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**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS**

Amicus Invitation No. 15-11-10

Case No.: A088152814

**REQUEST TO APPEAR AS AMICUS CURIAE AND
SUPPLEMENTAL BRIEF OF THE
FEDERATION FOR AMERICAN IMMIGRATION REFORM**

I. INTEREST OF *AMICUS CURIAE*

On behalf of the Federation for American Immigration Reform (FAIR), the Immigration Reform Law Institute (IRLI) respectfully responds to the request by the Board of Immigration Appeals (Board) on December 10, 2015, for supplemental briefing on this matter. FAIR is a nonprofit, public-interest, membership organization of concerned citizens and legal residents who share a common belief that our nation's immigration policies must be reformed to serve the national interest. Specifically, FAIR seeks to improve border security, to stop illegal immigration, and to promote immigration levels consistent with the national interest. The Board has solicited *amicus* briefs from FAIR for more than twenty years. *See, e.g., In-re-Q- --M-T-*, 21 I. & N. Dec. 639 (B.I.A. 1996).

II. ISSUE PRESENTED

FAIR respectfully submits a supplemental brief on the following issue for the Board's consideration in the instant case:

- In determining whether the offense constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43)(M)(i), must the false statement be "material" in order to find the statute "involves deceit?"

III. SUMMARY OF THE FACTS

The Respondent is a citizen of the People's Republic of China who adjusted status to a lawful permanent resident in 2010. (Order Den. Mot. To Reconsid. 1). In November 2014, the Respondent was convicted under 7 U.S.C. §§ 6b(a)(1)(B) and 13(a)(2) for "Making a False Report in Connection with Commodities Transactions." *Id.* As a result of the conviction, the Department of Homeland Security filed a Notice to Appear charging the Respondent with an aggravated felony under 8 U.S.C. § 1101(a)(42)(M)(i). *Id.*

IV. SUMMARY OF THE ARGUMENT

The Respondent's conviction fulfills the "involved deceit" requirement of § 101(a)(43)(M)(i) because the text of subsection (M)(i) does not require materiality. Requiring materiality would conflict with the Supreme Court's interpretation of the statute. If the Board were to impose a materiality requirement, the subsection (M)(i) could no longer be properly interpreted using the categorical method of analysis as announced in *Kawashima v. Holder*, 132 S. Ct. 1166 (2012). In addition to affirming the use of the categorical approach, *Kawashima* also did not impose a materiality requirement on the "involves deceit" language. While the Court held that the underlying conviction, which required materiality, constituted an aggravated felony, it did not then require materiality for all aggravated felonies under § 101(a)(43)(M)(i) going forward.

This interpretation of *Kawashima* is also consistent with the Third Circuit's recent precedent regarding § 101(a)(43)(M)(i). The Third Circuit has analyzed § 101(a)(43)(M)(i) twice since *Kawashima* and neither opinion has required that the deceit involved be material. In fact, the Third Circuit precedent supports a broad interpretation of the "involves deceit" language of § 101(a)(43)(M)(i). Because neither the text nor the precedent that analyzed § 101(a)(43)(M)(i) required materiality, the Board should find that an unwritten materiality requirement has not been imposed.

V. ARGUMENT

A. Requiring A Conviction Under § 101(a)(43)(M)(i) To Present Evidence of Materiality For Crimes That "Involve Deceit" Would Conflict With the Use of the Categorical Approach.

In *Nijhawan v. Holder*, the Supreme Court addressed what the correct approach was to analyze whether a conviction fell within the purview of § 101(a)(43)(M)(i). 557 U.S. 29 (2009).

The Court examined the text of subsection (M)(i) to determine if the traditional categorical approach, the modified categorical approach, or a circumstance-specific approach should be used to evaluate if a conviction constituted an aggravated felony. The Supreme Court stated that a circumstance-specific analysis was necessary to properly evaluate the § 101(a)(43)(M)(i) language “in which the loss to the victim or victims exceeds \$10,000.” *Id.* at 36. The Supreme Court later announced in *Kawashima* that the “involves fraud or deceit” portion of the statute should be analyzed using the traditional categorical approach. 132 S. Ct. 1166, 1172 (2012).

