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. 1324c Proceeding Case No. 94C00204
ANA MARIA VILLEGAS-VALENZUELA Respondent.	)	

FINAL DECISION AND ORDER
(July 21, 1995)

MARVIN H. MORSE, Administrative Law Judge

Appearances: Frederick E. Newman, Esq., for Complainant
Ralph J. Leardo, Esq., for Respondent

I. *Procedural History*

On December 1, 1994, the Immigration and Naturalization Service (INS or Complainant) filed a Complaint alleging that Ana Maria Villegas-Valenzuela (Villegas or Respondent) violated section 274C of the Immigration and Naturalization Act, as amended, 8 U.S.C. § 1324c. Specifically, INS alleges in a single count that Villegas knowingly used, obtained and possessed two described forged, counterfeited, altered and falsely made documents, i.e., (1) a Form I-151, and (2) a Social Security Card. The filing of the Complaint followed service on February 11, 1994 of an underlying INS Notice of Intent to Fine (NIF), and a March 10, 1994 request by counsel for Respondent for a hearing on her behalf. The allegations of the Complaint exactly track those of the NIF. INS asks a civil money penalty of $250 per count, for a total of $500.

On March 16, 1995, subsequent to motion practice addressed to failure timely to file an Answer to the Complaint, and substitution of

counsel on her behalf, Respondent filed an Answer. Villegas denies the allegations of the Complaint and asserts three affirmative defenses: (1) failure to state a claim upon which relief can be granted; (2) the Complaint fails for indefiniteness; and (3) that "the allegations of the complaint are so vague and indefinite that any judgment or order based upon the allegations as stated would violate respondent's due process rights to notice and a meaningful opportunity to respond and be heard. . . ." Answer at 2.

On March 30, 1995, Complainant filed a single pleading containing both a Motion to Strike Affirmative Defenses and a Motion for Summary Decision (Motions). Citing United States v. Villatoro-Guzman, 3 OCAHO 540 (1993), INS challenges the affirmative defenses. INS also notes that Respondent failed to plead any facts in support as required by the pertinent OCAHO rule of practice and procedure [28 C.F.R. § 68.9(c)(2)].[1]

By its terms, the Motion for Summary Decision placed Respondent on notice that both liability and the civil money penalty are at issue.

INS supports its summary decision motion with exhibits A through D, including a Form I-213, Record of Deportable Alien (Exh. A); a Form I-215W, sworn statement of Villegas, with an employment eligibility verification Form I-9 in her name attached (Exh. B); photocopies of the two documents which are the subject of the Complaint (Exh. C), and a computer printout of an extract from Complainant's central index system showing a total lack of data entries for the alien registration number (A-number) implicated in the first count of the Complaint (Exh. D).

The I-215W records a February 11, 1994 interview of Villegas by INS Border Patrol Agent Steven Borup (Borup), who took her signed statement under oath: Respondent admits she was an illegal alien who had purchased the counterfeit documents at issue in order to obtain employment. The Form I-9, bearing Complainant's name, and allegedly used in aid of obtaining employment in 1991 at the Fresno Hilton, contains entries bearing the A-number and Social Security number of those documents.

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[1] See 28 C.F.R. § 68.38. See generally Rules of Practice and Procedure for Administrative Hearings (Rules), 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)) [hereinafter cited as 28 C.F.R. pt. 68].

On May 31, 1995, after two extensions of time in which to reply, Respondent filed an Opposition to the Motions (Opposition). Respondent's rejoinder to the challenge to its affirmative defenses argues that there is no requirement that such defenses be buttressed by statements of fact but that if there were, "sufficient facts are stated to withstand a motion to strike." Opposition at 1.

