date for filing dispositive motions, the November 4, 1996 date was a "tentative" date and, given Respondent's tactics during discovery, Complainant's filing after that date is understandable.

Moreover, as shown by OCAHO case law, a Judge always has the discretion to waive scheduling dates. In this respect, United States v. Galeas, 5 OCAHO 790, at 2 (1995), 1995 WL 705947 at *3, is particularly relevant. Rejecting a respondent's contention that a Complainant's Motion for Summary Decision was untimely filed, the Court there stated,

> I do not understand the June 30, 1995 date for filing a Motion for Summary Decision as a deadline in the sense that mandatory dates in lawsuits need to be strictly viewed. June 30 was a date suggested by the parties as a date to expect Complainant's Motion; I did not mandate that a motion must be filed by that date. Moreover, there is no suggestion of prejudice to Respondent by the delay between the anticipated and the actual date of filing of the Motion for Summary Decision.

Id. Likewise, here, the Respondent has offered no evidence of prejudice to its case by the timing of Complainant's Motion. Indeed, because I required Complainant to remark its exhibits, Respondent had more time to consider and respond to Complainant's Motion for Summary Decision.

Furthermore, Respondent has been late in filing several pleadings in this case, including its own motion for summary disposition, which was filed on November 7, 1997, three days after the November 4, 1997 filing deadline.[13] Moreover, Respondent did not file a timely response to the Complainant's pending Motion. Complainant's Motion for Summary Decision was originally served on Respondent February 20, 1997. As per the OCAHO Rules of Practice, Respondent's

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[12] In that Order I did not specifically address Complainant's request for an extension of time to file dispositive motions, such as motions for summary decision. However, since I extended the deadline for completing discovery to December 2, 1996, which was nearly a month after the "tentative" date for filing motions for summary decision, obviously the November 4 date would have to be adjusted.

[13] Respondent's Motion for Summary Disposition was served on November 3, 1997, but it was not filed until November 7, 1997. The OGPP required that dispositive motions be filed by November 4, 1997. A motion or other pleading is not considered "filed" until received by the Administrative Law Judge. 28 C.F.R. § 68.8(b). Therefore, Respondent's motion was late.

answer to the Motion was due within fifteen days, which was not later than March 7, 1997. See 28 C.F.R § 68.8(c) and 68.11(b). Respondent did not file an answer within that time period and did not even request an extension until March 26, 1997, more than two weeks late.

Respondent also was late in filing other pleadings. Respondent did not respond at all to Complainant's Motion for Sanctions and Third Motion to Compel, which was served on December 12, 1996, and, consequently, I granted the motion on January 24, 1997. That order sanctioned some of Respondent's conduct and made adverse inferences against Respondent because of to his refusal to answer certain deposition questions despite being compelled to do so. On February 10, 1997, two months after Complainant's motion had been served, Respondent filed a motion for reconsideration of my order and attempted to proffer arguments as to why Complainant's original motion should have been denied! That untimely response was not favorably received, and on February 27, 1997, Respondent's motion for reconsideration was denied. Thus, given Respondent's several late filings in this case, Respondent is in no position to insist that deadlines strictly be imposed on the other party.

In light of Respondent's dilatory discovery tactics, his repeated failures to file timely on his own behalf, and the amendment of the procedural schedule, I reject Respondent's argument and accept the filing of Complainant's Motion for Summary Decision.

B. Fact Findings

Respondent was born in Iquitos, Peru, on March 25, 1967. Dep. Tr. at 18-8, 28-9. On April 21, 1989, he entered the United States as a visitor. CX-L-11. That was Respondent's first and only time entering the United States. Id. After arriving in the United States, Respondent admitted that he never obtained permission to work. CX-L-13. Respondent admitted to holding "half a dozen" jobs prior to his arrest by the INS. CX-L-14. Respondent applied for and obtained a social security card from the government. CX-L-17. Respondent admitted that "[t]he social security card . . . had . . . a restriction on it." CX-L-18. The restriction stated that the card was not valid for employment. CX-L-19.

Much of Respondent's work history has been determined since I already have made findings accepting as fact his prior employment with National Cash Register Company, Jochin Chrome Lab Company, GMA, and Bank of America. See Order Granting in Part and Denying in Part Complainant's Motion for Sanctions and Motion to Compel (January 24, 1997), at 6; see also Dep. Tr. Ex. 2 (resume of Roberto Davila determined to be authentic, supra, pursuant to 28 C.F.R § 68.23(c)). On October 8, 1990, Respondent began working for GMA. CX-B-1. Respondent completed a Form I-9 in January of 1991. Id. Ms. Terri Carter was the Human Resources Director of GMA Research Corporation at the time of Respondent's hiring and at the time of his completing the Form I-9. CX-A-2. Ms. Carter states that she will not sign Section 2 of the I-9 Form without reviewing documents. CX-B-1. In January 1991, the Respondent attested in his Form

I-9 that he was a citizen of the United States. CX-A-2. The social security card with the number SSN1 presented by Respondent did not bear the notation, "not valid for employment." See CX-A-3, CX-B-4.

From July 12, 1991 to December 5, 1992, Respondent was employed by Bank of America Corporation. CX-D-2. The Respondent's Form I-9 obtained from Bank of America indicates in Section 2 that Respondent presented a social security card with the number SSN1. CX-D-3. Jean Smith, an Associate Staffing Specialist, certified that the social security card presented was an original card that did not bear the notation "not valid for employment." Id. Further, the Respondent attested on his Form I-9 that he was a citizen of the United States and was eligible for employment. CX-D-3.

In February of 1993, Respondent began working for GTE Corporation. CX-E-2-5, CX-F-3. On February 1, 1993, Russell Sivey was Respondent's manager. CX-F-1. Respondent presented his Form I-9 attesting his United States citizenship to Mr. Sivey for Mr. Sivey's signature. CX-F-2. One of the documents submitted by Respondent was his social security card with the number SSN1. CX-F-3, CX-H-5. Kelly Worley, assistant to Mr. Sivey, attached a copy of the appropriate cards proffered by Respondent to Respondent's Form I-9 and forwarded them to Mr. Sivey. CX-G-1-2. Mr. Sivey signed Respondent's Form I-9 in an incorrect location, but the documents were nonetheless forwarded to GTE Headquarters. Karen Civiello was a Human Resources Assistant for GTE Corporation at the time of Respondent's hiring and corrected Mr. Sivey's error. CX-H-1-2. The copies of documents proffered by a new employee are attached to the employee's Form I-9. The Respondent's social security card did not bear any notation that the card is not valid for employment. CX-H-5, CX-I-3.

Vickie Higgins is a Social Insurance Program Specialist with the Social Security Administration (SSA). CX-C-1. Her duties include determining if a social security card is valid. Id. After speaking to Complainant's counsel, Ms. Higgins conducted an electronic search of SSA records and determined that Respondent has been assigned only one social security number: SSN1. CX-C-2. Respondent has been issued only two social security cards. Id. The original card issued to Respondent bore the legend, "not valid for employment," while a duplicate card later issued to Respondent stated, "valid for work only with INS authorization." CX-C-2-3. These are the only two cards ever issued to the Respondent. CX-C-3.

Ms. Higgins states in her affidavit that the social security card submitted to GMA "bear[s] obvious signs of erasure and overwriting." CX-C-4 (noting that the letters on the card appear to have been "whited out" or otherwise removed, and noting that the print on the card is not uniform). Ms. Higgins notes that the card submitted to GTE is "a more sophisticated" fraudulent social security card. Id. Nonetheless, Ms. Higgins states that the card is fraudulent. Id. (stating that the printed characters on the card do not match those generated by the SSA's printers, nor do they have the typeface "look" of characters on a valid card). According to an INS record of a deportable alien,

upon the Respondent's arrest, Respondent admitted that he counterfeited his original social security card. CX-J-1, CX-K-1-2. The Respondent turned over his authentic social security card, bearing a restrictive legend, to INS officials. CX-K-2; CX-C-9.

