



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*

**Marie E. Galindo
The Galindo Law Firm
3800 E. 42nd Street
Chase Plaza Building
Odessa, TX 79762**

**DHS/ICE Office of Chief Counsel - ELP
1545 Hawkins Blvd.
El Paso, TX 79925**

Name: URIAS-BAEZA, FELICITAS

A 041-776-048

Date of this notice: 7/9/2013

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:
Greer, Anne J.**

**schuckec
User team: Docket**

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**URIAS-BAEZA, FELICITAS
A041-776-048
8915 MONTANA AVE
EL PASO, TX 79925**

**DHS/ICE Office of Chief Counsel - ELP
1545 Hawkins Blvd.
El Paso, TX 79925**

Name: URIAS-BAEZA, FELICITAS

A 041-776-048

Date of this notice: 7/9/2013

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Greer, Anne J.

schuckec
Userteam: Docket

Falls Church, Virginia 22041

File: A041 776 048 – El Paso, TX

Date: JUL - 9 2013

In re: FELICITAS URIAS-BAEZA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Marie E. Galindo, Esquire

ON BEHALF OF DHS: Meggan G. Johnson
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] -
Convicted of aggravated felony (as defined in section 101(a)(43)(M)(i))

Lodged: Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] -
Convicted of two or more crimes involving moral turpitude (not sustained)

APPLICATION: Termination of removal proceedings

The respondent, a native and citizen of Mexico, appeals from the Immigration Judge's February 6, 2013, decision. In that decision the Immigration Judge found that the respondent's June 2012 wire fraud conviction, in violation of 18 U.S.C. § 1343,¹ for which she was ordered to pay \$13,150 in restitution, was an offense that was related to fraud. The Immigration Judge concluded that the respondent was removable as charged 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, to wit, "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).

The issue before us is whether the respondent's 2012 wire fraud conviction renders the respondent deportable under section 237(a)(2)(A)(iii) of the Act, as an alien convicted of an aggravated felony; namely, "an offense that ... involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000." The respondent, on appeal, does not dispute that her wire

¹ This provision states that whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

fraud is an offense that “involves fraud or deceit” within the meaning of section 101(a)(43)(M)(i) of the Act. However, she challenges the Immigration Judge’s determination that her offense of conviction caused a loss to victims of more than \$10,000.

In the section 101(a)(43)(M)(i) context, calculating the amount of victim loss resulting from a fraud crime entails a “circumstance-specific” inquiry, not a “categorical” one. *Nijhawan v. Holder*, 557 U.S. 29, 36 (2009); *see also Matter of Babaisakov*, 24 I&N Dec. 306, 317-320 (BIA 2007). An Immigration Judge’s findings regarding the amount of victim loss are inherently factual; as such, they are entitled to deference on appeal, subject only to clear error review. *Cf. United States v. Lawrence*, 189 F.3d 838, 844 (9th Cir. 1999); *see also* 8 C.F.R. § 1003.1(d)(3)(i). As with any other fact offered to establish removability, moreover, the Department of Homeland Security (the DHS) must prove the amount of victim loss by clear and convincing evidence. Section 240(c)(3)(A) of the Act, 8 U.S.C. § 1229a(c)(3)(A).

With the foregoing principles in mind, we discern no clear error in the Immigration Judge’s determination that the respondent’s offense of conviction resulted in a loss to her victims of more than \$10,000. As the Immigration Judge determined, the respondent was convicted of wire fraud as charged in Count 1 of the Federal indictment. The losses described in the plea agreement were stipulated, for sentencing purposes, to be “in the neighborhood of \$10,000” with all other sentencing issues, including restitution, to be determined by the court (Exh. 5, Tab B; I.J. at 4). The judgment of the court was that the respondent, having been found guilty of wire fraud, in violation of 18 U.S.C. § 1343, as charged in Count 1, “shall pay restitution in the amount of \$13,150.00” to her victim (Gp. Exh. 3; I.J. at 5). The Immigration Judge noted that the amount of the loss in the Midland, Texas, Police Report was exactly the same as in the court judgment (I.J. at 6). The evidence provided ample support for the Immigration Judge’s loss calculation.

