U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
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Name: WALTERS, CAROLINE SANDRA... **A 036-223-342**

Date of this notice: 4/26/2018

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Geller, Joan B
Liebowitz, Ellen C
Mullane, Hugh G.

Userteam: Docket

File: A036 223 342 – Fort Snelling, MN Date: APR 26 2018

In re: Caroline Sandra Nelson WALTERS

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Maria T. Baldini-Potermin, Esquire

ON BEHALF OF DHS: Colin P. Johnson
Assistant Chief Counsel

APPLICATION: Termination

The respondent, a native of India, a citizen of the United Kingdom, and a lawful permanent resident of the United States, appeals the Immigration Judge's November 28, 2017, decision ordering her removed from the United States.[1] The Department of Homeland Security ("DHS") opposes the appeal. The appeal will be sustained, and removal proceedings will be terminated.

We review findings of fact determined by the Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in appeals from decisions of Immigration Judges de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

On September 1, 2016, the respondent was convicted of knowingly making a false statement to a financial institution insured by the Federal Deposit Insurance Corporation ("FDIC") in violation of 18 U.S.C. § 1014 (IJ at 1-2; Exh. 3).[2] Based on that conviction, the DHS charged the respondent with deportability as an alien convicted of an aggravated felony; to wit, an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000 (IJ at 1; Exh. 1). Sections 101(a)(43)(M)(i) and 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(43)(M)(i), 1227(a)(2)(A)(iii). The Immigration Judge sustained the charge of deportability (IJ at 2-5). The respondent challenges that determination on appeal. We will sustain the appeal.

[1] All references to the Immigration Judge's decision relate to the November 28, 2017, written decision.

[2] Although the respondent was convicted in the United States District Court for the Northern District of Illinois, her administrative removal proceedings have taken place in Minnesota. Therefore, her removal proceedings fall within the jurisdiction of the United States Court of Appeals for the Eighth Circuit, not the United States Court of Appeals for the Seventh Circuit (Respondent's Br. at 13). *See Matter of Gonzalez*, 16 I&N Dec. 134, 135-36 (BIA 1977); *Matter of Waldei*, 19 I&N Dec. 189, 193 (BIA 1984).

An aggravated felony under section 101(a)(43)(M)(i) of the Act has two distinct elements: (1) it must be a crime that "involves fraud or deceit," (2) "in which the loss to the victim or victims exceeds $10,000." To determine whether a crime involves fraud or deceit, we employ a "categorical approach" in which we focus on the crime's statutory elements "rather than . . . the specific facts underlying the crime." *Kawashima v. Holder*, 132 S. Ct. 1166, 1172 (2012); *Mowlana v. Lynch*, 803 F.3d 923, 925 (8th Cir. 2015). Under this analysis, we ask whether a violation of the statute of conviction "necessarily involves facts that 'involve[] fraud or deceit.'" *Mowlana v. Lynch*, 803 F.3d at 925. By contrast, we use a "circumstance-specific" approach to determine whether the offense involved a loss to a victim or victims exceeding $10,000. *Nijhawan v. Holder*, 557 U.S. 29, 36 (2009); *Sokpa-Anku v. Lynch*, 835 F.3d 793, 795 (8th Cir. 2016). Under this "circumstance-specific" inquiry, the DHS must establish by clear and convincing evidence that the loss is "tied to the specific counts covered by the conviction." *Nijhawan v. Holder*, 557 U.S. at 42 (internal citation omitted); *Tian v. Holder*, 576 F.3d 890, 895 (8th Cir. 2009) ("The parties agree that the amount of the loss attributed to Tian must be tied to his unauthorized access to a computer—the only count of the indictment in which he pled guilty.").

As noted above, the respondent was convicted of violating 18 U.S.C. § 1014. To violate 18 U.S.C. § 1014, one must "knowingly make[] any false statement or report, or willfully overvalue[] any land, property or security, for the purpose of influencing in any way the action of" an FDIC-insured institution. *See also United States v. Alexander*, 679 F.3d 721, 726 (8th Cir. 2012) ("To sustain a conviction under section 1014, the government was required to prove that [defendant] knowingly made a false statement to an FDIC-insured institution with the intent to influence the institution's actions.").