C. Statute of Limitations

Since the effective date of 8 U.S.C. § 1324c is November 29, 1990, Respondent cannot be held liable under section 1324c for any acts occurring before that date. Therefore, to the extent that Respondent may have used fraudulent documents to obtain employment at National Cash Register Company in 1988 or at Jochin Chrome Lab Company in 1989, those acts are not cognizable in this proceeding because they occurred prior to November 1990. Further, any use of fraudulent documents by Respondent in connection with his initial hire by GMA in October 1990 also preceded the effective date of section 1324c and, thus, is not actionable under that statute.

In its Motion for Summary Decision, Complainant does not seek to rely on those prior jobs, but asserts that Respondent used a forged, altered, counterfeit or falsely made social security card to maintain or obtain employment on three other occasions after November 29, 1990; namely, at GMA in January 1991, at Bank of America in July 1991, and at GTE in February 1993. However, while section 1324c does not contain any time limit in which document fraud cases must be commenced, Respondent's actions at GMA in January 1991, which occurred more than five years prior to the filing of the instant complaint, could fall within the purview of the general statute of limitations promulgated at 28 U.S.C. § 2462, and, thus, protect Respondent from prosecution regarding that employment. The concept that section 2462 could protect Respondent from prosecution under section 1324c is based both on statutory and case law.

28 U.S.C. § 2462 provides as follows:

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

28 U.S.C. § 2462 (1994).

A threshold issue in determining whether section 2462 might apply to certain OCAHO cases is whether section 2462 applies to administrative, as well as judicial, proceedings. Turning first to the jurisprudence of the applicable Court of Appeals, which here is the United States Court of Appeals for the Fifth Circuit, the Court seems to assume, without substantial comment, that section 2462 is applicable to administrative proceedings. In United States v. Core Laboratories, Inc., 759 F.2d 480 (5th Cir. 1985), the Court determined, in the context of a claim to enforce a penalty already imposed, that the "first accrued" provision of section 2462 refers to when the subject

violation occurs, and not when the final administrative order assessing the penalty is entered. Id. at 482-83. Implicit in the Court's decision, however, was the application of the limitations statute to an administrative proceeding brought under the Export Administration Act.[14] Id. Discussing when the limitations statute started to run, the Court noted that the legislative history of the Export Administration Act discussed the lack of a statute of limitations section. Id. at 482. The Senate stated it "intended that the general 5-year limitation imposed by section 2462 of title 28 shall govern" proceedings, whether administrative or judicial, brought under that Act. Id. (quoting S. Rep. No. 363, 89th Cong., 1st Sess. 7, reprinted in 1965 U.S.C.C.A.N. 1826, 1832). Furthermore, the Court noted that, in general, the limitations period should begin when the applicable statute is violated, and not after the government has concluded the relevant administrative proceeding. Id. at 483. Thus, the Fifth Circuit tacitly took the position that section 2462 was applicable to administrative proceedings.

This interpretation of Core Laboratories is consistent with cases in other circuits and authority concerning the issue of whether section 2462 applies to administrative proceedings. See, e.g., 3M Co. v. Browner, 17 F.3d 1453, 1456 (D.C. Cir. 1994) ("[C]ourts have assumed, without discussion, that § 2462 covers administrative penalty proceedings") (citing, inter alia, Williams v. United States Dep't of Transp., 781 F.d 1573, 1578 n.8 (11th Cir. 1986)); Federal Election Comm'n v. Williams, 104 F.3d 237 (9th Cir. 1996) (involving an action by the Federal Election Commission under the Federal Election Campaign Act); Arch Mineral Corp. v. Babbitt, 104 F.3d 660, 669-70 (4th Cir. 1997) (adopting the rule and reasoning of 3M). See also Johnson v. SEC, 87 F.3d 484 (D.C. Cir. 1996) (finding that the statute of limitations of section 2462 applies to administrative actions under section 15(b) of the Securities Exchange Act of 1934); S. Rep. No. 363, 89th Cong., 1st Sess. 7 (1965) and H.R. Rep. No. 434, 89th Cong., 1st Sess. 5 (1965), reprinted in 1965 U.S.C.C.A.N. 1826, 1832); Reynolds, Is there any Statute of Limitations on the "Tax Shelter" Penalties, 77 J. Tax'n 342, 346 (1992) ("[T]he Fifth Circuit in Core Laboratories recognized that the provisions of 28 U.S.C. § 2462 apply to administrative proceedings to enforce penalties . . . . This authority leads to the conclusion that 28 U.S.C. § 2462 does apply to administrative acts to enforce penalties [and that it] appears by using "proceeding" Congress intended the statute of limitations in [that section] to apply to any step or stage in the penalty enforcement process.").

Another issue courts have addressed in construing and applying section 2462 is the scope of the word "enforcement," as used in that section. Core Laboratories does not hold that "enforcement" encompasses the initial assessment proceeding; as discussed below, that was not the issue before the court. The circumstances of that case, however, imply that the Fifth Circuit would apply section 2462 to the proceeding in which the penalty initially is assessed.[15] The defendant, Core Laboratories,

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[14] 50 U.S.C. § 2401 et seq. (1984).

[15] Independent of the issue of whether section 2462 applies to administrative proceedings (continued...)

violated antiboycott provisions of the Export Administration Act. See Core Laboratories, 759 F.2d at 481. Prior to five years from the date of violation, the Department of Commerce initiated administrative proceedings to seek a civil penalty. Id. Before five years from the date of violation, a civil penalty was imposed, and the defendant refused to pay the civil penalty. Id. After the expiration of five years from the date of violation, the government started an action to enforce the previously imposed penalty. Id. In that case, the sole issue before the Fifth Circuit was "the meaning of 'the date when the claim first accrued,'" id. (quoting 28 U.S.C. § 2462), for purposes of deciding whether the enforcement action was time barred under section 2462, id. The defendant argued that the date on which the claim first accrued is the date on which the underlying violations occurred, but the government contended that the date of accrual is the date of the final administrative order that imposed the penalty. Id.

The Fifth Circuit held that the date of the underlying violation is when the claim[16] first accrues for purposes of section 2462. Id. at 482-83. In other words, the Fifth Circuit interpreted section 2462 to require that a judicial action to collect a penalty already assessed must be brought within five years from the date of the violation that gave rise to the assessment of the penalty. It would seem that the administrative action to assess the penalty also would have to meet the five-year limitations period of section 2462, or the government would risk encountering the inability to collect any penalty imposed.[17] The Court, however, hints indirectly at the possibility that an action to assess a civil penalty might be brought after five years have elapsed from the date of the underlying violation, without implicating section 2462, if any subsequently imposed penalty were paid voluntarily, without the need of an enforcement proceeding. Unlike the D.C. Circuit in 3M, the Fifth Circuit appears to maintain a distinction between an action to "assess" a penalty and an action to

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[15](...continued)
is the issue of whether "enforcement," as used in that section, encompasses the action to impose a civil penalty, or merely refers to the action to enforce payment of a civil penalty already imposed. Several U.S. Courts of Appeals interpret "enforcement," as used in section 2462, to include the administrative imposition of the civil fine, penalty, or forfeiture. See 3M Co., 17 F.3d at 1457-59; Federal Election Comm'n v. Williams, 104 F.3d at 239-40 (citing, inter alia, 3M); See generally, Catherine E. Maxson, Note, The applicability of Section 2462's Statute of Limitations to SEC Enforcement Suits in Light of the Remedies Act of 1990, 94 Mich. L.R. 512, 516-20 (1995) ("Most courts assume without debate that section 2462 applies to suits seeking to impose penalties or forfeitures.") (footnote omitted).

[16] The claim, in that case, being to enforce the payment of the fine already imposed.

[17] The Fifth Circuit's opinion 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.