II. *Discussion*

A. Complainant's Motion to Strike Affirmative Defenses Granted

Title 28 C.F.R. § 68.9(c)(2) demonstrates that Respondent is wrong as to the law; self-evidently, the affirmative defenses are devoid of factual content. OCAHO case law establishes that lack of § 68.9(c)(2) compliance trumps an affirmative defense. See, e.g., United States v. Makilan, 4 OCAHO 610 at 4 (1994).[2] As to the merits, INS is correct that Villatoro-Guzman, 3 OCAHO 540 (1993), instructs that a complaint drawn in similar fashion to the Villegas Complaint adequately describes a claim upon which relief can be granted. Moreover, being neither too vague nor indefinite, it is free of the conclusory impedimenta claimed by Respondent. See Makilan at 8-9. Accordingly, the Motion to Strike Affirmative Defenses is granted.

B. Complainant's Motion for Summary Decision Granted

OCAHO Rules authorize the administrative law judge (ALJ) to "enter 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 party is entitled to summary decision." 28 C.F.R. § 68.38(c). A fact is material if it might affect the outcome of the case. Anderson v. Liberty Lobby, 477 U.S. 242, 248 (1986). In demonstrating that there is an absence of evidence to support the non-moving party's case, the movant bears the initial burden of proof.

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[2] As well stated in Makilan, Motions to strike are highly disfavored in the law, and are granted only when the asserted affirmative defenses lack any legal or factual bases. See United States v. Task Force Security, Inc., 3 OCAHO 533 at 3 (1993). For this reason, an affirmative defense will be ordered to be stricken only if there is no prima facie viability of the legal theory upon which the defense is asserted, or if the supporting statement of facts is wholly conclusory. Id., at 4; See also United States v. Watson, 1 OCAHO 253 (1990); United States v. Broadway Tire, 1 OCAHO 226 (1990).

Id.

In determining whether the movant has met its burden of proof, all evidence and inferences to be drawn therefrom are to be viewed in a light most favorable to the non-moving party. Matsushita Elec. Indus. Corp. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). The burden of production then shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. United States v. Davis Nursery, Inc., 4 OCAHO 694 at 8 (1994) (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323-25 (1985)). Failure to meet this burden invites summary decision in the moving party's favor.

1. Discussion of the Merits

Respondent's primary argument against summary decision asserts that Federal Rule of Civil Procedure 56, a close parallel to the OCAHO rule on summary decision (28 C.F.R. § 68.38), requires that a motion for summary judgment be "properly supported" by an affidavit, which sets out "admissible evidence." Opposition at 3. Respondent asserts that "[w]ithout an affidavit showing how they are admissible, these documents cannot be considered." Id. at 6 (citing Rule 56(e); § 68.38(b); Association for Reduction of Violence, 734 F.2d 63, 67 (1st Cir. 1984)).

I find Respondent's argument unavailing for at least three reasons. First, the Federal Rules are available as a guideline in adjudicating OCAHO cases in the absence of a pertinent OCAHO Rule.[3] Title 68 C.F.R. § 68.38 provides that a complainant "may move with or without supporting affidavits for summary decision. . . ." 28 C.F.R. § 68.38(a) (emphasis added). To the extent that § 68.38 does not parallel Federal Rule 56, the OCAHO Rule controls. Second, Respondent mischaracterizes Federal Rule 56 when she asserts that it compels affidavits in support of summary judgment. Rather, the pertinent clause in subsection (a) of Rule 56 does not differ one whit from OCAHO Rule 38(a). Finally, the challenge that the Motion is deficient because the evidentiary support initially lacked verification was rendered moot by the June 19, 1995 filing by Complainant of an affidavit by Borup. As discussed below, on the basis of Complainant's factual submissions, including the Borup affidavit, none of which are rebutted by Respondent, I am unable to discern any substantial dispute of material fact. Respondent's contentions do not fill the gap. Accordingly, this case is appropriate for summary decision.

Respondent's argument that motions for summary decision require authenticated supporting evidence erroneously relies on 28 C.F.R. §

[3] See 28 C.F.R. § 68.1.

