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

August 30, 1996

UNITED STATES OF AMERICA, Complainant,	)	
v.	)	8 U.S.C. §1324c Proceeding
	)	OCAHO Case No. 96C00024
LEONOR YOLANDA ORTIZ, Respondent.	)	

ORDER DENYING COMPLAINANT'S MOTION FOR RECONSIDERATION OF SUMMARY DECISION RULING

I. *Introduction*

Following the filing of the answer to the complaint in this case, on April 16, 1996, Complainant filed a motion for summary decision which was supported by a Declaration of Special Agent Jose Garcia and other extrinsic documents. The motion was opposed by Respondent, who relied in part on her affidavit filed with her answer to the complaint. After considering the parties' arguments, on May 21, 1996, I denied the motion, on the ground that there were disputed issues of material fact, particularly as to Respondent's state of mind, and that such issues could not be resolved on the basis of the record before me at the time. Order Denying Complainant's Motion for Summary Decision, 6 OCAHO 863, at 4–5 (1996).

Subsequently, the parties conducted discovery in this case, and Complainant took the depositions of both Respondent and her husband. On August 15, 1996, Complainant filed a motion for reconsideration of my ruling on the motion for summary decision, relying on the above named depositions, as well as other evidence obtained through discovery. Respondent filed her opposition to the motion on August 16, 1996, contending that the motion merely repeats argu-

ments already rejected and has no basis in fact or in law. This motion was discussed during the telephone prehearing conference held on August 23, 1996, and I deferred ruling on the motion during the conference.

II. *Standards for Summary Decision*

OCAHO Rules of Practice and Procedure authorize an Admiminstrative Law Judge 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 a 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.

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. Co. Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986). The moving party satisfies its burden of proof by showing that there is an absence of evidence to support the non-moving party's case. *United States v. Davis Nursery, Inc.*, 4 OCAHO 694, at 8 (1994) *citing Celotex Corp. v. Catrett,* 477 U.S. 317, 325 (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. *Id.* Failure to meet this burden invites summary decision in the moving party's favor.

III. *Analysis and Decision*

The only remaining material factual issue concerns Respondent's state of mind; i.e., did she know that the Resident Alien Card was forged, falsely made, altered or counterfeit? In deciding the motion for summary decision, the question is whether that issue can be resolved without an evidentiary hearing on the basis of the evidence presented by Complainant in support of its motion.

The discovery and prehearing process has helped to narrow the issues in this case. In fact, the parties have filed a Joint Stipulation of Facts and Law (Stip.) which includes stipulations that Ms. Ortiz is a citizen of Peru; has resided in Minnesota since August 1994; re-

ceived post secondary education in accounting, computer programming and bank administration before leaving Peru in June 1989; her primary language is Spanish, she does not speak English fluently and requires a translator; she applied for and was denied asylum by Canada; she arrived in the United States in April 1994 with her husband and daughter; she obtained Resident Alien Card A095318490 and Social Security Card 620–60–8962 from three unknown individuals at a bilingual church in Minneapolis sometime in May 1994; these individuals represented to her that they were experts at obtaining work authorization documents; she presented these cards to Sathers Candy for the purpose of obtaining employment; she did obtain employment and was employed by Sathers from July 1994 to February 1995; she was apprehended by the INS at Sathers on February 22, 1995, and surrendered Resident Alien Card A095318490 and Social Security Card 620–60–8962 on that date; and the Resident Alien Card and Social Security Card are forged, falsely made and counterfeit. *See* Stip. 1–7, 9, 11–12, 14–19, 21–23. Further, the parties stipulated that Ms. Ortiz never indicated to INS officials that she believed the cards to be forged, falsely made or counterfeit. Stip. 21. Finally, the parties agree that there is no material factual or legal dispute regarding the elements of a section 274C(a)(2) violation with the exception of any reference to "knowingly." Stip. 23. No stipulation is made regarding paragraph C of the complaint or to any reference to the term knowing or knowingly or to the mental state or knowledge of the Respondent. Stip. 24.

