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TAX LITIGATION ISSUES

Expert Analysis

Immigration Consequences for Convictions for Making False Statements

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In 2010, the U.S. Supreme Court held that competent criminal defense lawyers must advise their clients of the immigration consequences of pleading guilty, and that a lawyer who fails to explain the risk of deportation associated with a proposed guilty plea has not provided "reasonable professional assistance" to his or her client. *Padilla v. Kentucky*, 559 U.S. 356 (2010). Almost two years later, in *Kawashima v. Holder*, 565 U.S. 478 (2012), the Supreme Court held that because the offenses of willfully making and subscribing to a false tax return, in violation of 26 U.S.C. §7206(1), and of aiding and assisting in the preparation of a false tax return, in violation of 26 U.S.C. §7206(2), implicate fraud and deceit, they qualify as aggravated felonies under 8 U.S.C. §1101(a)(43)(M)(i) so long as the offense involved at least $10,000 in tax loss. Id. at 485-86; see Jeremy H. Temkin, *Supreme Court Clarifies Collateral Consequences of Tax Convictions*, NYLJ (March 8, 2012).

Thus, while 8 U.S.C. §1101(a)(43)(M)(ii) defines tax evasion in violation of 26 U.S.C. §7201 as an aggravated felony where the evaded taxes exceed $10,000 (see *Evangelista v. Ashcroft*, 359 F.3d 145 (2d Cir. 2004); see also *Serafino v. Attorney General of U.S.*, 186 Fed. Appx. 302 (3d Cir. 2006) (holding that alien's conviction for tax evasion in violation of 26 U.S.C. §7201 constitutes a crime of moral turpitude rendering him ineligible for deportation relief)), *Kawashima* marked an expansion of criminal tax charges as a basis for adverse immigration consequences.

Since *Kawashima*, the circuit courts have applied the Supreme Court's reasoning not just to defendants convicted of making false statements on tax returns, but also to other white-collar offenders. Indeed, just last month, the U.S. Court of Appeals for the Fifth Circuit affirmed a decision of the Board of Immigration Appeals finding that a lawful permanent resident was eligible for deportation by virtue of his conviction on one count of conspiracy and six counts of aiding and assisting in the preparation of false tax returns. *Muyaba v. Barr*, 792 Fed. Appx. 357 (2020). In reaching that conclusion, the court held that the alien had been responsible for more than $10,000 in actual losses and therefore that

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his offense qualified as an aggravated felony as defined by 8 U.S.C. §1101(a)(43)(M)(i), and moreover that the multiple counts of conviction satisfied the independent grounds for removal of aliens who commit at least two crimes of moral turpitude. Id. at 358. While *Muyaba* seems to be an obvious application of *Kawashima*, practitioners should be mindful of the growing body of case law holding that defendants convicted of various federal and state offenses involving false statements are all subject to deportation and precluded from seeking naturalization.

Other Fraud Offenses

Prior to *Kawashima*, the U.S. Court of Appeals for the Third Circuit had addressed the interplay between §1101(a)(43)(M)(i), which was at issue in *Kawashima* and applies to offenses involving fraud and deceit, and §1101(a)(43)(G), which separately provides that a theft offense punished by more than one year in prison qualifies as an aggravated felony. Ultimately, the court concluded that to qualify as an aggravated felony, a theft offense had to meet both §1101(a)(43)(M)(i)'s requirement that the victim's loss exceeded $10,000, and that the defendant was sentenced to at least one year in prison. *Nugent v. Ashcroft*, 367 F.3d 162, 174-75 (3d Cir. 2004). In *Al-Sharif v. U.S. Citizenship and Immigration Services*, 734 F.3d 207, 212-14 (3d Cir. 2013), however, the court rejected this "hybrid offense" theory, noting that no other court of appeals had adopted it and that the Supreme Court's decision in *Kawashima* "cast[] further doubt" upon its validity. Thus, the Third Circuit held that an appellant alien's prior conviction for conspiracy to commit wire fraud constitutes an aggravated felony under 8 U.S.C. §1101(a)(43)(M)(i), which precluded him from demonstrating the "good moral character" required for naturalization. Id. at 212-13.

Practitioners, and the courts, should also consider the impact these considerations may have on the willingness of alien defendants to plead guilty to charges predicated upon false statements.