68.40. Although § 68.40 does state that "[e]ach party shall have the right to present his/her case or defense by . . . duly authenticated copies of records and documents . . .," § 68.40 refers exclusively to evidence to be adduced at an adversarial evidentiary hearing, not pretrial motion practice. 28 C.F.R. § 68.40(b). Section 68.40 directly follows § 68.39 captioned "formal hearings" which addresses evidentiary principles pertinent to trial practice, and is removed both spatially and substantively from principles applicable to dispositive motion practice. More pointedly, as already noted, § 68.38 makes the filing of supporting affidavits discretionary, i.e., "[a] complainant . . . may move with or without supporting affidavits for summary decision on all or any part of the proceeding." 28 C.F.R. § 68.38(a) (emphasis added).

While § 68.38(a) affords the movant the option -- but makes no requirement -- to support a motion for summary decision with affidavits, it provides that any other party "may respond to the motion by serving supporting or opposing papers with affidavits, if appropriate, or countermove for summary decision." Id. Significantly, the direction to the party opposing the motion is clear and unambiguous:

> b) Any affidavits submitted with the motion shall set forth such facts as would be admissible in evidence in a proceeding subject to 5 U.S.C. 556 and 557 and shall show affirmatively that the affiant is competent to testify to the matters stated therein. When 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.

Title 28 C.F.R. § 68.38(b).

Consistent with § 68.38(b), OCAHO case law instructs that the opposing party bears the burden of disputing or contradicting

> the evidence of the movant on material factual issues with evidence of a substantial nature as distinguished from legal conclusions, and with concrete particulars as opposed to mere formal denials or general allegations which do not show the facts in detail and with precision.

United States v. Flores-Martinez, 5 OCAHO 733 at 3 (1995) (citing 28 Fed. Proc., L. Ed. § 62:539 (1984)). Indeed, "the principle and purpose which underlie the concept of motions for summary decision/summary judgment would be defeated if unsupported argumentation were allowed to defeat the motion and compel an unnecessary evidentiary hearing." Flores-Martinez, 5 OCAHO 733 at 4. See also Adickes v. Kress & Co., 398 U.S. 144, 161 (1970) (quoting 6 JAMES W. MOORE, FEDERAL PRACTICE ¶ 56.22 (2d ed. 1966): "[i]t has always been

perilous for the opposing party neither to proffer any countering evidentiary materials nor to file a 56(f) affidavit" (emphasis added)).

Here, confronted with Complainant's evidentiary submissions, Respondent proffered unsupported argumentation but tendered no evidentiary materials. Rather, Respondent's Opposition is replete with quotations from 28 C.F.R. § 68.38 and authorities which support but do not detract from the proposition that she failed at her peril to do little "more than simply rely on the contrary allegation in her complaint." Kress & Co., 398 U.S. at 160. Since confronted with the filing of the Borup affidavit, she has remained silent.

Arguing that summary decision is unavailable or premature because neither party has conducted discovery, Respondent claims that "the rule requiring an opposing party to come forward with evidence to rebut a motion for summary judgment only applies after there has been an adequate opportunity for discovery." Opposition at 8 (citing Fontenot v. Upjohn Co., 780 F.2d 1190 (5th Cir. 1986); Fano v. O'Neill, 806 F.2d 1262 (5th Cir. 1987)). Respondent's reliance on Fontenot and Fano, however, is misplaced. I am unaware of any rule obliging the parties to engage in discovery as a precondition to summary decision; I hold that there is no such rule.

The Fontenot court affirmed summary judgment against the party that had the burden of proof on the whole case. The court held that where such a moving party "has no access to evidence of disproof, and ample time has been allowed for discovery, he should be permitted . . . to rely upon the complete absence of proof of an essential element of the other party's case." 780 F.2d at 1195. In other words, a moving party who is not the party with the burden of proof on the whole case, i.e., a § 1324c respondent, can prevail on a motion for summary decision despite a lack of supporting evidence (to overcome an absence of evidence on the part of the nonmoving party), provided there has been an opportunity for discovery. The reference to discovery is understood to explain that despite the best efforts of defendant Upjohn, the party moving for summary judgment, it could prevail on its motion even though it could not obtain facts in support of its motion. Fontenot, in contrast to the present case, turned on the absence of proof on the part of the party moving for and obtaining summary judgment.