The categorical approach requires a court to examine the elements of the underlying conviction rather than the facts specific to the individual crime. *Id.* The traditional categorical approach compares the elements of the statute forming the basis of the respondent’s conviction with the elements of the “generic” federal crime. *Descamps v. United States*, 133 S. Ct. 2276, 2281 (2013). In *Kawashima*, the Court specifically stated that the categorical approach was to be used to analyze the “involves deceit” language to determine if convictions under 26 U.S.C. 7206(1) and (2) constituted aggravated felonies. 132 S. Ct. at 1172. Therefore, an adjudicator is to use the traditional categorical approach to determine if the elements of the underlying offense fulfill the generic language “involves deceit”; and under *Nijhawan*, an adjudicator is to use a circumstance-specific approach to determine if the underlying crime involved a loss of \$10,000 or more.

If the Board were to read a materiality requirement into the “involves deceit” language of the statute, the Board would be forced to abandon the Supreme Court’s current precedent regarding § 101(a)(43)(M)(i). Requiring materiality when the text of the statute does not would force the Board down one of two paths: (1) the Board would have to reject the categorical approach in favor of a circumstance-specific approach or (2) only those underlying statutes that

included a materiality requirement within the text would be eligible to be considered an aggravated felony. Neither of the two options is viable under the current Supreme Court precedent.

If the Board were to require materiality, the Board would be forced to abandon the categorical approach announced in *Nijhawan* and *Kawashima*. By requiring that the dollar amount provision was to be analyzed using a “circumstance-specific” approach, the Supreme Court in *Nijhawan* indicated that the other phrase it considered, “involves fraud or deceit,” was to be analyzed using the traditional categorical approach. *See* 557 U.S. at 38. This inference was confirmed in *Kawashima*, when the Court specifically required the categorical approach to be used to determine if a conviction “involved fraud or deceit.” 132 S. Ct. at 1172. Not every statute that may involve deceit has a materiality requirement. In those cases, the Court would have to look at the specific circumstances of the conviction to determine if there was deceit involved and if that deceit was material to the false statements and conviction. However, an in-depth examination of the underlying facts directly conflicts with the Supreme Court’s explicit adoption of the categorical for analyzing the “involves fraud or deceit” language.

The second possible approach that would allow the categorical approach to survive would be to find that only underlying statutes that explicitly include “materiality” as an element could constitute an aggravated felony. Specifically, the petitioners in *Nijhawan* argued that Congress intended for subsection § 101(a)(43)(M)(i) to only apply to specific fraud and deceit statutes that textually included a \$10,000 threshold. 557 U.S. at 31. The *Nijhawan* majority specifically rejected this narrow view of § 101(a)(43)(M)(i) and refused to accept that Congress would have limited the statute’s application in such a manner as suggested by the petitioner. *Id.* The Supreme Court found that the dollar amount within the statute was just a circumstance of a more

broadly defined fraud or deceit crime. *Id.* at 32 (emphasis added). As this variation of the second option has already been rejected by the Supreme Court, it cannot be a valid mode of analysis for the “involves deceit” language of § 101(a)(43)(M)(i). .

Similarly, materiality is just a circumstance of one of the many different crimes that could fall under the broad umbrella of crimes involving deceit. FAIR believes this interpretation best supports the broad application of the statute as indicated in Supreme Court precedent. Thus, the Board should find that materiality is not required for convictions “involving deceit.”

B. The Immigration Judge Properly Interpreted *Kawashima v. Holder* To Find That Materiality Is Not Required for Aggravated Felonies Involving Deceit Under § 101(a)(43)(M)(i).

Aggravated felonies under § 101(a)(43)(M)(i) which involve deceit do not require the false statements to be material. While the Respondent may contend otherwise, the Immigration Judge (IJ) properly interpreted *Kawashima v. Holder* to find that materiality only related to the two underlying criminal statutes under which the Respondent was found guilty, and not to 8 U.S.C. § 1101(a)(43)(M)(i). (Order Den. Mot. To Reconsid. 2).

In *Kawashima v. Holder*, the Supreme Court found that a conviction under 26 U.S.C. §§ 7206(1) and (2) involved deceit and thus qualified as an aggravated felony under § 101(a)(43)(M)(i). 132 S.Ct. at 1170. As noted above, the Supreme Court employed the categorical approach to evaluate whether the conviction involved fraud or deceit. *Id.* at 1172. “If the elements of the offenses establish that the Kawashimas committed crimes involving fraud or deceit, then the first requirement of Clause (i) is satisfied.” *Id.*

Section 7206 requires the false statements at issue must concern a material matter in order for an individual to be convicted of a violation. A materiality requirement in the

underlying statute does not impose a materiality requirement on § 101(a)(43)(M)(i). Therefore, the respondent made a materially false statement in fulfillment of the elements of his conviction.