We agree with the Immigration Judge that this offense categorically involves fraud or deceit (IJ at 3). *See, e.g.*, *Sampathkumar v. Holder*, 573 F. App'x 55, 57 (2d Cir. 2014) (18 U.S.C. § 1014 categorically involves fraud or deceit). Specifically, we agree that knowingly providing a false statement or report, or willfully overvaluing land, property, or security for "the purpose of influencing" an FDIC-insured institution "necessarily entail[s] fraudulent or deceitful conduct." *Kawashima v. Holder*, 132 S. Ct. at 1172. On appeal, the respondent claims that her conviction does not categorically involve fraud or deceit because the statute contains the term "false statement," rather than "fraud" or "deceit" (Respondent's Br. at 14). As noted by the Immigration Judge, this argument is foreclosed by the United States Supreme Court's decision in *Kawashima*, which held that an offense may involve fraud or deceit even if the terms "fraud" and "deceit" are absent from the text of the statute and are not formal elements of the crime. *Id.* (holding that "knowingly and willfully submit[ting] a tax return that was false as to a material matter" under 26 U.S.C. § 7206(1) necessarily involves fraud or deceit); *Mowlana v. Lynch*, 803 F.3d at 925.

The respondent also argues on appeal that the Immigration Judge clearly erred in finding that she was convicted of making false statements (plural) to a financial institution, as she pleaded guilty to a count that involved a single false statement (Respondent's Br. at 10). Although the respondent claims this alleged error of fact "is not minimal," she has not explained how pleading guilty to making only a single false statement to a financial institution would remove her conviction from the aggravated felony definition at section 101(a)(43)(M)(i) of the Act (Respondent's Br. at 10). We conclude that it does not, and we therefore conclude that any error

by the Immigration Judge concerning the number of false statements the respondent was convicted of making was harmless.

Although we disagree with the respondent that her offense did not involve fraud or deceit, we agree with her appellate argument that the Immigration Judge erred in concluding that the DHS established by clear and convincing evidence that the loss to the victim of her offense exceeded $10,000 (Respondent's Br. at 10-20; IJ at 3-4). The following facts are not in dispute. A Superseding Indictment charges the respondent and a co-defendant with several fraud crimes in violation of the United States criminal code (Exh. 3 at 35-107). In a Plea Agreement, the respondent pleaded guilty to only Count 15 as stated in the Superseding Indictment (Exh. 3 at 16). Count 15 alleges the following:

> Defendant herein, knowingly made a false statement to Cole Taylor [Bank] the deposits of which were then insured by the [FDIC], for the purpose of influencing Cole Taylor [Bank] to delay enforcement and protection of its rights to the TIF [Tax Increment Financing] project note for the Uptown Goldblatts project issued by the City of Chicago, in that [defendant] told Cole Taylor [Bank] that they were working with Bank of America to resolve the double pledge issue with the Uptown Goldblatts TIF note as part of continued negotiations with Bank of America regarding a loan modification; In violation of Title 18, United States Code, Section 1014.

(Exh. 3 at 95). The conviction documents, including the Second Amended Judgment, state that there was "no loss/no intended loss" to Cole Taylor Bank (Exh. 3 at 1, 4, 7; Exh. 8 at 163).[3] The respondent and her co-defendant were, however, ordered to pay $575,759 in restitution to Bank of America (Exh. 3 at 13-14).

The respondent argues that the "no loss/no intended loss" designation on the Second Amended Judgment establishes that the loss to the victim of her offense, Cole Taylor Bank, did not exceed $10,000 (Respondent's Br. at 10-20). The Immigration Judge acknowledged the "no loss/no intended loss" designation on the Second Amended Judgment, but she found that the $575,750 restitution order, payable to Bank of America, more accurately represented the loss to the victim under section 101(a)(43)(M)(i) of the Act (IJ at 3-4). Although this is a complicated issue, especially due to the particularities of the respondent's pleadings and the determinations of the federal judge, we reach a different conclusion than that of the Immigration Judge.