In Fano, the parties filed cross motions for summary judgment. Summary judgment for INS was reversed on appeal because the "government has made no affirmative presentation to negate Fano's claims, but it only urged that Fano stated no claim." 806 F.2d at 1266. Important-

ly, the court noted that "[h]ad the government discharged its burden of production as the moving party for summary judgment, Fano would have been required to raise a fact issue on his material allegations." Id. Here, Villegas failed to meet her obligation to raise fact issues in response to Complainant's evidentiary submission in discharge of its burden of production as the moving party.

Respondent also argues that, "even if all the evidence were considered, Complainant is not 'entitled to judgment as a matter of law.'" Opposition at 9. This is so because "the acts which Respondent is alleged to have committed do not come within the provisions of Section 274C[4] which she is alleged to have violated."

Opposition at 13. Respondent states that Complainant's Motion:

> specifically cites Section 274A of the [Immigration and Nationality] Act. Id. [citing to the Motion at 8]. However, it is clear that Section 274A of the Act makes only the employer's behavior unlawful, and imposes an obligation only on the employer to establish the employee's eligibility to work. Section 274A imposes no requirement upon the employee to provide valid employment authorization documents.
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> . . .
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> Therefore, an alien cannot be charged with committing document fraud under subsections (1), (2), or (3) of Section 274C for having allegedly used and possessed fraudulent documents for the purpose of obtaining work, on the grounds that such action is done for the purpose of satisfying the requirements of Section 274A.

Opposition at 11.

Respondent's assertion is contrary to OCAHO case law interpreting § 1324c document fraud cases. See United States v. Remileh, 5 OCAHO 724 (1995) (Modification by the Chief Administrative Hearing Officer (CAHO) of Administrative Law Judge's Order). In Remileh, the CAHO held that:

> [i]t 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 [viz, § 274C] violation against an employee in the context of the employment eligibility verification system of 8 U.S.C. § 1324a.

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[4] Title 8 U.S.C. § 1324c is § 274C of the Immigration and Nationality Act (INA), as enacted by Section 544 of the Immigration Act of 1990, Act of Nov. 29, 1990, Pub. L. 101-649, 104 Stat. 4978; 8 U.S.C. § 1324a is § 274A of the INA as enacted at Section 101 of the Immigration Reform and Control Act of 1986 (IRCA), Act of Nov. 6, 1986, pub. L. 99-603, 100 Stat. 3359, 3382.

Remileh, 5 OCAHO 724 at 3. Accord, United States v. Morales- Vargas, 5 OCAHO 732 at 5-6 (1995) (Modification by the Chief Administrative Hearing Officer).

Contrary to Respondent's contention, nothing could be plainer about the purpose of the § 1324a employment eligibility verification regime than that compliance with its dictates implicates an application by an employee for a benefit conferred by the INA, i.e., a clean bill of health to obtain employment in the United States after November 6, 1986. See United States v. Mester Manufacturing Co., 1 OCAHO 18, 54-5 (1988);[5] aff'd, Mester Mfg. Co. v. I.N.S., 879 F.2d 561 (9th Cir. 1989). To that end, the pertinent regulation defines "document" for document fraud purposes as including, but not limited to, "an application required to be filed under the Act and any other accompanying document or material." 8 C.F.R. § 270.1 (emphasis added). Respondent fails to persuade me that the documents she is accused of tendering in order to comply with § 1324a so as to obtain employment are not the subject of a proper § 1324c cause of action.

