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

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. l324c Proceeding
	)	Case No. 94C00139
MOURAD ABU REMILEH Respondent.	)	

MODIFICATION BY THE CHIEF
ADMINISTRATIVE HEARING OFFICER OF THE
ADMINISTRATIVE LAW JUDGE'S DECISION

On January 9, 1995, the Honorable Joseph E. McGuire, the Administrative Law Judge (ALJ) assigned to United States v. Remileh, issued an Order Granting Complainant's Motion for Summary Decision against the Respondent.

The events that led to the complaint in the instant case, as alleged by the Immigration and Naturalization Service (INS), are that the respondent, using a birth certificate lawfully issued to another, changed the date of birth to match his own, and presented the birth certificate to his new employer as a document acceptable to fulfill the requirements of 8 U.S.C. § 1324a(b), the employment eligibility verification system enacted as part of the employer sanctions provisions of the Immigration Reform and Control Act of 1986 (IRCA). An Employment Eligibility Verification Form (Form I-9) was completed by both the employee and the employer with information that matched that on the birth certificate, thus creating a Form I-9 reflecting the false information contained on the fraudulent birth certificate. See ALJ order at 5-6.

The complaint separated the charges against the respondent into two distinct and independent allegations of document fraud; Count I alleging a violation of 8 U.S.C. § 1324c(a)(1) and Count II alleging a

violation of section 1324c(a)(2).[1] Count II concerned the birth certificate with the altered birth date, and alleged that its presentation to the employer by the respondent was a violation of section 1324c(a)(2). Count I alleged that the Form I-9, completed by both the respondent and the employer, reflecting the false information contained in the birth certificate, establishes a violation of section 1324c(a)(1) against the employee, respondent Remileh.

In the January 9, 1995, order granting summary decision, the ALJ found that there was no genuine issue of material fact for trial with regard to respondent's liability for either count. Therefore, the ALJ granted summary decision finding that: 1) the respondent knowingly and falsely made the Form I-9 for purposes of satisfying a requirement of the INA[2] in violation of 8 U.S.C. § 1324c(a)(1), and 2) the respondent used the altered birth certificate knowing that document to be falsely made, for the purpose of satisfying a requirement of the INA, and in violation of 8 U.S.C. § 1324c(a)(2). See ALJ order at 5-6.

Count I, based directly on the Form I-9, alleges a section 1324c(a)(1) violation based on an employee's signature on a Form I-9 attesting to the truth of the demonstrably false information provided by the employee in the process of filling out the Form I-9. By pleading a violation of section 1324c under these facts, the INS is contending that information provided by an employee in section 1 of a Form I-9, which is false, establishes a violation of section 1324c(a)(1), because the act of attesting to false information is creating a "falsely made" document for the purpose of fulfilling a requirement of a provision of the INA, that is, the employment eligibility verification requirements in section

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[1] Title 8 U.S.C. § 1324c(a)(1) and (2) (1994) provides as follows:
It is unlawful for any person or entity knowingly-
(1) to forge, counterfeit, alter, or falsely make any document for the purpose of satisfying a requirement of this Act,
(2) to use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of this Act, ...

The "Act" referenced in the quotation above is the Immigration and Nationality Act (INA). This provision was enacted as an amendment to the INA (§ 274C of the INA) and was subsequently codified at 8 U.S.C. § 1324c (1994).

[2] Actually, the ALJ order variously refers to the alleged violations in Count I and II as having been committed for the purposes of satisfying a requirement of the Immigration Act of 1990 or of IRCA. See ALJ order at 1, 2, 5, and 6. However, as previously noted, the "Act" referenced in section 1324c(a) is the Immigration and Nationality Act. The complaint itself references the INA.