In challenging the Immigration Judge’s loss calculation, the respondent argues that she was the only one charged in a scheme which involved others, and she was not individually liable for the total amount of the loss. However, by pleading guilty to wire fraud, and agreeing to pay restitution in the amount of loss, to be determined by the court at sentencing, the respondent assumed criminal responsibility for the whole loss resulting from the scheme, and thus it is that loss amount which matters for purposes of section 101(a)(43)(M)(i). *See, e.g., James v. Gonzales*, 464 F.3d 505, 511-512 (5th Cir. 2006); *Khalayleh v. INS*, 287 F.3d 978, 980 (10th Cir. 2002).

The respondent also points out that in the complete background of facts which lead to her conviction, as reflected in the Midland, Texas, Police Report, there are a number of uncertainties with respect to the amount of the alleged loss. We find little relevance in that assertion. The pertinent issue under section 101(a)(43)(M)(i) is how much loss was determined to have resulted from the respondent’s offense of conviction, a loss that she was ordered to repay.

We find that \$13,150, the amount of restitution ordered, represents clear and convincing evidence of the loss resulting from the respondent’s offense that involved fraud or deceit. In conclusion, not only are we able to discern no clear error in the Immigration Judge’s determination that the respondent’s offense of conviction caused a loss to victims in excess of \$10,000, but we find no legal error in the methodology employed by the Immigration Judge to arrive at that determination. Because we agree that the respondent was convicted of wire fraud

in a scheme that resulted in a loss to a victim that totals more than \$10,000, we will affirm the Immigration Judge's determination that the respondent's conviction qualifies as an aggravated felony under section 101(a)(43)(M)(i) of the Act. Accordingly, we need not address the remaining arguments presented on appeal; the appeal will be dismissed.

ORDER: The appeal is dismissed.



FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
8915 MONTANA AVENUE
EL PASO, TX 79925

GALINDO, MARIE E. ESQ.
3800 E. 42ND STREET, STE 610
ODESSA, TX 79762

IN THE MATTER OF
URIAS-BAEZA, FELICITAS

FILE A 041-776-048

DATE: Feb 7, 2013

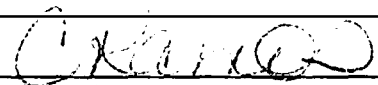
UNABLE TO FORWARD - NO ADDRESS PROVIDED

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
P.O. BOX 8530
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
8915 MONTANA AVENUE
EL PASO, TX 79925

OTHER: _____


COURT CLERK
IMMIGRATION COURT

FF

CC: HUNT, WILLIAM TA-EPD
1545 HAWKINS, SUITE 275
EL PASO, TX, 79925

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
Immigration Court
El Paso, Texas

A-041 776 048

In the Matter of

In Removal Proceedings

Felicitas Urias-Baeza,
Respondent

CHARGE(S): 237(a)(2)(A)(iii)(aggravated felony fraud offense)
LODGED: 237(a)(2)(A)(ii)(two or more crimes involving moral turpitude)
MOTION(S): Respondent's Motion to Terminate
Respondent's Motion to Continue Removal Proceedings (to
attempt post-conviction relief in the U.S. District Court)
FOR RESPONDENT: Marie E. Galindo, Esq.
FOR DHS: Meggan G. Johnson, Esq.

DECISION AND ORDER OF THE IMMIGRATION JUDGE

1. Background

On August 6, 2012, the Department of Homeland Security (DHS) issued a Notice to Appear (exhibit 1) charging respondent with being a resident alien who is deportable on account of a conviction for an aggravated felony as defined in section 101(a)(43)(M)(i) of the Immigration & Nationality Act (Act). On September 20, 2012, the DHS lodged an additional factual allegation in a form pleading (form I-261)(exhibit 2), alleging the amount of funds in question exceeded \$10,000.00. This form pleading also moved to strike allegations 6 and 7 contained in the Notice to Appear.¹ Finally, on December 21, 2012, the DHS lodged an additional charge of removal (exhibit 4) under section 237(a)(2)(A)(ii)(relating to two or more crimes involving moral turpitude).

