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Immigration Case Notes for Massachusetts Criminal Defense Attorneys
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U.S. Court of Appeals for the First Circuit

Nanje v. Chaves, 836 F.3d 131 (1st Cir 2016)

The appellant-plaintiff, Janarius Nanje, is a legal permanent resident. In 2006, he pled guilty to charges of filing a false healthcare claim and larceny. As part of his plea, he agreed to pay $12,000 in restitution to Harvard Pilgrim Health Care (HPHC). Subsequently, Mr. Nanje applied for citizenship, but his application was denied based on this prior conviction – in particular, it was denied based on the fact that his conviction for submitting a false claim was for an aggravated felony. Mr. Nanje's appeal of that decision was denied by the federal district court and he sought review by the First Circuit.

Under the immigration statute, an offense that involves fraud or deceit in which the loss to the victim exceeds $10,000, is an aggravated felony. 8 U.S.C. §1101(a)(43)(M)(i). An aggravated felony is a permanent statutory bar to citizenship (as well as a ground of removal). The critical issue to the parties was whether or not Mr. Nanje's conviction was in fact an aggravated felony. There was no dispute as to whether Mr. Nanje's conviction involved fraud or deceit, but the issue raised was whether Mr. Nanje could show by a preponderance of the evidence that the amount of loss was $10,000 or less.

Although the initial plea agreement simply indicated that restitution of $12,000 was due on both charges, in the years following his plea, after restitution had been paid in full and the case dismissed, Mr. Nanje attempted to revise the docket sheets such that the amount of loss was distributed among the charges and would fall under the $10,000 threshold. After multiple post-conviction motions, the state court revised the docket to indicate that Mr. Nanje had paid $6,000 in restitution for the larceny charge and $6,000 for the false claim charge. The court subsequently issued an order specifically stating that the amount of loss attributable to the fraud charge was no more than $6,000. Arguing that he had not been convicted of a single fraud offense where the loss was greater than $10,000, Mr. Nanje re-applied for citizenship. His application was again denied and the agency explained that the allocation of the restitution was irrelevant because the conviction records showed that Mr. Nanje engaged in a single scheme of conduct where the actual loss to the victim exceeded $10,000.

Unlike in most circumstances, where a court must apply the categorical approach to determine whether the state offense meets the federal ground of removal, in order to determine whether a fraud offense involved a loss exceeding $10,000 the court may look to the facts and circumstances underlying the offense and not just at the elements of the criminal statute. *Nijhawan v. Holder*, 557 U.S. 29 (2009). Just as the District Court had done, the First Circuit relied upon *Nijhawan* to find that all of the circumstances surrounding the conviction indicated that the amount of loss was at least $12,000. Furthermore, the Court rejected the notion that "non-essential statements of fact in an order issued years after a defendant's sentence has been imposed and carried out are entitled to dispositive weight in the *Nijhawan* circumstance-specific calculus." The Court further discredited the revised docket sheets saying that restitution award had clearly been manipulated for the sole purpose of influencing immigration and therefore it could not be considered as controlling. For these reasons, Mr. Nanje was unable to show that his conviction was not an aggravated felony.

Practice Tip - This case is a good reminder to try to limit the amount of restitution placed on fraud offenses. When it is not possible to keep the amount under $10,000 in total, the defendant is more likely to get the benefit of the doubt if the initial plea divides up the amount of loss rather than needing to revise the amount in post-conviction motions. Defense counsel should from the beginning try to minimize the amount of loss and/or structure the plea in a safer manner.

Board of Immigration Appeals

Matter of Chairez-Castrejon, 26 I&N Dec 819 (BIA 2016)

This is the third time this issue of the categorical approach has been before the Board. The decision clarifies that the understanding of "divisibility" which was laid out in *Descamps v. United States*, 133 S. Ct. 2276 (2013) and *Mathis v. United States*, 136 S. Ct. 2243 (2016) applies in immigration proceedings.