The question presented by the Supreme Court in *Kawashima* did not discuss requiring materiality in the false statement to constitute a conviction involving deceit. Instead, the opinion focused on whether the convictions under 26 U.S.C. § 7206 (1) and (2) generally constituted an aggravated felony under § 101(a)(43)(M)(i). *Id.* at 1170. There is no holding or even analysis in *Kawashima* of whether a materiality requirement should be read into the statutory language.

Oral argument before the Supreme Court also failed to reveal any questioning by the justices pertaining to the inclusion of materiality in § 101(a)(43)(M)(i). Only two references throughout the oral transcript reference materiality. Both mentions of materiality only relate to the underlying statutes' requirement of materiality, not whether the definition of aggravated felony under § 101(a)(43)(M)(i) required materiality. Transcript of Oral Argument at 9, *Kawashima v. Holder*, 132 S.Ct. 1166 (2012) (10-577) (“And you see for both of those you can’t be convicted [under § 7602(1) and (2)] unless you materially and willfully make a false statement.”); *id.* at 28. If the Supreme Court had fundamentally changed the interpretation of § 101(a)(43)(M)(i), by ignoring the plain language of the text and including a materiality requirement that was not included within the text, one could expect a lengthy argument. However, the justices did not discuss materiality within the context of including it as an implicit element of § 101(a)(43)(M)(i).

The Supreme Court’s construction of the use of the term “materiality” was consistent with its use in oral arguments. The *Kawashima* opinion makes no mention of materiality when defining § 101(a)(43)(M)(i). “Rather, Clause (i) refers more broadly to offenses that ‘involv[e] fraud or deceit—meaning offenses with elements that necessarily entail fraudulent or deceitful

conduct.” *Id.* at 1172. The Supreme Court did not include any reference to materiality within its definition of the phrase, “involves fraud or deceit.” “The language of Clause (i) is clear. Anyone who is convicted of an offense that ‘involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000’ has committed an aggravated felony. . . .” *Id.* at 1173.

The Court’s use of materiality is only connected to 28 U.S.C. § 7206. In its analysis of whether § 7206 qualified as an aggravated felony, the Court mentioned materiality as a required element of § 7206. Indeed, each time materiality was used in the majority opinion, a reference was made to § 7206 in the same sentence, but not to § 101(a)(43)(M)(i). *See id.* at 1173-1174. The only time materiality appears in the opinion without a direct reference to § 7206 is when the Court references the Government’s argument. *Id.* at 1172 (“The Government responds that the Kawashimas’ convictions necessarily involved deceit because they required a showing that the Kawashimas willfully made materially false statements.”).

In summary, *Kawashima* held that a conviction under § 7206, which requires materiality, is an aggravated felony under § 101(a)(43)(M)(i), not that an aggravated felony involving deceit under § 101(a)(43)(M)(i) requires materiality. The only references to materiality are directly linked to § 7206. The term materiality was never used in the *Kawashima* opinion so as to even imply that it is a required element for aggravated felonies involving deceit.

C. The Third Circuit’s Precedent Following *Kawashima* Does Not Require Materiality For Aggravated Felonies Involving Deceit.

Since the Supreme Court decided *Kawashima* in 2012, the Third Circuit has addressed whether convictions would qualify as an aggravated felony under § 101(a)(43)(M)(i) on two occasions. In those cases, the Third Circuit has not found that convictions “involving deceit” require materiality in order to be an aggravated felony under the INA.

In *Singh v. Holder*, the Third Circuit analyzed whether a conviction under 18 U.S.C. § 152(3), “to knowingly and fraudulently make a false . . . statement under penalty of perjury in a bankruptcy proceeding” constituted an aggravated felony under § 101(a)(43)(M)(i). 677 F.3d 503, 508 (3d Cir. 2012). The Third Circuit analyzed whether the language, “knowingly and fraudulently” would require finding the intent to defraud or just “an intentional untruth in a material matter to the issue which is itself material.” *Id.* at 509. Any discussion of materiality revolved around fraud, not deceit.¹ Therefore, even if the Third Circuit would have required materiality for convictions involving fraud, this would not imply that convictions involving deceit also required materiality.