"collect" a penalty. In refuting the applicability of Lancashire Shipping Co., Ltd. v. Durning, 98 F.2d 751 (2d Cir. 1938) cert. denied, 305 U.S. 635 (1938), a case cited by the government, the Fifth Circuit noted that the cited case involved "an action to recover a penalty, not to enforce one; there was in fact no enforcement action because the penalty at issue was paid voluntarily." Core Laboratories, 759 F.2d at 483 (emphases added). The Fifth Circuit went on to note, regarding Lancashire, that "[a]dministrative proceedings to impose the penalty had begun within the limitations period of § 791, predecessor to § 2462, but had ended after its expiration; it is thus neither surprising nor supportive of the Government's position that the Second Circuit rejected Lancashire's limitations defense." Core Laboratories, 759 F.2d at 483. The fact that the Fifth Circuit was not "surprised" at that result might indicate that the Fifth Circuit sees section 2462 as having no applicability until an actual enforcement proceeding is involved.[18]

One of the Fifth Circuit's rationales for holding that an accrual date refers to the date on which the underlying violation occurred seems to indicate that the Court would apply section 2462's limitations period to administrative actions for the assessment of a civil penalty. The Court relies strongly on the idea that statutes of limitations free potential defendants from perpetual fear that they will be made to bear responsibility for remote actions, concluding that a limitations period that began to run only after the government concluded its administrative proceedings would thus amount in practice to little or no protection. Id. at 483. Since the Fifth Circuit is concerned about defendants being faced with prosecutions based on remote acts, then reason would indicate that it would 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.

Thus, in light of the above-cited decisions of United States Courts of Appeals, as well as the implication from the Fifth Circuit in Core Laboratories, that the provisions of section 2462 are applicable in administrative proceedings and to proceedings involving the initial imposition of a civil penalty, the five-year statute of limitations for enforcement actions would seem to apply to the instant proceeding.

However, Respondent has not raised a statute of limitation defense in his answer or in his response to the Complainant's motion. Rule 8(c) of the Federal Rules of Civil Procedure provides, in pertinent part, that a party shall set forth affirmative defenses, including the statute of limitations,

[18] It is important to note, however, that the predecessor statute the Second Circuit was interpreting in Lancashire provided that "a suit or prosecution for any penalty or forfeiture . . . shall not be maintained unless commenced within five years from the time the penalty or forfeiture accrued." Lancashire, 98 F.2d at 753. That statute made no mention of an action for the enforcement of a civil penalty, as section 2462 currently provides, so the Second Circuit was not faced with the potential distinction between "imposition" and "enforcement" proceedings.

see Fed. R. Civ. P. 8(c),[19] and the relevant federal case law holds that failure to do so constitutes a waiver of the defense. See Davis v. Huskipower Outdoor Equip. Corp., 936 F.2d 193, 198 (5th Cir. 1991) (finding that defendant waived statute of limitations defense by failing to raise it in pleadings); United States v. Arky, 938 F.2d 579 (5th Cir. 1991), cert. denied, 503 U.S. 908 (1992) (holding that failure to raise statute of limitations defense at trial waives affirmative defense); United States v. Barakett, 994 F.2d 1107, 1110 (5th Cir. 1993) (following Arky). Respondent has neither argued that section 2462 should apply in these proceedings, nor raised any statute of limitations defense to the Complainant's action against him, and, consequently, the parties have not briefed this issue. Further, I may not apply a statute of limitations defense sua sponte. See Carbonell v. Louisiana Dep't of Health & Human Resources, 772 F.2d 185, 189 (5th Cir. 1985); Haskell v. Washington Townshp et al., 864 F.2d 1266, 1273 (6th Cir. 1988) (noting that it is ordinarily error for a district court to raise a statute of limitations defense sua sponte); Davis v. Bryan, 810 F.2d 42, 44 (2d Cir. 1987); Pino v. Ryan, 49 F.3d 51, 53 (2d Cir. 1995).

Thus, while it appears that section 2462 does apply to these proceedings, I rule that Respondent has waived the statute of limitations defense by failing to raise that issue as an affirmative defense. Consequently, any violations of section 1324c that have occurred since the effective date of the statute on November 29, 1990, including specifically Respondent's acts at GMA in January 1991, are cognizable in this action.

D. Appropriateness of Summary Decision in Document Fraud Cases

1. Appropriateness generally

In order to establish a violation of 8 U.S.C. § 1324c(a)(2), Complainant must show that (1) Respondent used or attempted to use a forged, counterfeit, altered, or falsely made document, (2) after the November 29, 1990, enactment date of the 1990 Act, (3) for the purpose of satisfying any requirement of the Act, (4) knowing that the document was forged, counterfeit, altered or falsely made. See 8 U.S.C. § 1324c(a)(2); Villegas-Valenzuela v. INS, 103 F.3d 805, 809 (9th Cir. 1996).

Summary decision is appropriate when there are no genuine disputed material issues of fact and a party is entitled to judgment as a matter of law. See 28 C.F.R § 68.38(c); Fed. R. Civ. P. 56(c). In a non-jury case in which there are no witness credibility issues, a court may draw factual inferences and resolve competing inferences from uncontested facts in deciding whether to grant a motion for summary decision if a trial would not enhance the court's ability to draw such inferences and conclusions from the facts. Nunez v. Superior Oil Co., 572 F.2d 1119, 1123-24 (5th Cir. 1978);

[19] The OCAHO Rules of Practice and Procedure provide that the Federal Rules of Civil Procedure may be used "as a general guideline in any situation not provided for or controlled by these rules, the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation." See 28 C.F.R. § 68.1 (1996).

CSX Transp., Inc. v. City of Pensacola, Fla., 936 F. Supp. 880, 883 (N.D. Fla. 1995) (citing Coats & Clark, Inc . v. Gay, 755 F.2d 1506, 1510 (11th Cir. 1985) and Nunez); In re Bevill, Bresler, & Schulman Asset Management Corp., 67 B.R. 557, 583 (D.N.J. 1986) (citing Nunez and United States v. ACB Sales & Servs., Inc., 590 F.Supp. 561, 569 (D. Ariz. 1984)); see also McMahon v. Prentice-Hall, Inc., 486 F.Supp. 1296, 1299 (E.D. Mo. 1980) (citing Nunez and noting that "[t]he standards to be applied, and the appropriateness of summary judgment, will necessarily depend on whether or not this case is to be tried to a jury").

Moreover, cases involving intent or knowledge also may be appropriate for summary decision in certain circumstances. See United States v. Villegas-Valenzuela, 5 OCAHO 784 (1995), 1995 WL 626197; United States v. Limon-Perez, 5 OCAHO 796 (1995), 1995 WL 714427. In those cases, as here, the individuals used fraudulent social security cards to obtain employment in the United States. See Villegas-Valenzuela, 5 OCAHO 784, at 2; Limon-Perez, 5 OCAHO 796, at 7. Based primarily on affidavits from a U.S. Border Patrol Agent, the INS moved for summary decision. According to the agent's affidavit, the individuals had signed I-9 forms attesting that they were authorized to work. Id. Also, as is true in the present case, the affidavits averred that the individuals admitted in statements to the agent that the documents they used to obtain employment in the United States were fraudulent. Id. The respondents in Villegas-Valenzuela and Limon-Perez both mounted defenses based not on the substantive evidence presented by the INS, but, instead, on the sufficiency of the complaint. Villegas-Valenzuela, 5 OCAHO 784, at 1; Limon-Perez, 5 OCAHO 796, at 2 (in both cases respondents asserted affirmative defenses that complaint allegations were vague and indefinite, and that the complaint failed to state a claim upon which relief could be granted). However, the respondents did not submit any counter affidavits refuting the statements in the Border Patrol Agent's affidavit.

In each case, the Administrative Law Judge rejected the respondents' contentions and, based on the Border Patrol Agent affidavits, the Respondent's I-9 forms, copies of the fraudulent documents, and documents from the INS Central Index System indicating the registration numbers on the respondents' cards were in fact issued to other aliens, summarily ruled in favor of the INS. Villegas-Valenzuela, 5 OCAHO 784, at 4-8; Limon-Perez, 5 OCAHO 796, at 4-5.