In the memorandum filed in support of its motion for summary decision, Complainant contends that the deposition testimony, Agent Garcia's declarations, and the other extrinsic evidence show that there is no genuine issue of fact and that Respondent used, attempted to use, and possessed the forged, counterfeited, altered and falsely made Resident Alien Card knowing that such document was forged, counterfeited, altered and falsely made. Complainant contends that Respondent is a well educated, sophisticated professional woman. Complainant notes that she completed high school and post secondary education in Peru with degrees in accounting, bank administration and computer programming and worked in those fields before leaving Peru. Moreover, Complainant notes that she applied to the Canadian Consulate in Peru to obtain a visa and while in Canada applied for asylum through an attorney. Complainant further notes that the signature on the lower left hand corner of the Resident Alien Card, and the fingerprint on that card, are not hers and that the "arrangers" never took any fingerprints from her.

Moreover, she acknowledges that she never asked the "arrangers" for their names or addresses and never contacted the INS about these documents.

In its current motion and memorandum, and in the prior briefs submitted in support of the first motion for summary decision, Complainant did not cite or discuss OCAHO cases granting summary decision in document fraud cases. Nevertheless, I have reviewed the pertinent case law which have considered summary decision motions filed by the government in document fraud cases brought pursuant to 8 U.S.C. §1324c. In several such cases summary decision has been granted in favor of the government. For example, in *United States v. Galeas,* 5 OCAHO 790, at 7 (1995), summary decision was granted for the United States, but in that case, unlike here, the respondent had admitted that the employment authorization document was false. Similarly, in *United States v. Chavez-Ramirez*, 5 OCAHO 774, at 5 (1995), the respondent's counsel admitted that the respondent *knowingly* used and possessed a forged, counterfeited, altered and falsely made alien registration card for the purpose of obtaining employment in the United States. In *United States v. Mubaraki*, 5 OCAHO 816, at 10 (1995), 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.* Thus, in contrast to the present case, the respondents in the above three cases admitted a knowing violation of 8 U.S.C. §1324c.

In some other cases, summary decision has been granted when the respondent has failed to respond to orders or to discovery requests. In *United States v. Rosas,* 4 OCAHO 702, at 4 (1994), the respondent filed an answer to the complaint but failed to respond to complainant's motion for summary decision and failed to respond to the Administrative Law Judge's orders. Consequently, the Judge concluded that facts submitted by complainant in support of its motion for summary decision were not in dispute. *Id.* at 6–7. Similarly, in *United States v. Noriega-Perez,* 5 OCAHO 811 (1995), the respondent failed to respond to requests for admission or to comply with the Judge's orders. Subsequently, the complainant filed a motion to compel, a motion for sanctions, and a motion for summary decision. After the respondent failed to fully comply with the Judge's orders, the Judge granted the complainant's motion for sanctions and ordered

that each matter of which an admission was requested was deemed to have been admitted by the respondent. *Id.* at 4. Consequently, the Judge concluded that, since the respondent had been deemed to have admitted the requests for admissions, there were no disputed issues of fact, and therefore summary decision was rendered in the complainant's favor as to liability. *Id.* at 12–13.

In other cases the non-moving party either has not responded to the motion for summary decision or has not supported its opposition with affidavits or other extrinsic evidence. In *United States v. Kumar*, 6 OCAHO 833 (1996), the complaint alleged that the respondent had knowingly used and possessed a forged, counterfeited, 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. Flores-Martinez*, 5 OCAHO 733 (1995), the respondent did file a response to the motion for summary decision but did not support the response by any affidavits or other extrinsic evidence.[1] The complainant had moved for summary decision, supported by affidavits and other exhibits. 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.[2] Thus, the Judge found that there were no genuine issues of material fact and granted judgment for the United States. *Id.* at 5–6.

Similarly, in *United States v. Limon-Perez*, 5 OCAHO 796 (1995), the complainant moved for summary decision supported by affi-

[1] Since Complainant's counsel Mr. Louie was government counsel in *Flores-Martinez,* I expect that he is familiar with that case.