2. Respondent's Constitutional Claims

Respondent also asserts that she was not warned of her right to counsel or that her statements could be used against her. I understand her to claim that she was entitled to but did not obtain "Miranda warnings."[6] It is well settled that constitutional claims such as Respondent asserts, including Miranda-type warnings against self incrimination and the right to an attorney, are applicable to criminal, but not civil proceedings. See e.g., United States v. Marion, 404 U.S. 307 (1971) (the Sixth Amendment speedy trial guarantee applies only after a person has been accused of a crime); INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984) ("[a] deportation proceeding is a purely civil action to determine eligibility to remain in this country, not to punish an unlawful entry, though entering or remaining unlawfully in this country is itself a crime . . . [and] [c]onsistent with the civil nature of the proceeding, various protections that apply in the context of a criminal trial do not apply in a deportation hearing"); Flores v. Meese, 934 F.2d

[5] Citations to OCAHO precedents reprinted in the recently distributed bound Volume 1 (Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Laws of the United States) reflect consecutive pagination within that bound volume; pinpoint citations to Volume 1 are to the specific pages, seriatim, of the entire volume. Pinpoint citations to other OCAHO precedents subsequent to Volume 1, however, are to pages within the original issuances.

[6] See Miranda v. Arizona, 384 U.S. 436 (1966).

991, 1012-13 (9th Cir. 1990) ("[e]xamples of criminal trial protections that do not apply in deportation proceedings include the quantum of proof, the need of Miranda warnings before a voluntary statement is given by the respondent, the ex post facto clause; and the inadmissibility of involuntary confessions").

The principle illustrated by these cases defeats Respondent's claim that because the interrogation by Borup could have resulted in a criminal prosecution, Miranda warnings should have been given. I am unaware of any such requirement. Villegas did not counter the exhibits accompanying the Motion for Summary Judgment by any showing of their inaccuracy, and she has failed to respond to the Borup affidavit, served June 13, 1995, filed June 19. Respondent has received all the process that is due.

To the same effect, I reject Respondent's claim of a right to confront Borup as the preparer of the I-213 through cross-examination because the document he prepared was not authenticated. This argument is unavailing in light of the fewer constitutional safeguards afforded civil proceedings and because of the subsequently filed Borup affidavit. Moreover, contrary to Villegas' argument, it is well settled that the I-213 is admissible in IRCA adjudications. See Mester, 1 OCAHO 18, 79 n.20. Significantly, the I-213 is buttressed by Villegas' own sworn statement set out on the I-215W. Her suggestion that there is no evidence that the signature is hers misunderstands her obligation as the non-moving party to provide some scintilla of evidence to defeat the evidentiary submissions which accompanied the Motion.

Whether because of a mistaken view of the law that lack of an INS affidavit rendered its evidentiary support a nullity or for any other reason, Villegas has failed to rebut Complainant's submissions. While the Borup affidavit is not critical to the outcome of this motion practice, it provides a useful wrap-up for the prima facie factual submission. It failed, however, to provoke a responsive pleading on behalf of Respondent.

The purpose of summary decision is to avoid an unnecessary trial where there is no genuine issue as to any material fact. Fontenot, 780 F.2d at 1195; 28 C.F.R. § 68.38(c). Villegas argues she will be denied due process unless she is afforded the opportunity to cross examine the witness, Borup, whose I-213 and subscription to the I-215W forms the core of the evidentiary submission in support of the motion. I understand the claim to be that she is entitled to an evidentiary confrontation in order for me to determine whether there is a genuine

dispute of material fact. Respondent's argument turns summary decision motion practice on its head, implicitly defeating the purpose of the dispositive motion. Electing not to make an evidentiary tender to rebut the prima facie showing by INS, she relies on rhetoric and a legal rationale which, if ever it had credibility, was overtaken by Remileh, 5 OCAHO 724 at 3.

The question arises whether tender of the Borup affidavit subsequent to filing of Respondent's Opposition to the Motion for Summary Decision occasions the need to withhold grant of summary decision. I think not! This is so because Respondent was on notice by virtue of 28 C.F.R. § 68.38(b) that, whether or not an affiant had subscribed to Complainant's evidentiary submission, she was at risk by resting her response on mere allegations and denials.