Generally, the categorical approach is used to determine whether a particular state criminal conviction matches the federal criminal grounds of deportability or inadmissibility. In *Descamps*, the Supreme Court clearly reasserted that under the categorical approach, the court is not concerned with what the defendant actually did, but only with the "elements," those facts that must be found beyond a reasonable doubt by a unanimous jury, of the statutory offense. Under this approach, courts look to the minimum conduct necessary to satisfy the elements of state offense and if those elements do not match the federal removal ground, the noncitizen is not subject to removal – so long as there is a "realistic probability" that a person would be prosecuted for that minimum conduct. Only when a statute is considered "divisible" – i.e. only when a statute includes two or more different crimes - may courts look beyond the statute to the record of conviction (a limited class of documents, such as a complaint or indictment, docket sheet, and plea colloquy, but not the police report) to determine the specific offense for which the individual was convicted. This secondary approach is called the modified categorical approach.

After *Descamps* there was debate between the circuits about how to determine whether a statute was divisible. Some courts concluded that a statute was divisible only if it included different crimes with different "elements", whereas other courts concluded that so long as the statute described an offense with different means of committing the offense listed in the alternative (even if the jury would not have to decide unanimously and beyond a reasonable doubt with respect to those particular means) such an offense would be considered divisible. In *Mathis*, the Supreme Court held that disjunctive language alone does not make a statute divisible unless each statutory alternative defines and independent element of the offense. The Court defined "elements" as the "constituent parts of a crime's legal definition—the things the prosecution must

prove…beyond a reasonable doubt." *Mathis*, 136 S. Ct. at 2248. Means are those parts of an offense that do not need to be found by a jury. *Id*.

The respondent in this case was a lawful permanent resident who had been convicted of discharge of a firearm under Utah law and sentenced to five years. The immigration judge had found him removable based on a conviction for an aggravated felony, specifically, a crime of violence with a sentence of a year or more. However, using the analysis set forth in *Mathis*, the Board determined that the Utah statute was overbroad, but not divisible and therefore the offense could not be an aggravated felony.

Practice Tip - The ongoing debate over how to apply the categorical approach in immigration court has largely been settled by this decision. The Board holds that they will follow the practice set forth in *Descamps* and *Mathis*. Having accepted the *Descamps* and *Mathis* methods, this decision may impact which Massachusetts criminal offenses fall into the various categories of inadmissibility and deportability. When analyzing the immigration consequences of criminal convictions, the IIU can help understand and apply these decisions. As always, appointed counsel should seek out the assistance of the IIU or other immigration expert to determine the consequences for individual clients.

Matter of Ibarra, 26 I&N Dec. 809 (2016)

In this case, the respondent, a lawful permanent resident, was convicted of two counts of robbery by force under California law. He received a sentence of three years committed. The Department of Homeland Security argued that this was an aggravated felony theft offense. Under immigration law, a theft offense is defined as the taking of property without consent of the victim with the intent to permanently deprive. The Immigration Judge in this case found that the California statute in question covered the taking of property from another *with consent* induced by the wrongful use of force or fear. Because the statute required consent, even if coerced, the IJ found that it did not meet the definition of theft and therefore could not be an aggravated felony theft offense. The Department of Homeland Security appealed.

The Board applied the categorical approach to determine whether the California statute matched the generic definition of theft under the immigration statutes. The Board held that "there is no meaningful difference between a taking of property accomplished against the victim's will and one where his 'consent' to parting with his property is coerced through force, fear, or threats." *Ibarra* at 811. Therefore, the Board held that the generic definition of theft includes extortionate takings in which consent is coerced by force or fear.

Practice Tip – This decision simply supports what most practitioners already recognized which is that induced consent is not the same as volitional consent and could thus be considered a theft offense. This means that MA larceny and robbery statutes will continue to be considered theft offenses and can become aggravated felonies with a term of imprisonment, suspended or committed, of a year or more.