1324a(b). In granting the motion for summary decision as to liability, the ALJ implicitly accepted INS' position on this issue.[3] However, I have determined that it is necessary to modify the ALJ's order in this regard because, 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. It is the underlying fraudulent document, submitted to an employer to establish identity and/or work authorization, which is the proper basis of a section 1324c violation against an employee in the context of the employment eligibility verification system of 8 U.S.C. § 1324a.[4]

The Chief Administrative Hearing Officer's Review Authority

Pursuant to the Attorney General's authority to review an ALJ's decision and order; as provided in 8 U.S.C. § 1324c(d)(4), and delegated to the Chief Administrative Hearing Officer (CAHO) in section 68.53(a) of 28 C.F.R.[5]; it is necessary, upon review, to modify the ALJ's January 9, 1995, order in Remileh for the reasons set forth below. As is well established, when reviewing a final decision from an ALJ, the CAHO has de novo review authority and may consider any facts or issues of law which were previously before the ALJ. See Mester Mfg. Co. v. INS, 879 F.2d 561, 565 (9th Cir. 1989); and Maka v. INS, 904 F.2d 1351, 1355 (9th Cir. 1990).

IT IS THE UNDERLYING FRAUDULENT DOCUMENT, SUBMITTED TO AN EMPLOYER TO ESTABLISH IDENTITY AND/OR WORK AUTHORIZATION, WHICH IS THE PROPER BASIS OF A SECTION 1324c VIOLATION AGAINST AN EMPLOYEE IN THE CONTEXT OF THE EMPLOYMENT ELIGIBILITY VERIFICATION SYSTEM OF 8 U.S.C. § 1324a.

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[3] In United States v. Segura-Sataray, 4 OCAHO 703 (1994), an Order Granting Complainant's Motion to Strike Affirmative Defenses, the ALJ struck an affirmative defense disputing the notion that the term "falsely made" includes the act of attesting to false information provided on a Form I-9. However, the ALJ's action in that case was primarily based on respondent's failure to provide a supporting statement of facts for the affirmative defense, as opposed to a specific rejection of its legal merits.

[4] See Daniel Levy, A Practitioner's Guide to Section 274C: Part One, Immigration Briefings, June 1994, at 6-7, for a discussion of "false making" in the context of section 1324c.

[5] Rules of Practice and Procedure for Administrative Hearings, 28 C.F.R. pt. 68 (1994), as amended by 59 Fed. Reg. 41,243 (1994) (to be codified at 28 C.F.R. § 68.2(i), (k)).

Looking at the relationship between 8 U.S.C. § 1324a and 8 U.S.C. § 1324c, it is clear that an employee does not "falsely make" a Form I-9 by attesting to false information contained thereon. The Form I-9, created under statutory authority of section 1324a(b), is designed to record the satisfaction of the employer's duty to check documents ensuring that employees are not unauthorized aliens as defined by section 1324a(h)(3); as well as the individual employee's duty to provide a legally acceptable document or combination of documents to enable the employer to establish and verify the employee's identity and work eligibility. 8 U.S.C. § 1324a(b)(1) and (2) and 8 C.F.R. § 274a.2(b)(1).[6] In relation to the employment eligibility verification system, the document fraud provisions of section 1324c are supplemental in that they require (when stated in the affirmative) that the employee only use validly issued identification or work authorization documents for these purposes. Although the breadth of the document fraud provisions of section 1324c extend to document fraud for the purpose of satisfying any requirement of the Immigration and Nationality Act; it does not automatically follow that false information on the Form I-9 itself, although offered to meet a requirement of the Act, constitutes document fraud as prohibited by section 1324c.

First, the information provided by an employee in section 1 of a Form I-9 is basic information as to identity and employment authorization which is to be reflected in the documents provided by the employee to the employer. Because section 1 of the Form I-9 contains the very information which is to be supported by documentation provided by the employee, it is difficult to conceive of an instance where a significant false statement on a Form I-9 would not also be accompanied by the presentation of a document already containing this false information.

The statute enumerates several means of committing document fraud which are applicable to the employment eligibility verification system created under section 1324a. If an employer has properly verified that an employee is not an unauthorized alien, as required by section 1324a, any false information on a Form I-9 will have as its "substantiating" source a fraudulent document. This is true regardless of the particular nature of the document fraud: the underlying documents provided may not belong to the possessor, the information contained on apparently valid documents may have been altered, or the documents may be outright forgeries.