¹ Those allegations related to another criminal conviction in the state court for "tampering with government records."

During a master calendar hearing respondent admitted to being a native and citizen of Mexico, and not a citizen or national of the United States. Respondent also admitted to acquiring permanent resident alien status on or about February 22, 1989. Respondent additionally admitted to having been convicted in the United States District Court for the Western District of Texas for the offense of Mail Fraud, in violation of 18 USC 1343, for which the term of imprisonment was "time served." Because the DHS had struck allegations 6 and 7 from the Notice to Appear, the respondent did not plead to these factual allegations. Respondent also pled to the lodged allegation relating to loss to victim in excess of \$10,000, contained in exhibit 2, and specifically denies this factual allegation, and also specifically denies the charge of removal under section 237(a)(2)(A)(iii).

A merits hearing was held on December 28, 2012, to receive and consider evidence submitted. The DHS submitted several exhibits but no testimonial evidence. The respondent did not testify or otherwise submit any documentary or testimonial evidence. The parties were also asked to submit written closing statements regarding the evidence submitted. This decision follows.

2. The Law

(I) Aggravated Felony Charge Section 101(a)(43)(M)(i)

The DHS seeks to remove respondent alleging she was convicted of an aggravated felony relating to "an offense that...involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000..." This charge requires the DHS to prove, by clear and convincing evidence the following elements:²

- A conviction (as defined in section 101(a)(48))
- For an offense involving fraud or deceit
- Where the loss to the victim or victims exceeded \$10,000.00

In determining whether a *conviction* exists, and whether such conviction is an *offense relating to fraud or deceit*, the categorical approach is used. In divisible cases where the statute includes offenses that involve fraud or deceit, and offenses that do not, the modified categorical approach may be used. Calculation of the amount of loss is, however, not subject to the categorical approach because the loss to the victims is not an element of the criminal case. Nijhawan v. Holder, 557 U.S. 29 (2009); Matter of Lanferman, 25 I. & N. Dec. 721 (BIA 2012); Matter of Babaisakov, 24 I. & N. Dec. 306 (BIA 2007). The fact of loss must still be proved by the government by evidence that is

² Because respondent has admitted alienage, the court will dispense with this element of the government's burden.

clear and convincing. Babaisakov, supra.

**(II) Two or More Crimes Involving Moral Turpitude
Section 237(a)(2)(A)(ii)**

The DHS lodged this charge in a form I-261 filed with the court on December 21, 2012, and marked exhibit 4 by the court on December 28, 2012. However, the DHS previously withdrew the factual allegations that support this charge of removal in a form I-261 filed with the court on September 20, 2012 and marked exhibit 2 by the court on November 8, 2012.

As such, the court finds the DHS has waived this charge by not alleging any factual allegations that support it. The court, thus, makes no decision on this charge of removal.

3. Arguments By Counsel

Respondent's attorney submitted her closing statement first, and argues that use of the restitution amount should not be used because there was no clear and convincing evidence in the record to show respondent *received* any of the amounts allegedly sent to bank accounts in the name of Estela Arellano or Yesenia Campa. Additionally respondent argues that the plea agreement more specifically identifies the actual loss, wherein it states that the actual loss is in the "neighborhood of \$10,000."³

DHS argues in its closing statement that in the court's judgment, respondent was ordered to pay restitution in the amount of \$13,150 to the victim of respondent's fraud. The DHS acknowledges respondent's plea agreement, but notes that the amount identified in the plea agreement is fluid, and does not suggest that respondent was not otherwise responsible for the restitution based upon her fraudulent activity. Additionally, the DHS disputes the respondent's assertion that the record contains no clear and convincing evidence that respondent received the amounts sent to the bank accounts of Estela Arellano and Yesenia Campa, arguing *inter alia* that the police report also makes clear that the respondent gave the victim Ms. Campa's and Ms. Arellano's bank account numbers and that all of the money the victim sent was for, and at the request of, the respondent.

