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. 94C00050
ORLANDO DIAZ ROSAS, Respondent.	)	

FINAL DECISION AND ORDER GRANTING COMPLAINANT'S MOTION FOR SUMMARY DECISION

(October 25, 1994)

Appearances:

For the Complainant
John B. Barkley, Esq.
U.S. Department of Justice,
Immigration and Naturalization Service

For the Respondents
Orlando Diaz-Rosas, Pro Se

Before: ROBERT B. SCHNEIDER
Administrative Law Judge

I. *Introduction*

The Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978 (1990)("1990 Act") created § 274C in the Immigration and Nationality Act of 1952 (INA), Pub. L., No. 82-414, 66 Stat. 163 (McCarran-Walter Act; codified as amended at 8 U.S.C. §§ 1101- 1524) which imposes civil penalties for document fraud.[1] This case involves allegations that Orlando Diaz-Rosas ("Respondent" or Diaz-Rosas) violated the civil document fraud provisions of the 1990 Act. Currently before me is Complainant's Motion for Summary Decision. For the reasons stated below the Motion shall be granted.

II. *Procedural History*

On April 19, 1993, Orlando Diaz-Rosas was served with a Notice of Intent to Fine. On May 25, 1993, Respondent requested a hearing on the Notice. On March 21, 1994, a complaint was filed by the United States of America, Department of Justice, Immigration and Naturalization Service ("INS" or "Complainant").

In a single count, the complaint alleges that Respondent knowingly obtained, possessed and used an altered and falsely made Employment Authorization Card (Form I-688A, numbered A070124011) after November 29, 1990 in order to satisfy a requirement of the Immigration and Nationality Act.

The Respondent is charged with violating § 274C(a)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1324c(a)(2). Activities prohibited under this section include:

> . . . any person or entity knowingly . . . 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 chapter . . .

Because of this alleged violation, Complainant requests that this agency order Respondent to pay a fine of $500.00 and direct Respondent to cease and desist from violating § 274C(a)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1324c(a)(2).

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[1] For an excellent discussion on the purpose, affect and application of 8 U.S.C. § 1324c, see Levy, "A Practitioner's Guide to Section 274C: Part One," 94-6 Immigration Briefings (June 1994); and Levy, "A Practitioner's Guide to Section 274C: Part Two," 94-7 Immigration Briefings (July 1994).

Respondent filed his answer to the complaint on April 7, 1994. In his answer Respondent denies the allegations of the complaint and states:

> 1) I would like to point out the fact that I do not understand the [E]nglish language. On the day that I was approached by the Immigration & Naturalization Department Officers, I was being spoken to in [E]nglish, not understanding what was being said ...
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> 2) When I obtained the document, Form I-688A (Employment Authorization), I had no idea that it was fraudulent. I obtained the document not knowing that it was altered and falsely made. The government has no evidence that I knew the I-688A was false. I used the I-688A because I was told it was good.

On April 12, 1994, I issued a notice scheduling a hearing for June 9, 1994, in Phoenix, Arizona.

On May 16, 1994, the Complainant filed a Motion for Summary Decision against Respondent, pursuant to 28 C.F.R. § 68.38. Attached to the Motion are nine supporting attachments.[2]

Respondent received a copy of this Motion. On May 18, 1994, I issued an Order Directing Respondent to Answer Complainant's Motion for Summary Decision and Continuing Hearing. Respondent was also directed to respond to the motion for summary decision by June 10, 1994. Respondent was mailed and served with this Order, but failed to respond.

On July 7, 1994 I issued an Order directing Respondent to Show Cause, on or before July 20, 1994, why he had failed to reply to my May