The Ninth Circuit Court of Appeals reviewed both decisions and affirmed the awarding of summary decision in both cases in a joint opinion styled Villegas-Valenzuela v. INS and Limon-Perez v. INS, 103 F.3d 805 (9th Cir. 1996) (hereinafter Villegas-Valenzuela). Although the decision was rendered by the Ninth Circuit Court, and the instant case arises in Texas, which falls within the Fifth Circuit's jurisdiction, the opinion in Villegas-Valenzuela is persuasive authority, especially since it is a recent ruling on the propriety of summary decision in a document fraud case. Initially, the court noted that summary decision may be granted in document fraud cases where the "pleadings, affidavits, material obtained by discovery or otherwise . . . show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." Id. The charged individuals contended that summary decision was inappropriate since the INS' motions were not supported by admissible evidence, did not contain properly formed affidavits, that use of such affidavits would

be unfair unless cross-examination was available, and that the INS had failed to meet its burden of proof with respect to the elements of an 8 U.S.C. § 1324c(a)(2) violation. Villegas-Valenzuela, 103 F.3d at 811. The court disagreed, finding that the charged individuals did not present any evidence to counter or question the authenticity or admissibility of the INS' affidavits or other supporting documentation. Id. at 812. The court further noted that it had rejected similar arguments in immigration proceedings, particularly where a respondent had an opportunity to contest an agent's affidavit, but squandered it. Id. at 812-13. Finally, the court held that the INS had not failed to meet the mens rea element of the statute; namely, that the individuals "knowingly" used fraudulent documents. Id. Thus, the Ninth Circuit's decision in Villegas-Valenzuela supports the use of summary decision in appropriate circumstances for document fraud cases.

Several other OCAHO decisions have granted summary decision for the INS in document fraud cases. For example, in United States v. Kumar, 6 OCAHO 833 (1996), 1996 WL 198124, the complaint alleged that the respondent had knowingly used and possessed a forged, counterfeit, altered and falsely made alien registration card. The complainant moved for summary decision supported by the affidavit of a U.S. Border Patrol Agent and other exhibits. Id. at 4. Kumar did not file any response to the motion, and the Judge granted summary decision for the complainant. Id. at 9. In United States v. Galeas, 5 OCAHO 790, at 7 (1995), summary decision was granted for the United States because respondent had admitted that the employment authorization document was false. Similarly, in United States v. Chavez-Ramirez, 5 OCAHO 774, at 5 (1995), 1995 WL 545442 at *4, respondent's counsel admitted that the respondent knowingly used and possessed a forged, counterfeit, altered and falsely made alien registration card for the purpose of obtaining employment in the United States, and thus summary decision was granted. In United States v. Mubaraki, 5 OCAHO 816, at 10 (1995), 1995 WL 813127 at *8-9, summary decision was likewise granted. The respondent admitted that she used her mother's name and "green card" when she completed the I-9 form for her employment at the restaurant. The respondent acknowledged that she knew she could not work in the United States with the type of visa she had been issued, and that she knew that her conduct was illegal. Id.

In United States v. Flores-Martinez, 5 OCAHO 733 (1995), 1995 WL 265084, the complainant moved for summary decision, supported by affidavits and other exhibits. The respondent, as in this case, filed a response to the motion for summary decision, but did not support the response by any affidavits or other extrinsic evidence. The respondent admitted that she was an illegal alien and that she had purchased the alien card and social security card, but contended that complainant had failed to show that she knowingly committed any of the alleged acts. Id. at 4. The Judge granted complainant's motion for summary decision, noting that the respondent had made only mere allegations and denials in her response and submitted no counter affidavits, documentary evidence or witnesses' statements in opposition to the motion.[20] Thus, the Judge found that there

[20] As provided by the OCAHO Rules of Practice and Procedure, when a motion for

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were no genuine issues of material fact and granted judgment for the United States. Id. at 5-6.

In United States v. Ortiz, OCAHO Case No. 96C00024, 6 OCAHO 863 (1996), 1996 WL 789041, (Order Denying Complainant's Motion for Summary Decision) and 6 OCAHO 889 (1996), 1996 WL 675563, (Order Denying Complainant's Motion for Reconsideration), I denied summary decision in a document fraud case because there were genuine issues of material fact. However, the procedural posture of that case was manifestly different from the present case. Although the INS had supported its motion with an affidavit from an INS agent, Ortiz submitted an affidavit in which she controverted the facts in the agent's statement. Thus, because she stated facts both in the affidavit and in her response to the summary decision motion that raised genuine factual issues as to her knowledge, I rejected INS' motion. Further, I distinguished Limon-Perez, as well as other OCAHO cases, because, unlike those cases, and unlike the present case, Ortiz never admitted to the INS agent or any other individual, that she knew the documents were fraudulent. Ortiz, 6 OCAHO 863, at 6 (1996). In denying INS' motion for summary decision, I ruled that it was inappropriate to attempt to resolve disputed genuine issues of credibility or state of mind on a motion for summary decision. Ortiz, 6 OCAHO 863, at 4-5; Ortiz, 6 OCAHO 889, at 6.

My ruling in Ortiz did not mean that summary decision in all document fraud cases was inappropriate. Following my ruling on the motion for summary decision in Ortiz, Case No. 96C00024, INS filed a second complaint against Ortiz based on her alleged use of a different fraudulent document at a later time. It then proceeded to file a motion for summary decision in that case. See United States v. Ortiz, OCAHO Case No. 96C00089, 6 OCAHO 905 (1996), 1996 WL 789041 (hereinafter Ortiz 96C89). In contrast to the earlier case, Respondent did not file any counter affidavits or other extraneous documents opposing the motion for summary decision. Further, unlike the earlier Ortiz case, the factual record in Ortiz 96C89 strongly supported the INS's position. The affidavits and other evidence supplied by the INS in Ortiz 96C89 established that Ms. Ortiz used a fraudulent social security card to obtain employment after she had been told by an INS agent that the social security number was invalid. Thus, I concluded that there were no genuine issues of fact and granted the INS' motion for summary decision. Ortiz 96C89, 6 OCAHO 905 (1996), 1996 WL 789041.

2. Appropriateness of summary decision in the present case

As discussed previously, to establish a violation of 8 U.S.C. § 1324c, Complainant must prove that (1) the Respondent used a forged, counterfeit, altered or falsely made document, (2) after the November 29, 1990 enactment date of the 1990 Act, (3) for the purpose of satisfying

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[20](...continued)
summary decision is supported by affidavits, the party opposing the motion may not rest upon the mere allegations or denials in its pleadings but must set forth specific facts showing that there is a genuine issue of fact for the hearing. 28 C.F.R. § 68.38(b); see Fed. R. Civ. P. 56(e).

any requirement of the INA, and (4) knowing that the document was forged, counterfeit, altered or falsely made. See 8 U.S.C. § 1324c(a)(2); Villegas-Valenzuela, 103 F.3d at 809. Therefore, to prevail on the Motion for Summary Decision, Complainant must show that there are no genuine factual issues as to those four elements, and that Complainant is entitled to judgment as a matter of law.

Complainant has shown that there are no genuine issues of fact. Complainant has supported its Motion with affidavits and other extrinsic evidence detailing the facts of this case. Respondent has not presented any affidavits or extrinsic evidence in rebuttal. As was discussed previously in the section of this decision concerning the factual findings, see supra section III.B., it is clear that Respondent used an unrestricted social security card in 1991 to maintain his employment at GMA and to secure employment at Bank of America in 1991 and at GTE in 1993. Complainant also has proven that Respondent was only issued social security cards with restrictions as to employment. Complainant has offered numerous affidavits and exhibits demonstrating that the social security card(s) Respondent submitted do not bear any such restriction. The factual record clearly shows that Respondent used a social security card that materially differed from the restricted card, i.e., did not contain any employment restrictions. It is clear that Respondent committed these three acts after November 29, 1990. See supra section III.B. Therefore, the second element of Complainant's case is proven. Since Respondent presented his social security card for the purpose of establishing employment eligibility, Complainant's third element is proven. In United States v. Morales-Vargas, 5 OCAHO 732, at 5-6 (1995), 1995 WL 265083 at *3-4 (modification by the Chief Administrative Hearing Officer of the Administrative Law Judge's decision), it was held that the act of submitting a social security card as evidence of employment eligibility was sufficient to satisfy a requirement of the Act. See also United States v. Chavez-Ramirez, 5 OCAHO 774, at 6 (1995), 1995 WL 545442 at *4-5; United States v. Remileh, 5 OCAHO 724, at 9 (1995), 1995 WL 139207 at *1-2; United States v. Zapata-Cosio 5 OCAHO 822, at 7 (1995), 1995 WL 813120 at *5. Finally, Respondent was aware his originally issued card bore a restriction as to employment eligibility, and he knew that the cards he used were not genuine. See CX-J-1; CX-K-1-2; CX-L-18-19. Consequently, I conclude that there are no genuine issues of material fact remaining in this matter.