Significantly, the court in *Singh* later sidelined its inquiry into fraud to find that regardless of which definition the court used to define defraud, a conviction under § 152(3) would involve deceit. *Id.* Once the court decided that it would use the deceit prong to confirm that the conviction was an aggravated felony under § 101(a)(43)(M)(i), the court did not discuss if it would require materiality. The Third Circuit has not recognized that convictions “involving deceit” require materiality. In *Singh*, the Third Circuit did agree that *Kawashima* had defined deceit as “an act of deceit by falsification, concealment, or cheating.” *Id.* (citing *Kawashima*, 132 S. Ct. at 1172). While the Third Circuit struggled with determining if convictions that involved fraud require materiality, it definitively adopted the *Kawashima* definition of deceit, which does not require materiality. *Id.*

From the Third Circuit’s analytical process, the Board can infer that the Third Circuit views deceit as broader conduct than fraud. In *Singh*, the Third Circuit could not decide on whether fraud should be defined as “intent to defraud” or “an intentional untruth of a matter

¹ The language of § 101(a)(43)(M)(i) specifically uses the disjunctive to describe crimes that involve fraud *or* deceit. As a result, each would require a different analysis.

material to the issue.” *Id.* at 508-09. Without deciding on a definition of fraud, the court determined that the conviction “involved deceit.” *Id.* The Third Circuit deliberately avoided defining fraud by using deceit because the broader definition of deceit would suffice. *See id.* By refusing to define fraud as the “intent to defraud” or “an intentional untruth of a matter material to the issue,” the Board can conclude that an interpretation of “involves deceit” does not include the “intent to defraud” or “an intentional untruth of a matter *material* to the issue.” *See id.* (emphasis added).

In its most recent case pertaining to the interpretation of § 101(a)(43)(M)(i), the Third Circuit abandoned its attempt to apply a hybrid formula for specific classification of convictions and instead analyzed the conviction solely under § 101(a)(43)(M)(i). *Al-Sharif v. U.S. Citizenship & Immigration Servs.*, 734 F.3d 207, 212-13 (3d Cir. 2013).² The Third Circuit found that a wire fraud conviction was an offense that involved fraud or deceit. *Id.* at 213. Notably, the underlying statute’s text did not expressly require materiality. *See* 18 U.S.C. § 371. The court concluded the conviction was an aggravated felony under subsection (M)(i) without analyzing whether the false statement was material to the conviction.

Importantly, when the defendant attempted to argue that § 101(a)(43)(M)(i) was ambiguous and that the rule of lenity should apply, the Third Circuit quickly disposed of this argument. *Id.* at 213-14. The court stated that the rule of lenity did not apply because the language of § 101(a)(43)(M)(i) was clear and unambiguous. *Id.* Thus, the Third Circuit has

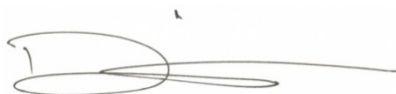
² The hybrid formula required that the alien’s conviction of certain types of fraud must meet the loss requirement of § 101(a)(43)(M)(i) as well as the term of imprisonment under § 101(a)(43)(G). *See Nugent v. Ashcroft*, 367 F.3d 162 (3d Cir. 2004). In abandoning the hybrid formula, the Third Circuit reiterated *Kawashima’s* finding that § 101(a)(43)’s meaning is plain. *Al-Sharif*, 734 F.3d at 213 (“The hybrid offense theory conflicts with the Supreme Court’s *textual* interpretation. . . .”). Textual interpretations look solely at the language of the statute rather than to other sources to guide the interpretation of the statute’s language.

supported the Supreme Court’s textual, unambiguous reading of 8 U.S.C. § 1101(a)(43)(M)(i) which does not include materiality as a requirement.

VI. CONCLUSION

Materiality is not a requirement of an aggravated felony finding under the text of § 101(a)(43)(M)(i). The Supreme Court has announced that the “involves deceit” language is to be interpreted using the categorical approach, and clarified that reading a materiality requirement into the text would conflict with this analytical approach. Additionally, neither the Supreme Court nor the Third Circuit have imposed a materiality requirement. Therefore, the Board should find that § 101(a)(43)(M)(i) does not require materiality for aggravated felonies that “involve deceit.”

Respectfully submitted,



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