[2] As provided by the OCAHO Rules of Practice and Procedure, when a motion for 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. 1268.38(b); *see* Fed. R. Civ. P. 56(e).

davits from a U.S. Border Patrol Agent. The Agent stated that the respondent had freely admitted to him that she was an illegal alien with no right to remain in the United States and had purchased the counterfeit documents described in the complaint, namely a social security card and alien registration card from a street vendor. *Id.* at 7. The affidavit further stated that the respondent admitted she presented the two fraudulent documents to her prospective employer in order to obtain employment. *Id.* While the respondent filed an opposition to the motion, she did not submit any counter affidavit refuting the statements in the Border Patrol Agent's affidavit. The Judge granted summary decision, concluding that complainant had established there was no genuine issue of material fact, and that respondent knowingly used and possessed the counterfeit documents in question. *Id.* at 8.

However, contrary to the facts in *Flores-Martinez* and *Limon-Perez,* here Respondent never indicated to INS officials that she believed the Resident Alien Card was forged, falsely made or counterfeit. Stip. 21. Further, she did submit an affidavit which refutes the allegations of the complaint with respect to her knowledge. Moreover, Ortiz asserts that she did not believe that she was purchasing documents but rather was paying a processing fee, and that she believed the documents were genuine. *See* ¶¶7–9 of Ortiz Affidavit dated April 1, 1996, which is attached to the answer to the complaint.

In adjudicating a summary decision motion, all reasonable inferences must be accorded the non-moving party. *Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). The Court should be cautious in granting a motion for summary decision when resolution of the dispositive issue requires a determination of state of mind and depends on the credibility of witnesses testifying as to state of mind. *Croley v. Matson Navigation Company*, 434 F.2d 73, 77 (5th Cir. 1970). Because determining state of mind requires the drawing of factual inferences, summary judgment usually is an inappropriate means of resolving an issue of this type. *See Pfizer, Inc., v. International Rectifier Corp.,* 538 F.2d 180 (8th Cir. 1976); *Braxton-Secret v. A.H. Robins Company,* 769 F.2d 528 (9th Cir. 1985). Rather, the trier of fact must be afforded the opportunity to observe, during direct and cross-examination, the demeanor of the witnesses whose testimony is relevant to establishing state of mind. *Croley v. Matson Navigation Company*, *supra* at 77; *Consolidated Electric Co. v. United States*, 355 F.2d 437, 438–39 (9th Cir. 1966). The burden on

the party moving for summary judgment to show the absence of any genuine issue is a heavy one in cases involving intent and motive. *Snyder v. Howard Johnson's Motor Lodges,* 412 F. Supp. 724 (S.D. Ill. 1976). While in rare cases it may be possible to resolve credibility and state of mind issues without an evidentiary hearing, for the reasons expressed in this Order, and in my May 21, 1996, Order Denying Complainant's Motion for Summary Decision, 6 OCAHO 863 (1996), Complainant has not met that heavy burden here, and therefore Complainant's motion for summary decision again must be denied.

Although I am denying the motion for summary decision, I will add an additional comment regarding the burden of proof with respect to the knowledge issue. This is not a criminal case, and therefore Complainant does not have to prove its case "beyond a reasonable doubt." Rather, the standard of proof is "preponderance of the evidence," which means that Complainant only needs to show that it is more likely than not that Respondent used, attempted to use, and possessed the Resident Alien Card knowing that it was forged, counterfeited, altered and falsely made. Once Complainant has established a prima facie case of knowledge, the burden will shift to the Respondent to come forward with evidence refuting Complainant's case. Further, as demonstrated by the case law cited in Complainant's pretrial brief, knowledge may be inferred when a party deliberately avoids or ignores evidence of unlawful circumstances. Thus, as stated in *United States v. Stone*, 987 F.2d 469, 471 (7th Cir. 1993), knowledge may be proved by conduct and by all the facts and circumstances surrounding the case, and one may infer knowledge if a party deliberately avoids acquiring full or exact knowledge of the nature and extent of suspicious dealings. *Accord, United States v. Fauls,* 65 F.3d 592, 598 (7th Cir. 1995).

IV. *Conclusion*

For the reasons expressed above, Complainant's motion for reconsideration of motion for summary decision is DENIED.

ROBERT L. BARTON, JR.
Administrative Law Judge