E. Meaning of forged, counterfeit, altered, and falsely made

The only remaining issue is a legal one; namely, whether the document used by Respondent was forged, counterfeit, altered or falsely made within the meaning of section 1324c(a)(2)?[21] Past OCAHO decisions, including decisions issued by the undersigned, finding violations of section 1324c, employ language finding that a respondent has "forged, counterfeited, altered or falsely made" a document without articulating the difference, if any, between the disjunctive terms of the

[21] Although the Complaint uses the terms in the conjunctive (i.e., Respondent used a forged, counterfeit, altered and falsely made document), since the statute uses these terms in the disjunctive, proof of any one would constitute a statutory violation.

statute. See, e.g., United States v. Ortiz, Case No. 96C00024, 6 OCAHO 863 (1996); United States v. Ortiz, Case No. 96C00089, 6 OCAHO 905, at 7 (1996); United States v. Pedraza-Guzman, 5 OCAHO 792, at 3 (1995), 1995 WL 705943 at *2; United States v. Noriega-Perez, 5 OCAHO 811, at 8-10 (1995), 1995 WL 813234 at *10, (referring to "forged/counterfeited" documents); United States v. Carpio-Lingan, 6 OCAHO 914, at 17 (1997), 1997 WL 176824 at *13, appeal filed, No. 97-60247 (5th Cir. 1997); United States v. Chavez-Ramirez, 5 OCAHO 774, at 3 (1995); United States v. Galeas, 5 OCAHO 790, at 6 (1995). Other cases have found a violation of only one of the four terms without attempting to define or distinguish the terms. See, e.g., United States v. Alvarez-Suarez, 6 OCAHO 862, at 27-30 (1996), 1996 WL 430390, (finding that the respondent "counterfeited" documents based on the respondent's own admissions); United States v. Kumar, 6 OCAHO 833 at 10 (1996), (finding that the respondent used a "forged" document in violation of the Act, but not stating definition of a forged document).

The words "forged, counterfeit, altered, or falsely made" were neither defined in the statute nor the pertinent regulations prior to September 30, 1996. However, a definition of falsely made was added to the statute by the amendments that went into effect on September 30, 1996. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, § 212(b), 110 Stat. 3009 (to be codified at 8 U.S.C. § 1324c(f)) (hereinafter IIRIRA). Thus, a threshold question arises as to whether the definition of "falsely make" applies retroactively to the events of this case. Section 1324c(f) provides, in pertinent part, that the term "falsely make" means 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 law or fact, or otherwise fails to state a fact that is material to the purpose for which it was submitted. While the definition "falsely make" in section 1324c(f) applies to both an application and a document, with respect to the issue of retroactivity, section 212(e) of Division C of Public Law No. 104-208 provides that section 1324c(f) "applies to the preparation of applications before, on, or after the date of the enactment of this Act" (emphasis supplied). However, it does not provide that 8 U.S.C. § 1324c(f) applies to preparation of all documents that occurred prior to September 30, 1996. See IIRIRA § 212(e).

8 C.F.R. § 270.1 defines "document" as "includ[ing] . . . an application required to be filed under the Act . . . ." Thus, while the word document includes an application, it does not appear that the converse is true, i.e., that application includes all documents in its definition. Put simply, the terms "application" and "document" are not identical or interchangeable. Rather, the term document is more inclusive, in that an application is a type of document. 8 C.F.R. § 270.1. Thus, section 212(e) did not make 1324c(f) applicable retroactively to all "documents," but only to a certain category of documents, namely, "applications." Compare text of IIRIRA § 212(b) with IIRIRA § 212(e). Without further guidance in the statute, legislative history, or regulations, I must find that the language of 8 U.S.C. § 1324c(f) applies retroactively to falsely made applications, but not to all falsely made documents. Since the type of document involved in this case, a social security card, cannot properly be characterized as an "application," the definition of falsely make contained in the 1996 amendments does not apply retroactively to this case.

The first task in interpreting statutory language is to give the words their plain meaning. The words employed in the instant statute have been used over the years in many other statutes, continue to be used in other statutes, and have been interpreted by courts in those contexts. The case law, as discussed below, shows that while the words "forge, counterfeit, alter, and falsely make" are similar, and often overlap, they do not have identical meaning. Certainly, in many circumstances the same act may violate more than one of the above strictures. Nevertheless, the case law, as discussed below, clearly shows that the terms are not synonymous.

None of these words should be read out of the statute by assuming they all mean the same thing. "The cardinal principle of statutory construction is to save and not to destroy." NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937). Further, the general rule of statutory construction is that words of a statute are to be given their ordinary meaning in the absence of persuasive reasoning to the contrary. Menasche, 348 U.S. at 538-39; Burns v. Alcala, 420 U.S. 575, 580-81 (1975) (cited in United States v. Thomas, 567 F.2d 299, 300 (5th Cir. 1978)). See also Finch v. Weinberger, 407 F. Supp. 34, 49 (N.D. Ga. 1975) (following identical principle of statutory construction).

That the words forge, counterfeit, alter and falsely make are not identical terms is shown by their use and definition in other statutes. The Uniform Commercial Code (UCC) has numerous provisions referring to "forged" signatures or "altered" checks. See, e.g., UCC § 3-403 comment 1, § 3-404, 3-405, 3-406.[22] While the UCC does not explicitly define either "forgery" or "counterfeit," it does define "alteration" as "an unauthorized change in an instrument that purports to modify in any respect the obligation of a party . . . or an unauthorized addition of words or other change to an incomplete instrument." See UCC § 3-407(a).

The use of the terms forge, counterfeit, alter or falsely made in the criminal code also may be persuasively relied on by OCAHO courts. Remileh, 5 OCAHO 724, at 5-7. Just as in 8 U.S.C. § 1324c(a)(1), the United States Criminal Code often uses the four terms in the disjunctive. See, e.g., 18 U.S.C. §§ 471-473, 478-480, 482-483, 485, 490, 493-495, 497-500, 506-508, 1426, 1543, and 1546.[23] While all of the above statutory sections use the words forge, counterfeit, alter and

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[22] The former language of the UCC referred to "unauthorized" signatures, but was changed to "forged" to reflect the fact that the terms represent different scopes and concepts. See § 3-406, comment 2.

[23] The pertinent language in the various criminal code sections is as follows: § 471 (". . . falsely makes, forges, counterfeits, or alters any obligation or security of the United States . . ."); 472 ("falsely made, forged, counterfeited, or altered"); 473 ("false, forged, counterfeited, or altered"); 478 (". . . falsely makes, alters, forges, or counterfeits any bond . . . of any foreign government . . ."); 479 ("false, forged, or counterfeited"); 480 (same); 482 ("falsely makes, alters, (continued...)

falsely make, like 8 U.S.C. § 1324c, they do not explicitly define those terms. However, other criminal statutes do provide definitions. For example, 18 U.S.C. § 513, which criminalizes possessing counterfeited securities of the United States, defines both "counterfeited" and "forged." 18 U.S.C. § 513(c)(1)-(2). Subsection (1) defines "counterfeit" as "a document that purports to be genuine but is not, because it has been falsely made or manufactured in its entirety." (emphasis added). Subsection (2) defines a "forged" document as one that "purports to be genuine but is not because it has been falsely altered, completed, signed, or endorsed, or contains a false addition thereto or insertion therein, or is a combination of parts of two or more genuine documents." Id. 18 U.S.C. § 514(b) in essence adopts the definitions of § 513. Similarly, section 2B5.1 of the United States Sentencing Guidelines, which concerns counterfeiting, forgery and infringement of copyright or trademark, defines a counterfeit instrument as one "that purports to be genuine but is not because it has been falsely made or manufactured in its entirety." See United States Sentencing Guidelines § 2B5.1, comment 2 (emphasis added). Thus, these sections of the criminal code and the sentencing guidelines clearly distinguish between counterfeiting and forgery, the former being a document falsely manufactured in its entirety, whereas the latter is one that has been falsely altered in a particular manner, such as a false signature or endorsement.