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[6] Documents establishing employment authorization, identity, or both are listed in the statute itself at section 1324a(b)(1), as well as in INS implementing regulations at 8 C.F.R. § 274a.2(b)(1)(v).

Second, 8 U.S.C. § 1324a, which imposes on the employer the duty of creating a Form I-9 for each new employee, enumerates the extent of penalties to be imposed for any violation. In regard to an employee, this statute requires by explicit authority in section 1324a(b)(2) that the employee attest on the form to citizenship, permanent residence, or status as an alien authorized to work in the United States. According to section 1324a(b)(2), the individual seeking employment provides this information "under penalty of perjury". Therefore, it is clear that section 1324a itself delineates the penalty for which the individual may be subject for answering falsely on this form.

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.

As previously noted, the complaint alleged that the respondent falsely made a Form I-9 in violation of 8 U.S.C. § 1324c(a)(1). This statutory provision makes it unlawful for any person knowingly "to forge, counterfeit, alter, or falsely make any document for the purpose of satisfying a requirement of this Act." Interpreting the term "falsely make" to include providing false information on a form is a leap of statutory construction which I am unwilling to make for several reasons based on applicable case law, the legislative intent of section 1324c, and a close reading of the parallel federal criminal law.

A. Common Law

The first task in determining whether providing false information constitutes false making is to look at the language of the statute, giving the words used their ordinary meaning. See Moskal v. United States, 498 US 103, 108 (1990)(citations omitted). The terms "forge, counterfeit, and falsely make" have traditionally been considered together as related terms, used as various phases of the crime of forgery. Under the English common law the term "falsely made" has been considered a synonym for "forgery" for centuries. See Merklinger v. United States, 16 F.3d 670, 673 (6th Cir. 1994), citing Gilbert v. United States, 370 U.S. 650, 655-57 (1962) (explaining English common law understanding of "forgery")

The majority opinion in Moskal held that "falsely made", as used in 18 U.S.C. § 2314 in the context of the interstate transport of fraudulent securities, applies to genuinely executed securities containing false information because, "Congress' general purpose in enacting a law may prevail over" the common law meaning of a term. 498 U.S. at 117.

However, Merklinger distinguishes itself from the majority decision of Moskal by noting that, "Moskal's understanding of the application of the term, 'falsely made', as used in § 2314, is not applicable to other statutes . . . where departing from the term's common law meaning would not serve any overriding Congressional purpose." 16 F.3d at 673, n.4. Similarly, there is no reason to depart from the common law understanding of the term "falsely made" in the context of section 1324c, since there is nothing in the rather sparse legislative history to indicate such an intention.[7]

The common sense distinction we make is between a forgery statute and a perjury statute. United States v. Moore, 60 F. 738, 739 (C.C.S.D.N.Y. 1894). The term "falsely made" has repeatedly been found to refer to the false execution of a document, not a valid document containing false information.[8] That this has been the common understanding of the term "falsely made" is persuasively argued in Merklinger, 16 F.3d at 673-5, citing to the dissent in Moskal, 498 U.S. at 121-26 (Scalia, J., dissenting)(reviewing the use of the term "falsely made" in a variety of law dictionaries, statutes, case law, and scholarly commentaries, all of which establish that the term is an essential element of forgery, and does not embrace false contents of a genuinely executed document.). The common law definition of "falsely made", therefore, supports the view that this term is not intended to include documents which contain false information, but which have been validly executed. A Form I-9, executed by the employer and employee containing false information, is not falsely made, but simply false.

B. Legislative Intent

In addition to ascertaining the accepted common law definition of the term "falsely made", it is important to ensure that statutory construction is done in accord with Congress' broad purpose in enacting the statute. Moskal, 498 U.S. at 117. The legislative language which eventually became the document fraud provisions of 8 U.S.C. § 1324c, began as one of several proposals, to supplement the enforcement of IRCA, contained in a bill introduced in the 101st Congress several weeks before the enactment of the Immigration Act of 1990. S. 3099, 101st Cong., 2nd Sess. (1990).