4. Exhibits

- Exhibit 1 is the Notice to Appear
- Exhibit 2 is form I-261 striking allegations 6 & 7 (relating to a state conviction for tampering with government records) and inserting a new allegation 6 (relating to

³ The court notes respondent did not assert in her closing statement that respondent's conviction does not relate to fraud or deceit.

loss to the victim).

- Exhibit 3 is a copy of a Judgment in a Criminal Case from the Western District of Texas showing respondent's conviction for wire fraud under 18 USC 1343, her sentence to "time served," and the restitution order for \$13, 150.00. The exhibit also contains the indictment, showing the original four counts of wire fraud, and the fraudulent scheme respondent pled guilty to committing. Also attached is a copy of the Midland, Texas Police Department investigation into this case.⁴
- Exhibit 4 is form I-261 lodging a new charge of removal under section 237(a)(2)(A)(ii), but relating to factual allegations that had been struck by prior DHS counsel.
- Exhibit 5, although titled a Bond Motion, contains respondent's submission of her plea agreement in the above case. The exhibit also contains an un-translated Spanish language document relating to the victim in the criminal case.
- Exhibit 6 is a copy of respondent's visa "face sheet" showing birth in Mexico, and a copy of the form I-213 (record of deportable alien) prepared by DHS officials in the respondent's current removal proceedings.
- Exhibit 7 is a certified copy of respondent's criminal conviction for wire fraud; a certified copy of the indictment for wire fraud; a certified copy of a criminal conviction relating to allegations 6 and 7 (which were struck by DHS counsel in exhibit 2); and a modified conviction record relating to the same case.
- Exhibit 8 is another copy of the Midland Police Department investigators report in the respondent's wire fraud case

5. Findings of Fact

The court makes the following findings of fact:

- Respondent is not a citizen or national of the United States (respondent's admissions)
- Respondent is a native and citizen of Mexico (respondent's admissions; exhibit 6)
- Respondent is a lawfully admitted permanent resident alien (respondent's admissions; exhibit 6)
- Respondent was convicted on June 7, 2012 in the Western District of Texas federal court for Wire Fraud, in violation of 18 USC 1343, and sentenced to time served (respondent's admissions; exhibits 3 & 7)
- Respondent's conviction for wire fraud under 18 USC 1343 is an "offense relating to fraud or deceit." Khalayleh v. INS, 287 F.3d 978 (10th Cir. 2005).
- Respondent was ordered to pay financial restitution to the victim in the amount of \$13,150 by the court (exhibit 3 & 7)
- Respondent's plea agreement identified the loss to the victim "in the neighborhood of \$10,000..." (exhibit 5, Plea Agreement, page 5)

⁴ The court notes respondent did not submit any rebuttal evidence to this investigative report.

- This stipulation in the plea agreement is included in the portion of the plea agreement regarding potential sentencing of the respondent and does not appear to be an agreement by the government that respondent was not responsible for a greater loss to the victim
- Respondent's plea agreement also identified the fraudulent scheme wherein respondent directed the victim to wire "payments to the bank account of two of respondent's relatives" (exhibit 5, Plea Agreement, page 3)
- The two relatives mentioned in the plea agreement are identified in the Midland Police Department report as Estella Arellano, respondent's niece, and Yesenia Campa, another of respondent's nieces (exhibit 3 & 8)
- The police report further identified various transfers of funds from the victim to respondent, Yesenia Campa and Estella Arellano, from Western Union and Citibank Global Transfer, the amounts of which total \$13,150.00.
- The respondent has submitted no rebuttal evidence (other than to argue that the plea agreement shows loss of \$10,000 or less)
- The court finds the actual financial loss to the victim due to respondent's fraudulent scheme was \$13,150.00

6. Analysis

As noted by the DHS in their closing statement, the federal court ordered respondent to pay restitution in the amount of \$13,150.00. The calculation of this amount is not articulated by the court in the judgment, and the DHS did not submit a copy of the Presentence Investigation Report to show how this calculation was made (like was done in Babaisakov, supra). Instead, the DHS submitted a copy of the Midland Police Department's investigative report on the underlying fraudulent activities of the respondent. This report identified each transaction, amount, and ultimate payee, as well as verifying that the payees other than respondent were receiving the monies on behalf of respondent even though deposited in the payee's bank accounts under their own names.