However, the statutory language contained in section 1324c, and, in particular, the term "falsely make," was the subject of several decisions issued by the CAHO, beginning with United States v. Remileh, 5 OCAHO 724 (1995). In Remileh, the CAHO observed that the first task in determining the meaning of the language is to give the words used their ordinary meaning. Id. at 5. The CAHO noted that "[t]he term "falsely made" has repeatedly been found to refer to the false execution of a document, not a valid document containing false information." Remileh, 5 OCAHO 724, at 5. Remileh held that "the attestation of an employee to false information on a Form I-9 . . . does not constitute the creation of a 'falsely made' document in violation of 8 U.S.C. § 1324c

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[23](...continued)
forges, or counterfeits"); 483 ("false, forged, or counterfeited"); 485 (". . . falsely makes, forges, or counterfeits any coin . . ."); 490 (same); 493 (". . . falsely makes, forges, counterfeits or alters any note, bond, debenture . . ."); 494 (same); 495 (same); 497 (". . . falsely makes, forges, counterfeits, or alters any letters patent . . ."); 498 ("forges, counterfeits, or falsely alters"); 499 (". . . falsely makes, forges, counterfeits, alters, or tampers with any naval, military, or official pass . . ."); 500 (". . . falsely makes, forges, counterfeits, engraves, or prints any order . . . purporting to be a money order . . ."); 506 (". . . falsely makes, forges, counterfeits, mutilates, or alters the seal of any department . . ."); 507 ("falsely makes, forges, counterfeits, or alters any instrument . . . purporting to be, an abstract . . . of the . . . registry . . . of any vessel . . ."); 508 (". . . falsely makes, forges, or counterfeits [transportation requests of the Government]"); 1426 (". . . falsely makes, forges, alters or counterfeits [naturalization or citizenship papers]"); 1543 (". . . falsely makes, forges, counterfeits, mutilates, or alters any passport . . ."); 1546 ("forges, alters, counterfeits, or falsely makes any immigrant or nonimmigrant visa, permit, [etc.]").

. . . . [Instead] [i]t is the underlying fraudulent documents submitted to an employer to establish identity and/or work authorization, which is the proper basis of a section 1324c violation . . . ." Id. at 2-3 (footnote omitted); see also United States v. Thoronka, 5 OCAHO 772 (1995), 1995 WL 545447; United States v. Noorealam, 5 OCAHO 797, at 2 (1995), 1995 WL 714435 at *2, (CAHO modification, discussing Remileh definition of "falsely made"). The present case involves use of an underlying document (social security card), and, therefore, the holdings in Remileh and its progeny do not bar this action. For example, Remileh noted that while English common law considered "falsely made" and "forgery" to be synonyms, id. at 3, the United States Supreme Court explicitly rejected this notion, United States v. Moskal, 111 S. Ct. 461, 466 n.3 (1990) ("[appellant] . . . argues that 'falsely made' was synonymous with 'forged' at common law. We . . . reject [appellant's] common-law argument . . . .").

Subsequent OCAHO cases modified or affirmed by the CAHO have touched, to varying degrees, on the Remileh definition. See, e.g., United States v. Morales-Vargas, 5 OCAHO 732, at 2 (1995), 1995 WL 265083 at 3-4 (noting that "[i]t is the underlying fraudulent documents submitted to an employer to establish identity and/or work authorization, which is the proper basis of a section 1324c violation . . . .") (internal citation omitted); Cf. United States v. Thoronka, 5 OCAHO 772, at 1 (1995) (CAHO affirmation).

In United States v. Noorealam, 5 OCAHO 797 (1995), the two count complaint charged that the respondent obtained and used a series of fraudulent documents to obtain approval for permanent residence status and employment authorization. The first count alleged that respondent used various forged, counterfeit, and falsely made documents, such as telephone bills, to obtain employment. The second count charged that respondent knowingly forged, counterfeited and falsely made an application for permanent residence (Form I-485) and an application for employment authorization (Form I-765). The ALJ found that the respondent "knowingly used, attempted to use, and possessed the forged, counterfeited, and falsely made documents" as alleged in the first of the two count complaint. The ALJ found violations as to both counts. In reviewing the decision, the CAHO affirmed the ruling as to the first count, but reversed the finding as to the second count, holding that, in accordance with Remileh, the providing of false information on a Form I-485 and Form I-765 does not constitute the creation of a falsely made document in violation of section 1324c, nor does it constitute the forging or counterfeiting of a document in violation of the INA. Id. at 5. Noorealam made it clear that the holding in Remileh was not limited to false entries on I-9 forms, and that a genuinely executed INS form that contains false information comes within the ambit of Remileh.

While Remileh and its progeny provide useful guidance with respect to the term "falsely make," they do not explicitly define "falsely make" or the words "forge," "counterfeit," or "alter." Thus, I must consider controlling judicial precedent. Since the present matter originates in Texas, the controlling circuit case law is that of the United States Court of Appeals for the Fifth Circuit. Considering the word forgery, the Fifth Circuit in United States v. Stinson, 316 F.2d 554 (5th Cir. 1963), stated that "the terms [forged and falsely made] are of different meanings." Id. at 555. Forgery, as defined by Stinson, does not necessarily carry the presumption that there is a genuine or

real item in existence. Id. In Charter Bank Northwest v. Evanston Ins. Co., 791 F.2d 379 (5th Cir. 1986) and Cincinnati Ins. Co. v. Star Financial Bank, 35 F.3d 1186 (7th Cir. 1994), the dispute concerned the interpretation of "forgery" in an insurance bond. The Charter Bank court noted that "forgery" is viewed in the context of illegal or deceptive signatures. Charter Bank, 791 F.2d at 382. The court also noted that "alteration" presupposes a genuine instrument that has been fraudulently changed. Id. at 383 (citing Richardson National Bank v. Reliance Ins. Co., 491 F.Supp. 121 (N.D. Tex. 1977), aff'd, 619 F.2d 557 (5th Cir. 1980). Likewise, in Cincinnati, the Court approved without comment the private parties' definition of "forgery" as "the signing of the name of another with intent to deceive . . . ." Cincinnati Bank, 35 F.3d at 1189. See also United States Fidelity and Guaranty Co. v. Planters Bank & Trust Co., 77 F.3d 863, 866 (5th Cir. 1996) (approving of private parties identical definition of "forgery" without comment).

Fifth Circuit case law centers on signatures as a central element of forgery. See, e.g., United States v. Taylor, 869 F.2d 812, 814 (5th Cir. 1989) (noting that the relevant statute prohibits false endorsements or signatures); United States v. Hall, 845 F.2d 1281, 1284 (5th Cir. 1988) (affirming conviction for forgery where defendant fraudulently endorsed check); United States v. Cavada, 821 F.2d 1046, 1047-48 (5th Cir. 1987) (discussing forgery in terms of false signatures or endorsements); French v. United States, 232 F.2d 736, 738 (5th Cir. 1956) (affirming forgery conviction where defendant signed name of another with intent to defraud). See also United States v. Hagerty, 561 F.2d 1197, 1199 (5th Cir. 1977) (rejecting finding of forgery since defendant did not sign another's name to an instrument and rejecting the argument that "forgery" and "falsely made" are synonymous terms, characterizing "forgery" as a "rigorous concept"). Thus, the thrust of the controlling case law from the Fifth Circuit ties forgery to false signatures or endorsements. Applying that case law to section 1324c, only documents that contain a false signature or endorsement would be considered as forged, as that term is used in the statute.