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[7] See discussion on legislative history of section 1324c, infra p. 6.

[8] See Clarendon Bank and Trust v. Fidelity & Deposit Corp., 406 F. Supp. 1161, 1165 (E.D.Va. 1975), citing Gilbert, 370 U.S. at 655-58, citing Marteney v. United States, 216 F.2d 760, 763 (10th Cir. 1954).

Senate Bill 3099, introduced by Senator Alan Simpson (R. Wyo.) on September 24, 1990, was proposed after INS apprehensions of illegal aliens began increasing, after an initial decline with the passage in 1986 of the employer sanctions provisions as part of IRCA. It was apparent that employer sanctions were not having the desired effect of reducing the "magnet" of U.S. jobs as an inducement to illegal immigration. See 136 Cong. Rec. S13616-05, S13628 (Sept. 24, 1990)(statement of Sen. Simpson). Senate Bill 3099 contemplated increasing new alien entry point barriers, limiting the types of documents to prove employment authorization, and improved security for driver's licenses. In addition, the bill contained a "system of civil fines to deter users of fraudulent documents". 136 Cong. Rec. S13629. This last provision contained the precise language that was ultimately enacted as part of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990), and codified at 8 U.S.C. § 1324c. As Senator Simpson stated upon introduction of Senate Bill 3099, "I am introducing this legislation today because I believe it will attack the two greatest weaknesses in our current enforcement efforts: first,[9] the large numbers of false documents that now exist which can be used to fraudulently satisfy the employment authorization requirement of employer sanctions." 136 Cong. Rec. S13629 (Sept. 24, 1990).

This statement by Senator Simpson indicates that the focus of the language that became 8 U.S.C. § 1324c was the increase in fraudulent documents being used to evade effective compliance with the employment eligibility verification requirements. Nothing in the record indicates that making false statements on the Form I-9 itself was a major obstacle to effective implementation of employer sanctions to be prevented by the passage of the civil document fraud provision. The false documents which enabled unauthorized aliens to make false statements on Forms I-9 with impunity appeared to be the impetus behind what became section 1324c. Thus, it is inappropriate to assume, absent some direct statement to the contrary, that Congress intended to include the provision of false information on a Form I-9 within the ambit of the statute.

C. Relation to Criminal Law

The notion that Congress somehow intended to encompass the provision of false information within the meaning of "falsely make", without expressing such an intent anywhere in the legislative history, is further negated by the precision of the language in the parallel

[9] The second weakness of concern to the Senator was border enforcement

criminal law on the subject. In 1986, when IRCA was enacted, Congress included an amendment to the Federal Criminal Law at 18 U.S.C. § 1546, entitled Fraud and Misuse of Certain Immigration-Related Documents. The criminal law was amended because Congress was concerned that a side-effect of creating the work authorization verification system of 8 U.S.C. § 1324a would be "an increase in the demand for, the production of, and the use of counterfeit work authorization documentation." Villatoro-Guzman, 3 OCAHO 540, at 3 (1993). To counter this likely effect, the amendment added the following language to the federal criminal provision which expressly addressed the use of fraudulent documents for employment authorization as required by section 1324a:

> (b) Whoever uses-
> (1) an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor,
>
> (2) an identification document knowing (or having reason to know) that the document is false, or
>
> (3) a false attestation, for the purpose of satisfying a requirement of section 274A(b) of the Immigration and Nationality Act [8 U.S.C.S. § 1324a(b)], shall be fined in accordance with this title, or imprisoned not more than two years, or both.
> 18 U.S.C. § 1546(b)

With these express inclusions, it is significant that when section 1324c was written four years later, to provide a parallel civil penalty, no such language regarding attestations to false information in regard to section 1324a was included.

