U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

FRIDAY, JAMES OGUNYEMI
68170-066/A078-510-752
PIKE COUNTY CORRECTIONAL FACILITY
175 PIKE COUNTY BLVD.
LORDS VALLEY, PA 18428

DHS LIT./York Co. Prison/YOR
3400 Concord Road
York, PA 17402

Name: FRIDAY, JAMES OGUNYEMI

A 078-510-752

Date of this notice: 1/30/2017

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:
Pauley, Roger
Creppy, Michael J.
Mullane, Hugh G.

Userteam: Docket

File: A078 510 752 – York, PA

Date: JAN 3 0 2017

In re: JAMES OGUNYEMI FRIDAY a.k.a. Friday James

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Jeffrey T. Bubier
Senior Attorney

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Termination

In a summary decision issued on September 13, 2016, an Immigration Judge ordered the respondent removed from the United States. The respondent thereafter filed a timely motion to reconsider, but the Immigration Judge denied that motion in a decision dated September 21, 2016. The respondent now appeals from both of the aforementioned decisions. The Department of Homeland Security ("DHS") opposes the appeal. The appeal will be sustained and the record will be remanded.[1]

The respondent is a native and citizen of Liberia and a lawful permanent resident of the United States. On October 30, 2013,[2] the respondent was convicted in a Federal District Court in Pennsylvania of 26 counts of aiding and assisting in the preparation and filing of materially false tax returns in violation of 26 U.S.C. § 7206(2) (Exh. 2, tab D). The court did not order the respondent to pay restitution; however, the Presentence Investigation Report ("PSR") prepared in anticipation of the respondent's sentencing indicates that in 2009 and 2010 the respondent

[1] The respondent's request for a waiver of the appellate filing fee is granted.

[2] The respondent claims in his brief that he was convicted in October 2012 rather than October 2013, and he challenges the accuracy of the removal charge on this basis (Resp. Brief at 14-16). However, the respondent's Judgment of conviction clearly identifies October 30, 2013, as the date when the court entered its judgment (Exh. 2, tab D, at 13). *See* section 101(a)(48)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(48)(A) (defining "conviction," in pertinent part, as "a formal judgment of guilt of the alien entered by a court"). Accordingly, we conclude that the DHS provided the respondent with proper notice of the factual basis for the removal charge.

assisted in the preparation and filing of about 2,000 false tax returns, causing losses of more than $1.2 million to the Internal Revenue Service ("IRS") (Exh. 2, tab D, at 23, 24). Based on the foregoing evidence, the DHS alleged—and the Immigration Judge found—that the respondent is removable from the United States under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien convicted of an "aggravated felony"—i.e., an offense that involves fraud or deceit in which the loss to the victim or victims exceeds $10,000. *See* section 101(a)(43)(M)(i) of the Act, 8 U.S.C. § 1101(a)(43)(M)(i).

On appeal, the respondent argues that the Immigration Judge erroneously relied on the PSR to establish the amount of loss resulting from his conviction (Resp. Brief at 7-14).[3] According to the respondent, a PSR is not admissible as a "record of conviction" in removal proceedings (Resp. Brief at 7-8). Further, he contends that the particular PSR at issue here does not reliably establish that the amount of loss specified therein was "tethered" to his convicted conduct (Resp. Brief at 8-10).

The respondent's challenge to the admissibility of the PSR is unpersuasive because the DHS did not proffer it as evidence of his "conviction"; the Judgment was sufficient for that purpose (Exh. 2, tab D, at 13-14). Instead, the PSR was offered as proof of the amount of loss resulting from his offense of conviction—a factual matter that is proven through ordinary evidence, without regard to the constraints imposed by the "categorical" approach. *Nijhawan v. Holder*, 557 U.S. 29, 40 (2009). Like any other item of evidence, a PSR is admissible in removal proceedings so long as it is probative and its admission is not fundamentally unfair. *See Matter of J.R. Velasquez*, 25 I&N Dec. 680, 683 (BIA 2012); *Matter of D-R-*, 25 I&N Dec. 445, 458 (BIA 2011).