Counterfeiting is not synonymous with forgery. See United States v. Turner, 586 F.2d 395, 397 (5th Cir. 1978) (distinguishing counterfeit from forgery); United States v. Slone, 601 F.2d 800, 805 (5th Cir. 1979) (citing Turner). See also United States v. Yamin, 868 F.2d 130, 132 (5th Cir. 1989). "'Counterfeited means imitated, simulated, feigned or pretended.'" United States v. Smith, 318 F.2d 94, 95 (4th Cir. 1963) (citing 2 Oxford Dictionary 1066 (1933 ed.)). "A counterfeit must be of such falsity as to fool an honest, sensible, and unsuspecting person of ordinary observation and care." Id. (internal citations omitted); see also Turner, 586 F.2d at 397 (defining counterfeit similar to Smith, supra, and noting that many counterfeiting cases use the language employed by Smith in various other circuits). Specifically, the Turner court held that counterfeiting involved a "fraudulent obligation [which] bears such a likeness or resemblance to any . . . genuine obligations . . . as is calculated to deceive an honest, sensible and unsuspecting person of ordinary observation and care . . . ." Turner, 586 F.2d at 397. See also United States v. Gomes, 969 F.2d 1290, 1293 (1st Cir. 1992). The Gomes court noted that the law of counterfeiting does not seek only to prohibit masterpieces--a counterfeit document need not be an artistic triumph. Id. Nor need the copy be entirely complete if what remains is inconsequential or insignificant. Id.; see also United States v. Hammoude, 51 F.3d 288, 294 (1st Cir. 1995) (citing Gomes and employing definition of counterfeit

similar to Turner, supra). Thus, the case law and statutory definitions strongly suggest that a counterfeited document is not a genuine document that has been altered, but rather is a manufactured document. See, e.g., Turner, 586 F.2d at 397 (involving photocopies created to resemble dollar bills); 18 U.S.C. § 513(c)(1) (defining counterfeit as a document that has been manufactured in its entirety).

"Alteration" also differs from both "counterfeit" and "forgery." Federal courts typically refer to conventional dictionaries when defining this term. See, e.g., Hallauer v. United States, 40 C.C. P.A. 197, 200, 1953 WL 6138, at *3 (1953) (using Webster's); Border Brokerage Co. v. United States, 43 Cust. Ct. 226, 229, 1959 WL 8914, *3 (1959) (using same); Turner v. United States, 707 F.Supp. 201, 205 (W.D. N.C. 1989) (using Random House dictionary); Piantone v. Sweeny, 1995 WL 590311, *8 (E.D. Pa. 1995) (using Black's Law Dictionary). As defined in Piantone, "alter" means, "[t]o make a change in; to modify; to vary in some degree; to change some elements or ingredients or details without substituting an entirely new thing or destroying the identity of the thing affected. To change partially." Piantone, 1995 WL 590311, at *8 (citing Black's).

Case law suggests that "alter" and "modify" are interchangeable terms. In MCI Telecomm. Corp. v. ATT Co., 512 U.S. 218 (1994), the Court looked to the Random House Dictionary of the English Language, Webster's Dictionary, and Black's Law Dictionary in defining the term, "modify."[24] Id. at 225. In each dictionary, the words "alter" and "modify" are intertwined. Id. "Modify" is typically defined as "[t]o alter; to change in incidental or subordinate features; enlarge; extend; amend; limit; reduce." Id. (citing Black's Law Dictionary 1004 (6th ed. 1990)). While the Fifth Circuit has not explicitly defined "alter," two United States Bankruptcy Courts in the Fifth Circuit, utilizing Black's Law Dictionary, have equated the words "alter" and "modify." In re Dixon, 151 B.R. 388, 393 n.6 (S.D. Miss. 1993) (defining modify as "to alter"); In re Schum, 112 B.R. 159, 161 (N.D. Tex. 1990) (defining modify using American College Dictionary as "to change somewhat . . . to alter") (emphasis added). Thus, in contrast to a forged document which contains a false endorsement or signature, or a counterfeited document which is manufactured in its entirety, an altered document is one that is is changed "partially" without "substituting an entirely new thing" or "destroying the identity of the thing affected." See Piantone, 1995 WL 590311, at *8.

Falsely made has been discussed previously in this Order. Supra at pages 23-24. Remileh, supra. Remileh, however, stated what did not constitute a false making, but did not explicitly define the term. See generally Remileh, 5 OCAHO 724, at 3-5. The Fifth Circuit Court of Appeals, which likewise has not explicitly defined falsely made, has provided guidance as to the term's interpretation. See United States v. Huntley, 535 F.2d 1400 (5th Cir. 1976). In that case, the court stated that "[w]e think it apparent that the purpose of the term "falsely made" was to broaden the statute beyond rigorous concepts of forgery and to prohibit the fraudulent introduction into

[24] Both the United States and federal circuit decisions often have utilized conventional and legal dictionaries in defining words, as has been shown above.

commerce of falsely made documents regardless of the precise method . . . [used]." Id. at 1402 (citing United States v. Tucker, 535 F.2d 1290, 1294 (6th Cir.), cert. denied, 412 U.S. 942 (1973)) (emphasis added). See also United States v. Hagerty, 561 F.2d 1197, 1199 (5th Cir. 1977) (following Huntley interpretation of "falsely made"). Thus, "falsely made" stands as a broader characterization of forgery, counterfeiting, and alteration, particularly where the means employed are not specificically known. Huntley, 535 F.2d at 1402.

F. Application of legal authority to Roberto Davila's actions.

In the present case, Complainant has proven that Respondent Davila never has been issued an unrestricted social security card. CX-C-2-3. The Complainant also has proven that the card Respondent presented to GMA in January 1991 bears "obvious signs of erasure and overwriting." CX-C-4. Therefore, Complainant has demonstrated that the social security card Respondent presented to GMA was altered and falsely made.

A card used later by the Respondent at Bank of America and GTE was a "more sophisticated" fraudulent social security card. Id. However, the "sophisticated" card does not bear any restriction on employment eligibility. Id. Therefore, it is clear that Respondent did use an unauthorized document to obtain employment. The question is whether the document used can be characterized as forged, counterfeit, altered, or falsely made.

Complainant has not proven specifically how Respondent or another individual falsified the social security card that was submitted to GTE and Bank of America. CX-C-4. However, Respondent is only charged with "using" such a fraudulent document. Thus, I need only find that the document is fraudulent under one of the disjunctive terms of the relevant statute to find a section 1324c(a)(2) violation.

In that respect I have found that the social security card issued to Respondent had a restriction against employment on its face. CX-C-2-3. Next, Respondent was at no time ever issued an unrestricted social security card. Furthermore, Respondent was aware that the social security card issued to him bore a restriction against employment. CX-L-18. Finally, the card submitted by Respondent to GTE and Bank of America Corporation bears no restriction against employment. CX-D-3; CX-H-5; CX-I-3. Thus, it is clear that Respondent Davila used an invalid social security card. While it is not clear based on the present record whether the card used by Davila at Bank of America and GTE was altered (i.e. modified partially) or was counterfeited and forged (i.e., a manufactured document containing a false signature), it is clear that it was not a valid document and was falsely made because his only validly issued social security card contained a restriction against employment. Thus, I conclude that Davila used a falsely made social security card at both Bank of America and GTE.

Complainant has met its burden of establishing a prima facie case that Respondent violated 8 U.S.C. § 1324c(a)(2) by knowingly using an altered and falsely made social security card at GMA

to continue his employment and a falsely made social security card at Bank of America and GTE to secure employment. Since the statute is framed in the disjunctive, Complainant does not have to show how that the card was forged or counterfeit to establish a violation. Therefore, the burden shifts to the Respondent to show that there are genuine issues of material fact that preclude granting the Complainant's motion for summary decision. See United States v. Carpio-Lingan, 6 OCAHO 914, at 15 (1997) (describing that once a complainant has established a prima facie case as to each of its allegations, the burden of production shifts to the Respondent to "only show specific facts, as opposed to general allegations, that present a genuine issue worthy of trial"). Respondent's Answer to Complainant's Motion, however, does not even attempt to meet the substance of Complainant's evidence. The compelling evidence referenced by Complainant in its motion, including Respondent's admissions in his deposition testimony, Complainant's proffered affidavits, and Complainant's reproductions of Roberto Davila's various social security cards, have gone unchallenged by the Respondent. By contrast, Respondent has not even submitted one affidavit or a single piece of extrinsic evidence to show that the social security card was valid.[25]

The procedural posture of this case resembles that of Ortiz 96C89. In that case, the INS supplied a great deal of extrinsic evidence, including a sworn declaration by an INS Special Agent, to prove that Ms. Ortiz used a falsely made social security card. Ortiz submitted nothing to refute the INS' evidence. See Ortiz 96C89, 6 OCAHO 905, at 3. Likewise, here, other than some cursory declarations that material issues exist, Respondent has not submitted any affidavits or extrinsic evidence that challenges Complainant's evidence.