In *Nanje v. Chaves*, 836 F.3d 131 (2016), the First Circuit affirmed the rejection of an alien's petition for review of the denial of his application for naturalization noting that persons who have been convicted of aggravated felonies are categorically disqualified from attempting to show the moral character required for naturalization. See 8 U.S.C. §§1101(f)(8), 1427(a)(3). Relying on *Kawashima*, the First Circuit held that the petitioner's conviction for filing a false health care claim constituted a crime of fraud or deceit and therefore an aggravated felony where the loss to the victim or victims exceeds $10,000. Id. at 135.

In *Mowlana v. Lynch*, 803 F.3d 923 (8th Cir. 2015), the court similarly held that an alien's prior conviction for the knowing use, transfer, acquisition, alteration, or possession of benefits in a manner contrary to the statutes and regulations of the Supplemental Nutrition Assistance Program (SNAP) constitutes an aggravated felony under 8 U.S.C. §1101(a)(43)(M)(i). Significantly, the court rejected the petitioner's argument that the statute at issue (7 U.S.C. §2024(b)) does not involve fraud or deceit because it does not require a specific intent to defraud, concluding that "[t]his construction of the aggravated felony provision is foreclosed by *Kawashima*." Id. at 928. The court found that while §2024(b)(1) could be violated in multiple ways, each necessarily involved fraud or deceit by requiring proof that the defendant knowingly provided false information or made a false representation to the government. Id. at 926-27. Based on this finding, the court concluded that the alien petitioner was convicted of an aggravated felony and subject to removal. Id. at 928.

Fraud and Deceit Under State Law

Of course, crimes of fraud and deceit are prosecuted under state as well as federal law, and counsel need to be mindful of the immigration consequences of state crimes. For example, in *Walker v. U.S. Atty.*

Gen., 783 F.3d 1226 (2015), the U.S. Court of Appeals for the Eleventh Circuit held that alien petitioner's conviction for uttering a forged instrument in violation of Florida state law is categorically an aggravated felony under 8 U.S.C. §1101(a)(43)(M)(i), when the conviction involves a loss of $10,000 or more. Based on its reasoning that "[u]ttering a forged instrument necessarily includes deceit because the violator 'utters and publishes as true' something that the violator 'know[s]' to be 'false'" (id. at 1228), the court concluded that the alien petitioner was removable. Id. at 1229. The Eleventh Circuit addressed a similar question last year in the context of a denial of a naturalization application in *Lindo v. Secretary, U.S. Department of Homeland Security*, 766 Fed. Appx. 897 (11th Cir. 2019). There, the court relied on both *Walker* and *Kawashima* to find that because insurance fraud under Florida state law "requires knowingly making a materially false or misleading statement in an insurance claim, it necessarily involves an act of deception." Id. at 900. As a result, the court concluded that the petitioner's insurance fraud conviction involved deceit as a matter of law and constituted an aggravated felony rendering her ineligible for naturalization. Id. at 901.

Materiality Requirement

Lining up against this clear weight of authority, the U.S. Court of Appeals for the Third Circuit found that an alien's conviction for making a false report in connection with a commodities transaction in violation of 7 U.S.C. §§6b(a)(1)(B) and 13(a)(2) did not include materiality as a required element of the offense and therefore did not "involve fraud or deceit" as required by 8 U.S.C. §1101(a)(43)(M)(i). *Fan Wang v. Attorney General of the United States*, 898 F.3d 341 (2018). Specifically, the court declined the government's invitation to import the common law of fraud or deceit, which includes a materiality requirement, onto §6b(a)(1)(B)'s prohibition against willfully making false reports or statements. Id. at 345.

Conclusion

From a practitioner's perspective, while the most direct result of the court's decision in *Kawashima* was to clarify that *Padilla*'s obligation to inform clients of the potential immigration consequences of a guilty plea applies to offenses involving false statements on tax returns, with the passage of time it has become clear that competent criminal defense lawyers also need to consider, and inform their clients of, the potential immigration consequences of a guilty plea to any charge involving a false statement. Although the Supreme Court has not directly faced this issue, all of the Circuit Courts of Appeals to address it have found that convictions for offenses based on material false statements, made either to the government or a private entity, inherently involve fraud or deceit and therefore constitute aggravated felonies where the loss involved is equal to or greater than the $10,000 statutory threshold.

Practitioners, and the courts, should also consider the impact these considerations may have on the willingness of alien defendants to plead guilty to charges predicated upon false statements. In my prior article discussing *Kawashima*, I noted the concern expressed by Justice Ginsberg in her dissent that expanding the definition of an aggravated felony would likely complicate plea discussions in criminal tax cases involving aliens. The circuit decisions since *Kawashima* suggest that Justice Ginsburg's concern may apply well beyond the criminal tax arena and make it much more difficult to achieve pretrial dispositions in false statement cases.