Furthermore, the Supreme Court does not instruct otherwise. See Adickes v. S.H. Dress & Co., 398 U.S. at 160; Fontenot, 780 F.2d at 1195. The Borup affidavit added no new dimension to prima facie proof of the § 1324c allegations. It is evident from the exhibits to Complainant's motion that both before and after filing of the affidavit there was and is no substantial dispute of material fact to warrant a confrontational evidentiary hearing. Indeed, in this case a

> trial would be a bootless exercise, fated for an inevitable result but at continued expense for the parties, the preemption of a trial date that might have been used for other litigants waiting impatiently in the judicial queue, and a burden on the court and the taxpayers.

Fontenot, 780 F.2d at 1195.

3. Civil Money Penalty Adjudged

Although there are OCAHO cases in which the ALJ, granting a dispositive motion in favor of liability, severs the issue of civil money penalty for a separate inquiry, that separate inquiry is not necessary where Respondent is on notice that a pending motion addresses the issue of civil money penalty as well as liability. See United States v. Fox, 5 OCAHO 756 at 3 (1995); United States v. Raygoza, 5 OCAHO 729 at 3 (1995) (discussing United States v. Martinez, 2 OCAHO 360 (1991), vacated and remanded in part, Martinez v. I.N.S., 959 F.2d 968 (5th Cir. 1992) (unpublished)).

Complainant's Motion explicitly implicates and addresses both liability and the civil money penalty. Respondent is no less on notice of the peril for failing to contest the Motion as to quantum than she is as to

liability. Accordingly, there is no reason to bifurcate this proceeding and to delay judgment on penalty while now adjudicating liability. Respondent's Opposition neglected to address the civil money penalty despite Complainant's explicit discussion in its Motion, supporting a penalty at the statutory minimum, i.e., $250 per violation. See 8 U.S.C. § 1324c(d)(3). As discussed above, I find the rationale explained in Complainant's pleading provides a sufficient basis on which to adjudicate the appropriate civil money penalty.

III. *Ultimate Findings, Conclusions and Order*

I have considered the Complaint, Answer, motions and accompanying documentary materials submitted by the parties. All motions and other requests not previously disposed of are denied. Accordingly, as previously found and more fully explained above, I determine and conclude the following:

1. that the Motion to Strike Affirmative Defenses is granted;

2. that Respondent has provided only mere allegations and denials in the Response to Complainant's Motion for Summary Decision which are insufficient to overcome Complainant's Motion for Summary Decision under 28 C.F.R. §§ 68.38(a) and (b);

3. that upon considering the documentary evidence submitted, I am unpersuaded that there is a genuine issue as to any material fact and, therefore, Complainant's Motion for Summary Decision is granted;

4. that Respondent possessed, used, and obtained the forged, counterfeited, altered and falsely made documents listed in the Complaint for the purpose of satisfying a requirement of the INA, in violation of § 274C(a)(2) of the INA, 8 U.S.C. § 1324c(a)(2);

5. that it is appropriate and just that Respondent pay a civil money penalty at the statutory minimum in the amount of $500.00 ($250.00 for each violation listed in the Complaint);

6. that Respondent cease and desist from violating § 274C(a)(2) of the INA, 8 U.S.C. § 1324c(a)(2).

This Final Decision and Order Granting Complainant's Motion for Summary Decision "shall become the final agency decision and order of the Attorney General unless, within 30 days, the Attorney General modifies or vacates the decision and order, in which case the decision and order of the Attorney General shall become a final order. . . ." 8 U.S.C. § 1324c(d)(4).

"A person or entity adversely affected by a final order under this section may, within 45 days after the date the final order is issued, file

a petition in the Court of Appeals for the appropriate circuit for review of the order." 8 U.S.C. § 1324c(d)(5).

SO ORDERED.

Dated and entered this 21st day of July, 1995.

MARVIN H. MORSE
Administrative Law Judge