Thus, I conclude that there are no genuine issues of material fact, and Complainant has shown that Roberto Davila violated 8 U.S.C. § 1324c(a)(2) by knowingly using an altered and falsely made social security card after November 29, 1990, for the purpose of satisfying a requirement of the INA, specifically, for the purpose of continuing his employment at GMA. Further, he knowingly used a falsely made social security card after November 29, 1990, for the purpose of securing employment at Bank of America and GTE.

IV. PENALTY

As relief, Complainant requests a civil money penalty in the amount of $1,000 and an order

[25] Instead, Respondent has fixated on the "disorganized documents" of Complainant's Motion for Summary Decision, stating that Complainant failed to explain how Complainant's supporting affidavits, extrinsic evidence, and excerpts from Roberto Davila's testimony before an Immigration Court prove Complainant's case. Id. However, sweeping characterizations of unfavorable evidence bear little weight. Furthermore, even were I to agree that Complainant's Motion for Summary Decision contained exhibits not easily followed because of referencing, Complainant's filing of re-marked exhibits alleviated any disorganization problems.

to Respondent to cease and desist from violating section 274C(a)(2) of the INA.[26] Upon a finding of liability, the ALJ must fine a respondent at least $250 "for each document used, accepted, or created and each instance of use, acceptance, or creation." 8 U.S.C. § 1324c(d)(3)(A) (1994). Complainant notes that Respondent has stated that he does not contest the amount of the fine charged against Respondent, and that there is no question regarding Respondent's ability to pay the fine in this matter. Complainant's Motion for Summary Decision at 14 n.1. Indeed, Respondent does not even address the penalty issue in his response to Complainant's motion for summary decision.

Unlike section 1324a, which contains five (5) criteria to be considered in determining civil penalties in employer sanction cases, 8 U.S.C. § 1324a(e)(5), section 1324c does not provide similar guidance, 8 U.S.C. § 1324c(d)(3). Prior OCAHO rulings have utilized "a judgmental approach under a reasonableness standard and consider[ed] the factors set forth by Complainant, any relevant mitigating factors provided by Respondent, and any other relevant information of record." United States v. Remileh, 6 OCAHO 825, at 3 (1995), 1995 WL 848948, (quoting United States v. Diaz-Rosas, 4 OCAHO 702, at 7-8 (1994), 1994 WL 752313); United States v. Villatoro-Guzman, 4 OCAHO 652, at 15 (1994), 1994 WL 482550. Respondent has not offered any mitigating factors regarding the civil penalty, and, as discussed above, has not addressed the proposed civil penalty in this matter. Therefore, I need only determine whether the proposed civil penalty is "reasonable."

Respondent's failure to challenge the civil penalty amount implicitly suggests that the proposed civil penalty is "reasonable" as contemplated by Remileh and Diaz-Rosas. See also United States v. Sea Pine Inn, Inc., 1 OCAHO 578, 583-85 (Ref. No. 87) (1989), 1989 WL 433853, (finding that Respondent neither contested proposed civil penalty nor offered any mitigating factors, resulting in adoption of Complainant's proposed civil penalty as adopted from the Notice of Intent to Fine).

The Respondent here is a well-educated individual with a Master of Science in Electrical Engineering from the University of Southern California. CX-L-29. The transcripts of the deposition taken of Mr. Davila in this case, and the transcript of the proceedings before the Immigration Court in which he testified, strongly suggest that Mr. Davila speaks and understands English. The Respondent was recruited out of college to work for GTE Corporation, thus potentially denying a

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[26] Even if Respondent were not liable for any acts committed prior to April 2, 1991, his prior acts could be considered in setting an appropriate civil penalty. Turner v. Upton County, Texas, 967 F.2d 181, 185 (5th Cir. 1992) ("Although the statute of limitations clearly destroys the . . . cause of action . . . the statute does not make relevant evidence . . . inadmissible at trial. [The plaintiff] cannot recover for damages arising from any acts . . . committed before that date, but the statute of limitations does not preclude the jury [nor the Court] from considering those [acts] as evidence . . . ."). See also EPA v. City of Green Forest, Ark., 921 F.2d 1394, 1408-09 (8th Cir. 1990) ("[T]here is no rule that automatically excludes evidence pre-dating a statute of limitations period.").

valid, work-authorized individual or citizen the opportunity to work for GTE. CX-L-29. He also obtained other employment in this country that he was not authorized to have. Therefore, the seriousness of the underlying violation cannot be denied.

The Respondent has received approval from the INS to obtain an H1-B Visa. Id. As a result of this, the Respondent currently has an offer of employment from a company known as Automation Image C.M.A., at a salary of $75,000 per year. CX-L-30-31. Thus, the professions Respondent has engaged in, and previously has been engaged in, are not of the low-wage, unskilled variety. Indeed, it is quite the opposite. Therefore, Respondent potentially prevented other work-authorized citizens from obtaining high-level, well-paid employment because of his deception.

There is undisputed evidence, based on testimony by Respondent, documentation supplied by the Complainant, and inferences drawn from Respondent's failure to answer discovery requests, that Respondent used fraudulent documentation at three separate employers over a period of several years. A civil money penalty may be assessed only for the three violations involving his use of a falsely made social security card in illegally obtaining employment at Bank of America and GTE, and an altered and falsely made social security card in obtaining employment with GMA. Considering that the statutory minimum is $250, and the maximum is $2,500, I find that a civil money penalty of $1000 (or approximately $333 per violation) is very "reasonable" pursuant to OCAHO jurisprudence. Indeed, considering the seriousness of Respondent's conduct, a greater penalty than that sought by Complainant would be neither excessive nor unreasonable, and a penalty of $1,000 for each violation would not be excessive. Nevertheless, since Complainant is not seeking a total penalty greater than $1,000, I order Respondent to pay a civil money penalty in the amount of $1,000 and to cease and desist from violating section 274C(a)(2) of the INA.

V. CONCLUSION

I find that Respondent used an altered and falsely made social security card, number SSN1, in January 1991, knowing that such document was altered and falsely made, for the purpose of continuing his employment at GMA, in violation of section 274C(a)(2) of the INA, 8 U.S.C. § 1324c(a)(2). I also find that Respondent used a falsely made social security card, number SSN1, after November 29, 1990, knowing such document to be falsely made, to secure employment at both Bank of America and GTE, in violation of section 274C(a)(2) of the INA, 8 U.S.C. § 1324c(a)(2). Therefore, Complainant's Motion is granted, and Respondent is ordered to pay a civil money penalty in the amount of $1,000 and to cease and desist from violating section 274C(a)(2) of the INA, 8 U.S.C. § 1324c(a)(2). Any other unadjudicated motions not specifically addressed in this Order are hereby denied.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE

NOTICE REGARDING APPEAL

Pursuant to the Rules of Practice, 28 C.F.R. § 68.53(a)(1), a party may file with the Chief Administrative Hearing Officer (CAHO) a written request for review, with supporting arguments, by mailing the same to the CAHO at the Office of the Chief Administrative Hearing Officer, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2519, Falls Church, Virginia 22041. The request for review must be filed within 30 days of the date of the decision and order. The CAHO also may review the decision of the Administrative Law Judge on his own initiative. The decision issued by the Administrative Law Judge shall become the final order of the Attorney General of the United States unless, within 30 days of the date of the decision and order, the CAHO modifies or vacates the decision and order. See 8 U.S.C. § 1324c(d)(4); 28 C.F.R. § 68.53(a).

Regardless of whether a party appeals this decision to the Chief Administrative Hearing Officer, a person or entity adversely affected by a final order issued by the Administrative Law Judge or the CAHO may, within 45 days after the date of the Attorney General's final agency decision and order, file a petition in the United States Court of Appeals for the appropriate circuit for the review of the final decision and order. A party's failure to request review by the CAHO shall not prevent a party from seeking judicial review in the appropriate circuit's Court of Appeals. See 8 U.S.C. § 1324c(d)(5).