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[2] The attachments include copies of: (1) Complainant's First Requests for Admissions with Respondent's Answers (Attachment #1, Exhibit #1); (2) a D.O.J. Employment Authorization card in the name of Orlando Diaz-Rosas (Attachment #1, Exhibit #1); (3) the sworn statement of Respondent taken by Special Agent (I.N.S.) Timothy Thomas on March 10, 1993 (Attachment #1, Exhibit #2); (4) a subpoena dated March 12, 1993, addressed to Ms. Debbie Payan, Assistant Personnel Manager or Custodian of Records regarding Woodstuff Manufacturing, Inc., which shows service of process on March 12, 1994 (Attachment #2); (5) an Employment Eligibility Verification Form for Respondent dated July 16, 1993 (Attachment #3); (6) the Affidavit of Ken Ingram, an employee of Woodstuff Manufacturing who processed Respondent's application for employment (Attachment #4); (7) The Record of Deportable Alien (INS Form I-213) for Respondent dated March 10, 1993 (Attachment #5); (8) the Order of the Immigration Judge in Deportation Proceedings for Respondent showing granting of voluntary departure, dated February 21, 1992 (Attachment #6); (9) the Affidavit of Orlando Diaz-Rosas taken on March 10, 1993 by INS officer Kevin R. Carlisle (Attachment #7); (10) the Order to Show Cause and Notice of Hearing for Respondent dated March 11, 1993 (Attachment #8); and (11) the Oral Decision of the Immigration Judge in the Deportation Proceedings of Respondent dated August 31, 1993 (Attachment #9).

18, 1994 Order. This Order was mailed to Respondent, but again he failed to respond.

III. *Factual Background*

OCAHO's regulations require a party opposing a Motion for Summary Decision to plead specific facts showing that there are material facts in dispute. 28 C.F.R. § 68.38(b). The regulations also provide that an Administrative Law Judge may take various actions against a party who fails to follow his orders, including "rule that for the purposes of the proceeding the matter or matters concerning which the order was issued be taken as established adversely to the non-complying party;" and "that a pleading or part of a pleading, or a motion or other submission by the non-complying party, concerning which the order was issued, be stricken, or that a decision of the proceeding be rendered against the non-complying party, or both."[3]

In view of Respondent's failure to respond to the orders described above, including his failure to respond to Complainant's Motion for Summary Decision, I find that the following facts submitted by Complainant in support of its Motion for Summary Decision are not in dispute.

Respondent, a citizen of Honduras, was born on August 13, 1974 in Dali el Paraiso, Honduras. In May, 1992 he entered the United States illegally near Nogales, Arizona. (Motion for Summary Decision, Attachment #5). On March 11, 1993 the INS filed charges against Respondent pursuant to § 241 (a)(1)(B) for his deportation because of illegal entry. On August 31, 1993 an Immigration Judge denied Respondent's application for asylum and voluntary departure and ordered him deported to Hondorus. (Motion for Summary Decision, Attachment #9). Respondent stayed in Honduras approximately three months and then again illegally entered the United States. (Motion for Summary Decision, Attachment #7).

Shortly after his entry into the United States in May, 1992, Respondent purchased the fraudulent Employment Authorization Card (Form I-688A, number A070124011) described in the complaint, from an unknown party for $60.00. (See Motion for Summary Decision, Complainant's First Request for Admissions (hereinafter "Admissions"), Admission No. 2 and Attachment 5). Respondent obtained the card in

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[3] For the complete list of actions the Administrative Law Judge may take against a party failing to follow Court Orders See 28 C.F.R. §§ 68.23(c)(1)-(7).

a bus station and knew the card was counterfeit because the man who sold it to him told Respondent that it was counterfeit. (See Admissions Nos. 3-10 and Motion for Summary Decision, Attachment No. l). Respondent purchased the card because his other card had expired and he needed the counterfeit card in order to work. (Admissions Nos. 11 and 12).

Respondent used this fraudulent employment authorization card when he applied for a job with Woodstuff Manufacturing, Inc. (Admissions Nos. 13-14 and 16). He obtained employment with Woodstuff on or before July 16, 1992. (Admission No. 16).

On March 10, 1993 Respondent was apprehended on an outstanding warrant of deportation at his place of employment. (Motion for Summary Decision, Attachment No. 4). On March 12, 1993, the INS issued a subpoena for the Employment Eligibility Verification Form (Form I-9) of Orlando Diaz-Rosas from Woodstuff Manufacturing, Inc. (Motion for Summary Decision, Attachment #2). The I-9 indicated that Respondent first showed an Employment Authorization Card (A070124011) that expired on "7-11-92." The Form I-9 was completed on "6-10-92." The business made a photocopy of the cards. (Motion for Summary Decision, Attachment No. 3).

The Form I-9 also indicates that a second expiration date was entered, "7-16-93." Attached to the Form I-9 was a photocopy of a second card with the expiration date noted as "7-16-93." (Motion for Summary Decision, Attachment No. 3). That is the counterfeit card that is the basis of the charge in the complaint.