Respondent has not submitted any rebuttal evidence other than the plea agreement, indicating a stipulation by the U.S. Attorney's office and respondent's criminal defense attorney that the loss was "in the neighborhood of \$10,000" when discussing respondent's potential sentence to confinement. Respondent declined to testify regarding her part in this fraudulent scheme or to refute any of the facts articulated in the indictment or police investigative report.

The court finds the plea agreement loss calculation is too variable to be a reliable indication as to the actual loss as the court cannot ascertain what the parties meant by the term "in the neighborhood of \$10,000." Additionally, the statement of loss in the plea agreement does not appear to be an actual factual stipulation regarding the exact loss to the victim, but merely an amount used by the respondent's defense attorney and the U.S. Attorney's office to properly classify the respondent's "points" in

an effort to have the court agree to the ultimate sentence of "time served" rather than an actual sentence of confinement to the Bureau of Prisons.

Because the amount of loss to the victim calculated in the Midland Police department investigative report is exactly the same as the amount calculated by the federal court in its restitution order, the court finds that the loss articulated in the police report and restitution order is more reliable than the loss calculation contained in the plea agreement. The court further finds that this evidence is clear and convincing evidence of the victim's loss during respondent's fraudulent scheme.

7. Respondent's Motion to Continue For Post-Conviction Relief/Modification of Judgment

Respondent, indirectly, requests a continuance of these removal proceedings to seek post-conviction relief if the court is inclined to find respondent removable from the United States for an aggravated felony.⁵ The respondent also seeks a continuance of these removal proceedings to "modify the erroneous Judgment of Conviction as to restitution." The motion will be denied.

Respondent has not submitted any evidence that the consequences of her plea of guilty to the facts of this case were not fully explained to her by her criminal defense attorney.⁶ Respondent has also not submitted any evidence that she has filed any motions or petitions with the District Court seeking a withdrawal of her guilty plea under Padilla v. Kentucky, 130 S.Ct. 1473 (2011), or to modify her judgment as to the restitution order under 28 USC 2255.

As such, on this record, the court finds respondent's motion for continuance fails to establish good cause for such motion under 8 CFR part 1240.6.

8. Conclusion

The court has found the DHS withdrew (and did not re-file) factual allegations relating to the charge of removal under section 237(a)(2)(A)(ii). Therefore, the court makes no decision regarding this lodged charge of removal.

However, the court finds respondent has been convicted of an offense relating to fraud or deceit in which the loss to the victim was over \$10,000. The court further finds respondent's conviction is an aggravated felony under section 101(a)(43)(M)(i) of the Act. Because the crime was committed after respondent was admitted as a legal permanent resident, it renders her deportable as charged in the Notice to Appear under

⁵ This motion is contained within the body of respondent's closing statement on fourth page, just before the conclusion of her legal argument.

⁶ An affidavit from respondent's criminal defense attorney would have been nice.

section 237(a)(2)(A)(iii) of the Act.

Respondent has identified no relief from removal within the power of this court to consider, and the court is not aware of any relief from removal. Therefore, the court will enter the following orders:


ORDER: Respondent's motion to continue these removal proceedings while respondent seeks post-conviction relief in the federal court is denied.

FURTHER

ORDER: Respondent's motion to terminate removal proceedings is denied.

FURTHER

ORDER: Respondent is ordered removed from the United States to Mexico on the charge contained in the Notice to Appear (but not the lodged charge).



William Lee Abbott
Immigration Judge

Date: February 6, 2013