The companion civil statute creating money penalties for document fraud, 8 U.S.C. § 1324c, was intended as an alternative to exclusively pursuing document fraud cases under the criminal statute.[10] Comparing the language of the parallel criminal and civil statutes covering immigration-related document fraud is a useful source for guidance in interpreting Congress' intended breadth of the more recently written civil statute. First, it is apparent that both statutes are intended to encompass similar means of creating fraudulent documents since the language of the two statutes is parallel. The terms "to forge, counterfeit, alter, or falsely make" are identical in both the civil and the criminal statutes, 8 U.S.C. § 1324c and 18 U.S.C. § 1546.

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[10] See 139 Cong. Rec. S2897-04, S2903 (Mar. 16, 1993) (statement of Sen. Simpson). See generally, United States v. Villatoro-Guzman, 3 OCAHO 540 (1990) for a history of section 1324c and its relation to federal criminal prosecutions.

Second, the drafters of the criminal statute were very careful to include language covering false statements in immigration documents. Section 1546(a), interalia, makes it unlawful to knowingly make under oath, or as permitted under penalty of perjury,

> "knowingly [to] subscribe[] as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations proscribed thereunder, or knowingly present[] any such application, affidavit, or other document containing any such false statement".

Since section 1546 was available as a tried and tested model of statutory language that has been found to be plain and unambiguous (See U.S. v. Carrillo-Colmenero, 523 F.2d 1279 (5th Cir. 1975), it is of significance that in enacting section 1324c Congress did not include this parallel language to explicitly provide for false statements or false attestations in otherwise legitimate documentation.

Conclusion

It is clear from the foregoing examination of applicable case law, legislative history and parallel criminal statutes that the term "falsely make", as employed in section 1324c(a)(1), does not apply to the activities alleged in Count I of the complaint in the instant case. It is equally clear that, at least in the context of the employment eligibility verification process, this interpretation of the statute will not preclude a finding of section 1324c liability for the presentation of fraudulent documents. Even if this interpretation were, in a given case, to preclude any finding of section 1324c liability, we must be mindful of Justice Scalia's admonition in his dissent in Moskal: "The temptation to stretch the law to fit the evil is an ancient one, and it must be resisted." 498 U.S. at 132, (paraphrasing Chief Justice Marshall's remarks in United States v. Wiltberger, 5 Wheat. 76, 96 (1820)).

ACCORDINGLY,

For the above stated reasons, the ALJ's decision granting summary decision to the complainant on Count I of the complaint against the respondent, Remileh, is hereby MODIFIED in that:

Count I is dismissed, because:

1) 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; and

2) It is the underlying fraudulent document, submitted to an employer to establish identity and/or work authorization, which is the proper basis of a section 1324c violation against an employee in the context of the employment eligibility verification system of 8 U.S.C. § 1324a.

The summary decision issued in regard to Count II is hereby AFFIRMED in that the respondent is liable for knowingly using an altered birth certificate, knowing that document to be falsely made, after November 29, 1990, for the purpose of satisfying a requirement of the INA, in violation of the provisions of 8 U.S.C. § 1324c(a)(2).

It is **SO ORDERED**, this 7th day of February, 1995

JACK E. PERKINS
Chief Administrative Hearing Officer

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

January 9, 1995

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. 1324c Proceeding
	)	OCAHO Case No. 94C00139
MOURAD ABU REMILEH, Respondent.	)	

ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION

On September 23, 1993, complainant, acting by and through the Immigration and Naturalization Service (INS), commenced this action by filing a Notice of Intent to Fine (NIF), SPM-274C-93-0085, upon Mourad Abu Remileh (respondent). That citation contained three (3) counts which alleged three (3) violations of the document fraud provisions of the Immigration Reform and Control Act of 1986 (IRCA), 8 U.S.C. § 1324c, and civil penalties totaling $1,500 were assessed.

In Count I of the NIF, complainant asserted that respondent knowingly and falsely made an Employment Eligibility Verification Form (Form I-9) after November 29, 1990, for the purpose of satisfying a requirement of IRCA, 8 U.S.C. § 1324c(a)(1). Complainant assessed a civil money penalty of $500 for that alleged violation.