In the employer's affidavit, Ken Ingram states:

> I remember Orlando Diaz presenting his employment authorization form I-688A May 87 (sic) on or about 7-16-92. I made a copy of same card at that time, expiration date 7-16-93. Also I initialed the copy and attached it to his original I-9.

(Motion for Summary Decision, Attachment No. 4).

IV. *Legal Analysis*

A. Guidelines for Deciding Motion for Summary Decision

The rules of practice and procedure for administrative hearings provide for the entry of summary decision, "if the pleadings, affidavits, and material obtained by discovery or otherwise show that there is no genuine issue as to any material fact." 28 C.F.R. § 68.38(c). This rule

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 district court cases. Consequently, federal case law interpreting Rule 56(c) is instructive in determining the burdens of proof and the standards for determining whether summary decision under § 68.38 is appropriate in proceedings before this agency. Egal v. Sears Roebuck and Co., 3 OCAHO 442 at 9 (July 23, 1992); Alvarez v. Interstate Highway Construction, 3 OCAHO 430, at 7 (June 1, 1992).

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, 477 U.S. 242, 248 (1986). In determining whether there is a genuine issue as to a material fact, all facts and reasonable inferences are to be viewed in the light most favorable to the non-moving party. Matsushita, 475 U.S. at 587. Once the movant has carried its 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).

B. Liability

The Respondent is charged with violating § 274C(a)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1324c(a)(2). Activities prohibited under this section include:

> . . . any person or entity knowingly . . . 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 chapter . . .

The complaint alleges that Respondent violated this statute because he "obtained, possessed and used the . . . altered and falsely made document" which was an "Employment Authorization Card (I-688A, A070124011)."

Respondent admits obtaining the card in a bus station. (Admission No. 8). He admits he was told it was counterfeit. (Admission No. 9). He admits that he had previously obtained a valid work authorization card, but that he needed the fraudulent card because his work authorization expired. (Admission No. 15). Respondent, therefore, had actual knowledge that the card was not valid.

The Act provides for a system of employment eligibility verification. § 274A(b)(1) of the Act, 8 U.S.C.§ 1324a(b)(1). The Act specifies that in

order to gain employment in this country, a person must establish employment authorization and identity. An alien registration card is evidence of both identity and employment eligibility. § 274A(b)(1)(B)(v) of the Act, 8 U.S.C. § 1324a(b)(1)(B)(v). Even though Respondent admits that he obtained the card in order to work, the Form I-9 is further evidence that the card was actually used for that purpose by the alien. Respondent, therefore, had admitted the violation and there is no evidence to the contrary.

Respondent's sole defense is that he did not speak English at the time he was interviewed by the agent. See Respondent's Answer. The Respondent gave a statement at that time that mirrors his admissions. The Respondent admits that it is his signature at the end of the statement. The Respondent has now admitted that everything in the statement is true. Therefore, while the INS does not allege that Respondent was interviewed in English, it is unnecessary to reach that issue because Respondent has affirmed his statement in the Admissions.

I therefore find that Respondent, as alleged in the complaint, obtained, possessed and used an altered and falsely made Employment Authorization Card (I-688A, AA070124011), after November 29, 1990, knowing that such document was altered and falsely made for the purpose of satisfying a requirement of the Immigration and Nationality Act. I further find that Respondent's conduct in obtaining, possessing and using the altered and falsely made document as described in the complaint is in violation of § 274C(a)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1324c (a)(2).

C. Civil Money Penalties

Having determined upon the preponderance of the evidence that Respondent has violated 8 U.S.C. § 1324c(a), the statute requires that I issue an order requiring Respondent to cease and desist [in the future] from committing such violations and to pay a civil money penalty in an amount of not less than $250.00 and not more than $2,000.00 for inter alia each document used or instance of use. 8 U.S.C. § 1324c(d)(3).

The statute does not provide any factors to be considered in aggravation or mitigation of this civil money penalty. The statute does provide for an increased range of fines for persons previously subject to a final order, but that is not relevant to this case.