The assessment that the respondent's conduct caused a loss of approximately $1.2 million to the IRS is well explained and substantiated within the PSR itself, and an addendum to the PSR reflects that the respondent preserved no objection to that assessment (Exh. 2, tab D, at 35). Thus, we discern nothing fundamentally unfair about the Immigration Judge's admission and consideration of the PSR. *See Kaplun v. Att'y Gen. of U.S.*, 602 F.3d 260, 266 (3d Cir. 2010) (approving an Immigration Judge's consideration of a PSR to establish victim loss under section 101(a)(43)(M)(i) of the Act where no objection was made to the contents of the PSR during the criminal proceedings); *Matter of Babaisakov*, 24 I&N Dec. 306, 319-20 (BIA 2007) (same).

The *admissibility* of the PSR is not the end of the matter, however. In addition, the respondent argues that the PSR does not establish by clear and convincing evidence that the $1.2 million in IRS losses recited therein was tethered to his convicted conduct. We agree, and therefore we will sustain the appeal and remand the record for further proceedings.

It is well settled that losses attributable to charges or conduct that did not result in conviction may not be used to calculate the loss to a victim under section 101(a)(43)(M)(i) of the Act.

[3] The respondent does not dispute that the offense defined by 26 U.S.C. § 7206(2) "involves fraud or deceit."

See Nijhawan v. Holder, *supra*, at 42 (citing *Alaka v. Att'y Gen. of U.S.*, 456 F.3d 88, 106-108 (3d Cir. 2006), *as amended* (Aug. 23, 2006)); *see also Sokpa–Anku v. Lynch*, 835 F.3d 793, 795-96 (8th Cir. 2016); *Matter of Babaisakov*, *supra*, at 320, 321 n.12. Thus, to carry its burden of proof the DHS must establish by clear and convincing evidence that the respondent's *offenses of conviction* caused more than $10,000 in victim losses.

The PSR indicates that the IRS sustained a loss of about $1.2 million as a result of the respondent's filing of approximately *2,000* false tax returns (Exh. 2, tab D, at 23, 24); however, the respondent's *conviction* pertained to only *26* of those 2,000 returns (Exh. 2, tab D, at 13). Neither the Judgment nor the PSR specifies the increment of loss attributable to the 26 false returns the respondent was *convicted* of preparing, and the DHS has not yet filed a copy of the Indictment or any other evidence that might shed light on that narrow question.

As the PSR does not establish that more than $10,000 of the IRS's $1.2 million loss was attributable to conduct encompassed by the 26 counts under which the respondent was convicted, we will sustain the respondent's appeal, vacate the Immigration Judge's removal order, and remand the record for further proceedings. On remand, the Immigration Judge shall give the DHS an opportunity to submit supplemental evidence bearing on the loss question, shall permit the respondent to reply to any such evidence, and shall conduct such further proceedings and enter such further orders as he deems necessary and appropriate thereafter.[4]

ORDER: The appeal is sustained, the Immigration Judge's decision is vacated, and the record is remanded for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

[4] As the validity of the removal charge is an open question, we conclude that it would be premature to address the respondent's appellate arguments bearing on his eligibility for relief from removal (Resp. Brief at 16-18).

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
3400 CONCORD ROAD, SUITE 2
YORK, PA 17402

Law Offices of Stephen C. Fleming
Fleming, Stephen C
119 South Burrowes Street
Suite 601
State College, PA 16801

IN THE MATTER OF FILE A 078-510-752 DATE: Sep 21, 2016
FRIDAY, JAMES OGUNYEMI
68170-066

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO: BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
5107 Leesburg Pike, Suite 2000
FALLS CHURCH, VA 22041

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
3400 CONCORD ROAD, SUITE 2
YORK, PA 17402