Complainant asserted in Count II of the NIF that respondent knowingly used the forged, altered, and falsely made document described therein, a Certificate of Live Birth issued by the Minnesota Department of Health, Section of Vital Statistics, in the name of Zachary Mohamed Armeli, and did so after November 29, 1990, for the purpose of satisfying a requirement of IRCA, 8 U.S.C. § 1324c(a)(2). For that alleged violation, complainant levied a civil money penalty of $500.

Count III of the NIF contained the assertion that after November 29, 1990, respondent used the document described therein, a Minnesota Department of Health, Section of Vital Statistics, Certificate of Live

Birth, in the name of Zachary Mohamed Armeli, knowing that that document was lawfully issued to a person other than the possessor, for the purpose of satisfying a requirement of IRCA, in violation of the provisions of 8 U.S.C. § 1324c(a)(3). Complainant assessed a civil money penalty of $500 for that alleged violation.

In the NIF, respondent was advised of his right to request a hearing before an Administrative Law Judge assigned to this Office if he filed such a request within 60 days of his receipt of that notice.

On October 29, 1993, Lenore Millibergity, Esquire, filed a Notice of Entry of Appearance as counsel for respondent, as well as a timely request for hearing.

On July 27, 1994, complainant filed the two (2)-count Complaint at issue.

In Count I, complainant alleged that respondent knowingly and falsely made a Form I-9 after November 29, 1990, for the purpose of satisfying a requirement of the Immigration Act of 1990 (IMMACT), in violation of IRCA, 8 U.S.C. § 1324(c)(a)(1). Complainant requested a civil money penalty of $500 for that alleged violation.

Complainant alleged in Count II of the Complaint that after November 29, 1990, respondent used, attempted to use, and possessed the allegedly forged, counterfeited, altered and falsely made document described therein, a Minnesota Department of Health, Section of Vital Statistics, Certificate of Live Birth, in the name of Zachary Mohamed Armeli, knowing that document to be forged, counterfeited, altered and falsely made for the purpose of satisfying a requirement of IMMACT, and thus violated the provisions of 8 U.S.C. § 1324c(a)(2). Complainant also requested a civil money penalty of $500 for that alleged violation.

Copies of the Complaint and the Notice of Hearing were served upon respondent via regular mail, and upon respondent's counsel of record via certified mail, return receipt requested.

The Domestic Return Receipt attached to those copies of the Complaint and Notice of Hearing served upon respondent's counsel was returned to this Office on August 4, 1994, and discloses that respondent's then counsel of record received those documents on August 1, 1994.

On August 10, 1994, the package containing the copy of the Notice of Hearing and Complaint which had been sent to respondent via regular

mail was returned to this Office with the notation "Return to Sender, No Forward Order on File."

On August 8, 1994, respondent's counsel filed a Motion to Withdraw from representation, premising that request upon her assertion that in January 1994, she and respondent had agreed that counsel would no longer represent respondent in these proceedings. Respondent's counsel asserted that she would be unable to answer the Complaint in a timely, adequate and competent manner because she has had no contact with respondent since that time.

On August 16, 1994, that Motion to Withdraw was denied for the following reasons. Respondent's counsel of record did not qualify or limit her initial representation of respondent. In addition, she was the only person authorized to receive documents on respondent's behalf and, finally, because her law office was the only address to which documents could be delivered.

On August 19, 1994, Richard L. Breitman, Esquire, filed a Notice of Appearance as successor counsel of record for respondent, and on August 22, 1994, Attorney Millibergity filed a renewed Motion to Withdraw. That motion was granted on August 23, 1994, because successor counsel had filed an entry of appearance, and Attorney Breitman was substituted as respondent's successor counsel of record.

On September 30, 1994, respondent filed its Answer, in which he denied each and every allegation in the Complaint, and also asserted three (3) affirmative defenses to the alleged violations.

For his first affirmative defense, respondent asserted that "[t]he INA requires only that employers verify documents and no obligation has been created by the INA upon respondent."