In determining the appropriate amount of civil money penalty in this document fraud case under 8 U.S.C. § 1324c, I will use a judgmental approach under a reasonableness standard and consider the factors set forth by Complainant, any relevant mitigating factors provided by Respondent, and any other relevant information of record. See United States v. Oscar Eduardo Villatoro-Guzman, OCAHO Case No. 93COOO33 (Final Decision and Order Granting Complainant's Motion for Summary Decision) (June 22, 1994) at 15.

Complainant has requested a fine of $500.00. In determining an appropriate civil penalty in this case I have considered a number of factors including: (1) Respondent purchased the card; (2) Respondent is an alien without valid work authorization; (3) Respondent used the card in order to gain employment; (4) Respondent used the alien A-number assigned to him by the Immigration and Naturalization Service on the fraudulent card, and (5) Respondent is a repeat offender of U.S. immigration laws. These factors are more fully discussed below.

1. Respondent purchased the fraudulent card

Respondent claims in his statement that he paid $60.00 for the card. (Motion for Summary Decision, Attachment No. 1, Exhibit No. 2, Q. 19). The purchase of a fraudulent card contributes to the criminal conduct of others in making and selling fraudulent documents in an effort to circumvent the IRCA's employment verification provisions.[4]

2. Respondent is an alien without valid work authorization

Respondent is an illegal alien unauthorized for employment in the United States. (Motion for Summary Decision, Attachment No. 5). Congress has indicated that employers who knowingly hire such individuals should be fined similar amounts ($250.00 to $2,000.00). (§ 274A(e)(4) of the 1990 Act, 8 U.S.C. § 1324a(e)(4)). One of the factors to consider in paperwork verification violations is whether the violation relates to an employee who was unauthorized for employment. (§ 274A(e)(5), 8 U.S.C. § 1324a(e)(5)). It is logical, therefore, for a fine to

[4] Section 274C was created to enhance the enforcement provisions of the Immigration and Nationality Act of 1952 by imposing civil fines to deter users of fraudulent documents and thereby attacking "one of the two greatest weaknesses in our current enforcement efforts: . . . the large number of false documents that now exist which can be used to fraudulently satisfy the employment authorization requirement of employer sanctions." See Yale-Loehr, "Employer Sanctions, Antidiscrimination and Document Fraud," in Understanding the Immigration Act of 1990, 11-1, 11-5 (1991), quoting Senator Simpson's argument in favor of § 274C.

be increased for civil document fraud if the person who used the document is an unauthorized alien.

3. Respondent used the card in order to gain employment

Respondent used the document to continue his employment. The use of the document to obtain employment undermines the verification system established by Congress. The Chief Administrative Hearing Officer stated that a complete failure to complete a Form I-9 is serious and conduct that renders ineffective the Congressional prohibition against the employment of unauthorized aliens. U.S. v. Charles C. W. Wu, 3 OCAHO 434 (July 9, 1992) (Modification of the Decision and Order of the Administrative Law Judge).

> Certainly, . . . a failure to complete any forms I-9 whatsoever fundamentally undermines the effectiveness of the employer sanction statute and should not be treated as anything less than serious.

Id. at 2. Likewise, the use of fraudulent documents by the unauthorized alien is conduct that should be treated as serious. In Wu, the Chief Administrative Hearing Officer affirmed the civil money penalty of $225.00 per violation when the range of penalties is $100.00 to $1,000.00. That is $125.00 over the minimum. Id. at 3.

The fine in Wu was increased 125% over the minimum. The Complainant is requesting that the fine in this case be increased only 100% over the minimum. The fine amount here, $500.00, is therefore justified because of the serious of Respondent's actions in using the fraudulent document to continue his employment.

4. Respondent used the A-number assigned to him by the Immigration and Naturalization Service on the fraudulent card

Respondent used the actual alien A-number assigned to him on the fraudulent card. Respondent had previous work authorization which expired. The fraudulent card had his name, A-number and photo on it, suggesting that he was extensively involved in the creation of the card. Furthermore, the use of a valid A-number undermines the system of verification of identity used by the Service in that it prevents Respondent's fraudulent card from casual detection. This increased involvement is a legitimate reason to increase the fine from the minimum.