Under certain circumstances, a federal restitution order may be a persuasive consideration in determining the amount of loss to the victim or victims under section 101(a)(43)(M)(i) of the Act.

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[3] We note that actual loss is not an element of 18 U.S.C. § 1014. *See, e.g.*, *Kay v. United States*, 303 U.S. 1 (1938) (actual damage on part of Home Owner's Loan Corporation is not a necessary element of making false statements for the purpose of influencing the action of a corporation); *United States v. Trexler*, 474 F.2d 369 (5th Cir. 1973), *cert. denied* 412 U.S. 929 (defendant properly convicted of making false statements to federally insured bank to influence action of bank even though there was no actual loss because bank eventually covered its loss by the seizing funds the defendant had in another account).

See Matter of Babaisakov, 24 I&N Dec. 306, 319-20 (BIA 2007) (explaining when a restitution order may be considered for determining loss under section 101(a)(43)(M)(i) of the Act); *see, e.g.*, *Nijhawan v. Holder*, 557 U.S. at 43 (restitution order indicative of loss amount); *Sokpa-Anku v. Lynch*, 835 F.3d at 796 (same); *cf. Singh v. Att'y Gen. of the United States*, 677 F.3d 503 (3d Cir. 2012) (restitution order not indicative of loss amount); *Munroe v. Ashcroft*, 353 F.3d 225 (3d Cir. 2003) (same). In order to be considered, however, the restitution order must be "tied to the specific counts covered by the conviction" and not to "acquitted or dismissed counts or general conduct." *Nijhawan v. Holder*, 557 U.S. at 42 (*citing Knutsen v. Gonzales*, 429 F.3d 733, 739-40 (7th Cir. 2005) ("[T]he court should focus narrowly on the loss amounts that are particularly tethered to convicted counts alone.")); *Sokpa-Anku v. Lynch*, 835 F.3d at 795-96; *Matter of Babaisakov*, 24 I&N Dec. at 319 (explaining that a restitution order must be assessed "with an eye to what losses are covered"). Under *Nijhawan*, a restitution order must also be assessed in the context of "conflicting evidence" in the record. *Nijhawan v. Holder*, 557 U.S. at 43.

In this case, the respondent was convicted under 18 U.S.C. § 1014 for making a false statement to Cole Taylor Bank. Cole Taylor Bank is the "victim" of the respondent's offense for purposes of section 101(a)(43)(M)(i) of the Act. The conviction documents establish that Cole Taylor Bank suffered no intended or actual loss resulting from the respondent's false statement. The restitution order indicates that the respondent and her co-defendant must pay $575,759 in restitution to Bank of America. Although Bank of America may be considered a "victim" for purposes of a federal restitution order, it is not a "victim" for purposes of section 101(a)(43)(M)(i) of the Act in this case because the respondent's conviction under 18 U.S.C. § 1014 did not involve making a false statement to Bank of America. In other words, the restitution order is not tethered to Count 15 in the Superseding Indictment, the only count for which the respondent pleaded guilty. Indeed, the conviction records reveal that the $575,759 restitution order is tied to Counts 6 and 8, counts that were dismissed as part of the respondent's plea agreement (IJ at 4; Exh. 8 at 163). *See Sokpa-Anku v. Lynch*, 835 F.3d at 796 ("In this case, we need not decide whether *totally unrelated* fraud counts in a single conviction may be aggregated."). Accordingly, we conclude that the restitution order in this case does not represent the loss amount for purposes of section 101(a)(43)(M)(i) of the Act.

For the aforementioned reasons, we conclude that the respondent's fraud conviction did not result in a loss to the victim or victims exceeding $10,000. Therefore, she is not removable as an alien convicted of an aggravated felony under sections 101(a)(43)(M)(i) and 237(a)(2)(A)(iii) of the Act. Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is sustained, and removal proceedings are terminated.

FOR THE BOARD

Board Member Hugh G. Mullane dissents without further opinion.