Respondent's second affirmative defense asserted that "[n]o act occurred with respect to representations to an official of the United States government."

In its third affirmative defense, respondent asserted that "[t]he amount of the proposed penalty is excessive."

On October 28, 1994, complainant filed a Motion to Strike Affirmative Defenses, moving to strike all three (3) of complainant's affirmative defenses on the ground that they had been improperly asserted, and on November 14, 1994, the undersigned granted complainant's motion.

On December 6, 1994, complainant filed a pleading captioned Motion for Summary Decision, in which it requested that summary decision be granted on the facts of violation alleged in Counts I and II of the Complaint, on the grounds that respondent admitted all of the necessary elements needed to show liability for those counts.

On December 20, 1994, respondent filed a pleading captioned Memorandum in Opposition to Motion for Summary Decision, requesting therein that the undersigned deny complainant's Motion for Summary Decision because a material issue of fact remained regarding whether respondent's acts were taken in order to satisfy a requirement of IMMACT.

The pertinent procedural rule governing motions for summary decision in document fraud cases provides that "[t]he Administrative Law Judge may enter a summary decision for either party if the pleadings, affidavits, and 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).

Section 68.38(c) is similar to and based upon Rule 56(c) of the Federal Rules of Civil Procedure, which provides for the entry of summary judgment in Federal court cases. For this reason, Federal case law interpreting Rule 56(c) is instructive in determining whether summary decision under Section 68.38 is appropriate in proceedings before this Office. Alvarez v. Interstate Highway Constr., 3 OCAHO 430, at 7 (1992).

The 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. United States v. Goldenfield Corp., 2 OCAHO 321, at 3 (1991). "Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986) (quoting Schwarzer, Summary Judgment Under the Federal Rules: Defining Genuine Issues of Material Fact, 99 F.R.D. 465, 467 (1984)).

An issue of material fact is genuine only if it has a real basis in the record. Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586-87 (1986). A genuine issue of fact is material if, under the governing law, it might affect the outcome of the suit. Anderson v.

Liberty Lobby, Inc., 477 U.S. 242, 248 (1986); United States v. Primera Enters., Inc., 4 OCAHO 615, at 2 (1994). In determining whether there is a genuine issue as to a material fact, all facts and reasonable inferences to be derived therefrom are to be viewed in the light most favorable to the non-moving party. Matsushita, 475 U.S. at 587; Primera, 4 OCAHO 615, at 2.

The party seeking summary decision assumes the burden of demonstrating to the trier of fact the absence of a genuine issue of material fact. See Celotex Corp., 477 U.S. at 323. Once the movant has carried this burden, the opposing party must then come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); Matsushita, 475 U.S. at 587.

Summary decision may be based on matters deemed admitted. Primera, 4 OCAHO 615, at 3; United States v. Goldenfield Corp., 2 OCAHO 321, at 3-4 (1991).

It is well documented that IMMACT created civil money penalties for both employers who knowingly accept fraudulent documents and for aliens who knowingly use fraudulent documents. See 8 U.S.C. § 1324c; see also United States v. Villatoro-Guzman, 3 OCAHO 540 (1993).

In Count I, complainant alleged that respondent knowingly and falsely made a Form I-9 after November 29, 1990, for the purpose of satisfying a requirement of IMMACT, in violation of IRCA, 8 U.S.C. § 1324(c)(a)(1).

In order to prove the violation alleged in Count I, complainant must show that: (1) respondent knowingly forged, altered or falsely made; (2) the Form I-9 document; (3) after November 29, 1990; and (4) for the purpose of satisfying a requirement of IMMACT.

Respondent admitted that he falsely made the Form I-9 by using the name of Zachary Armeli to complete the pertinent sections of that Form. See Respondent's November 18, 1994 Response to Request for Admissions, Requests 13, 14; Complainant's December 6, 1994 Memorandum in Support of Motion for Summary Decision, Exhibit 2; Respondent's January 3, 1995 Response to Complainant's First Set of Interrogatories, Response 1-c. Respondent signed that Form I-9 using the name Zachary Armeli on June 14, 1993. See Respondent's January 3, 1995 Response to Complainant's First Set of Interrogatories, Response 1-c.