5. Respondent is a repeat offender of the immigration laws of the United States

Respondent's immigration history as a repeat offender is relevant in assessing the fines. On February 21, 1992, Respondent was granted voluntary departure to Honduras until April 1, 1992.[5] (Attachment No. 6). Respondent claims to have departed within that time, however, there is no I.N.S. record of that fact. (Attachment No. 7). Respondent then reentered the United States illegally and was once again found deportable by an Immigration Judge. (Attachment Nos. 8 and 9). This time the Immigration Judge refused to give Respondent voluntary departure.[6] Respondent, therefore, is a repeat offender of the immigration laws of the United States.

Unlike employer sanctions, civil document fraud penalties have a direct tie to deportation and exclusion proceedings. [7]An alien who is subject to a final order under civil document fraud is both deportable and excludable. Immigration history, therefore, is relevant to the assessment of a fine because a repeat immigration offender is likely to be a repeat civil document offender. A greater penalty is a more likely deterrent to future civil document fraud. The fine in this case, therefore, should be greater than the statutory minimum. I find that the fine of $500.00 requested by Complainant is fair and reasonable under all the facts and circumstances described herein, and is well within the parameters of the statute.

V. *Ultimate Findings of Fact and Conclusions of Law*

Based on all the evidence of record, as well as the relevant law and my analysis above, I make the following findings of fact and conclusions of law:

1. Mr. Diaz-Rosas knowingly obtained, possessed and used an altered and falsely made document, the Employment Authorization Card (I-688A, A070124011), after November 29, 1990, for

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[5] Voluntary departure is available to an alien in certain cases pursuant to § 244(e) of the Act, 8 U.S.C. § 1254(e).

[6] Respondent appealed the decision of the Immigration Judge. The appeal is pending. However, he admitted deportability at the hearing. (Attachment No. 9).

[7] Exclusion Grounds (§ 212(a)(6)(F) of the Act, 8 U.S.C. § 1182(a)(6)(F)): SUBJECT OF CIVIL PENALTY. -- An alien who is the subject of a final order for violation of § 274C is excludable. Deportation Grounds (§ 241(a)(3)(C) of the Act, 8 U.S.C. § 1251 (a)(3)(C)): DOCUMENT FRAUD. -- Any alien who is the subject of a final order for violation of § 274C is deportable.

the purpose of satisfying a requirement of the Immigration and Nationality Act;

2. Mr. Diaz-Rosas violated § 274C of the Immigration Act of 1990, 8 U.S.C. § 1324c, by knowingly obtaining, possessing and using an altered and falsely made document for the purpose of satisfying a requirement of the Immigration and Nationality Act;

3. Complainant's Motion for Summary Decision is hereby GRANTED;

4. Complainant's requested civil money penalty is reasonable and well within the parameters of the statute;

5. Respondent is ordered to pay a civil money penalty of $500.00.

6. Respondent is ordered to cease and desist from further violations of 8 U.S.C. § 1324c(a);

VI. *Appeal Procedure*

The Chief Administrative Hearing Officer (CAHO) has the discretionary authority, pursuant to §§ 274A(e)(7) and 274C(d)(4) of the Immigration and Nationality Act and 5 U.S.C. § 557(b), to review the Administrative Law Judge's (ALJ) decision and order. 28 C.F.R. § 68.53(a). A party may file with the CAHO a written request for review together with supporting documents. Within thirty (30) days of the date of the ALJ's decision and order, the CAHO may issue an order which modifies or vacates the ALJ's decision and order. However the CAHO is not obligated to issue an order unless the ALJ's order is modified or vacated. 28 C.F.R. § 68.53(a)(1).

If the CAHO issues an order which modifies or vacates the ALJ's decision and order, the CAHO's decision and order becomes the final agency decision and order of the Attorney General on the date of the CAHO's decision and order. If the CAHO does not modify, or vacate, the ALJ's decision and order becomes the final agency order of the Attorney General, thirty (30) days after the date of the ALJ's decision and order. 28 C.F.R. § 68.53(a)(2).

A person or entity adversely affected by a final agency decision and order of the Attorney General respecting an assessment may file, within forty-five (45) days after the date of the Attorney General's final agency decision and order, a petition in the Court of Appeals for the

appropriate circuit for review of the Attorney General's final decision and order. Failure to request review by the CAHO of a decision by the ALJ shall not prevent a party from seeking judicial review. 28 C.F.R. § 68.53(a)(3).

SO ORDERED on this 25th day of October, 1994, at San Diego, California.

ROBERT B. SCHNEIDER
Administrative Law Judge