_X_ OTHER: IJ ORDER DENYING MOTION TO RECONSIDER

JKW
COURT CLERK
IMMIGRATION COURT FF

CC: DISTRICT COUNSEL, C/O YORK PRISON
3400 CONCORD ROAD
YORK, PA, 174020000

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
YORK, PENNSYLVANIA

IN THE MATTER OF	**IN REMOVAL PROCEEDINGS**
	A 078-510-752
FRIDAY, James Ogunyemi	
Respondent	

ON BEHALF OF RESPONDENT
Stephen Fleming
119 S. Burrowes Street, Ste. 601
State College, PA 16801

ON BEHALF OF DHS
Office of Chief Counsel
Immigration and Customs Enforcement
York, PA 17402

DECISION OF THE IMMIGRATION JUDGE

AND NOW, this 21st day of September 2016, upon consideration of Respondent's Motion to Reconsider, and all other relevant papers of record, it is **ORDERED** that the Motion for Reconsideration is **DENIED**.

Further, the Court finds that the previous Immigration Judge adequately explained his reason for sustaining the charge of removability. Nevertheless, while the explanation given orally on May 10, 2016 at Respondent's Master hearing was adequate, the Court finds appropriate to reiterate that reasoning.

The Supreme Court has held that, in analyzing whether a crime is an aggravated felony under INA § 101(a)(43)(M), courts must use a categorical approach as to whether the crimes is a fraud or deceit crime, and a circumstance specific approach regarding whether the loss to the victim(s) exceeds $10,000. Nijhawan v. Holder, 557 U.S. 29, 38 (2009). The Third Circuit has determined that "[t]he amount of restitution ordered as a result of a conviction may be helpful to a court's inquiry into the amount of loss to the victim if the plea agreement or the indictment is unclear as to the loss suffered." Munroe v. Ashcroft, 353 F.3d 225, 227 (3d Cir. 2003). Further, the Board of Immigration Appeals has held that restitution can be used to calculate loss for purposes of INA § 101(a)(43)(M), insofar as the restitution ordered reflects the actual loss

resulting from the offense. Matter of Babaisakov, 24 I&N Dec. 306 (BIA 2007). "[T]he Immigration Judge is not restricted to 'record of conviction' evidence but may consider any evidence admissible in removal proceedings bearing on the loss to the victim." *Id.* at 307. Thus, although Respondent argued that the presentence investigation report should be viewed as comparable to a police report and thus not considered as part of the record of conviction, the presentence investigation report is appropriately considered in a calculation of the amount of loss.

Convictions under 26 U.S.C. § 7206(2) have been held to be crimes of fraud or deceit within the meaning of INA § 101(a)(43)(M)(i). Kawashima v. Holder, 132 S.Ct. 1166 (2012). Tax crimes are included in subsection (i); the phrase "loss to the Government" in subsection (i) is comparable to "loss to the victim" in subsection (ii). *Id.* Thus, the fact that the victim of Respondent's crime was the government does not preclude a finding that the conviction was an aggravated felony under subsection (i).

Here, the judgment in Respondent's criminal case indicates that he was not ordered to pay any restitution or fines. Ex. 2-D, p. 17. He was obligated to pay an "assessment" of $2,600. *Id.* However, the presentence investigation report states that "the Internal Revenue Service suffered a loss of $1,215,562" as a result of Respondent's preparation of false and fraudulent income tax returns. *Id.* at 24. The addendum to the presentence report states that Respondent did not object to any part of the report. *Id.* at *35*. The failure to object to the amount of loss is significant in Respondent's case, as the calculation resulted in a 22-level upward sentencing adjustment. *See Id.* at 24.

Respondent's conviction of Aiding and Assisting in the Preparation and Filing of Materially False Tax Returns, in violation of 26 U.S.C. § 7206(2), is a crime of fraud or deceit which did result in a loss to the government of over $10,000, thus rendering his conviction an aggravated felony under INA § 101(a)(43)(M)(i).

21 SEPT 11
Date

John Ellington
Immigration Judge