Respondent also admitted that he was an alien admitted with nonimmigrant student status subject to deportation for unauthorized

employment. See Respondent's November 18, 1994 Response to Request for Admissions, Requests 1, 6. Respondent further acknowledged that he used the social security number of Zachary Armeli on the Form I-9, to obtain employment with Valley Fair, knowing that social security number not to be his own. See Respondent's November 18, 1994 Response to Request for Admissions, Requests 13, 14.

IRCA provides for an Employment Verification System which mandates that in order to gain lawful employment in the United States, an individual must establish both employment authorization and identity. 8 U.S.C. § 1324a(b)(1).

Based upon the undisputed evidence in the record, including respondent's admissions, it has been shown that respondent knowingly falsely made the June 14, 1993 Form I-9 after November 29, 1990, for the purpose of satisfying a requirement of the Act, and in doing so violated the provisions of 8 U.S.C. § 1324c(a)(1).

Accordingly, because there is no genuine issue for trial with regard to his liability for the violation contained in Count I, complainant's Motion for Partial Summary Judgment is granted as it pertains to respondents' liability for the facts of the violation alleged in that count.

In Count II, complainant alleged that respondent used the allegedly forged, altered or falsely made document described therein, a Minnesota Department of Health, Section of Vital Statistics, Certificate of Live Birth, in the name of Zachary Mohamed Armeli, knowing that document to be falsely made, after November 29, 1990, for the purpose of satisfying a requirement of IMMACT, and thus violated the provisions of 8 U.S.C. § 1324c(a)(2).

In order to prove the violation alleged in Count II, complainant must show that: (1) respondent used the allegedly forged, altered or falsely made document; (2) knowing that document to be forged, altered or falsely made; (3) after November 29, 1990; and (4) for the purpose of satisfying a requirement of IMMACT.

Respondent has admitted that he took the birth certificate of Zachary Armeli and typed in his own birth date of June 28, 1973. See Respondent's November 18, 1994 Response to Request for Admissions, Request 16. Respondent also admitted that he presented that altered birth certificate to his employer one (1) or two (2) weeks after beginning employment. See Respondent's November 18, 1994 Response to Request for Admissions, Request 15.

Valley Fair used that birth certificate to complete section 2 of respondent's Form I-9. Respondent unquestionably presented the altered birth certificate to his employer in order to prove that he was Zachary Armeli, an individual authorized to work in the United States.

Complainant has demonstrated, as alleged in Count II, that respondent knowingly used the altered birth certificate knowing that document to be falsely made, after November 29, 1990, for the purpose of satisfying a requirement of IMMACT, and thus violated the provisions of 8 U.S.C. § 1324c(a)(2).

Accordingly, complainant's Motion for Summary Decision is also being granted as it pertains to respondent's liability for the facts alleged in Count II, since there is no genuine issue for trial with regard to respondent's liability for the violation contained in that count.

In summary, because complainant has shown that there is no genuine issue of material fact regarding the violations alleged in Counts I and II of the Complaint, and has also shown that it is entitled to decision as a matter of law with respect to those violations, complainant's December 6, 1994 Motion for Summary Decision is hereby granted. It is found that respondent has violated the pertinent provisions of IRCA in the manners alleged in Counts I and II of complainant's July 27, 1994 Complaint.

In view of this ruling, the evidentiary hearing scheduled to begin at 9:00 a.m. on Wednesday, January 18, 1995, in Minneapolis, Minnesota, is hereby canceled.

In lieu of that hearing, a telephonic prehearing conference will be held at 10:30 E.S.T. on January 11, 1995, for the purpose of selecting the earliest mutually convenient date upon which a hearing can be conducted for the purpose of determining the appropriate civil money penalties to be assessed for those two (2) violations set forth in Counts I and II.

All pending motions in this action are denied, in accordance with this Order.

JOSEPH E. MCGUIRE
Administrative Law Judge