UNITED STATES DEPARTMENT OF JUSTICE
EXCECULTIVE OFFICE FOR IMMIGRATION REVIEW
ATLANTA IMMIGRATION COURT

IN THE MATTER,

FILE NO: 205 085 029

OF

IN REMOVAL PROCEEDINGS

ROGERIO CHAVES SCOTTON,

Respondent.

_____/

RESPONDENT'S MOTION TO APPLY FOR ADJUSTMENT OF STATUS (I-485) CONCURRENTLY WITH A WAIVER UNDER SECTION 212(h) BEFORE THE IMMIGRATION COURT

Come now, the Respondent Rogerio Chaves Scotton, ("SCOTTON"), by and through pro se, respectfully moves this Honorable Immigration Court with this motion to apply for adjustment of status (I-485) concurrently with a waiver under section 212(h) before this Immigration Court.

As an initial matter, Scotton respectfully requests, as a pro se litigant that this Court construe his motion liberally, pursuant to *HAINES v. KERNER, 404 U.S. 519, 92 S. Ct. 594, 30 L. Ed. 2d 652*

(1972), accepts all factual allegations contained herein and as detailed under this motion as true, and evaluates all reasonable inferences derived from those facts in the light most favorable to the Respondent. *TANNENBAU v. UNITED STATES, 148 F.3d 1262 (11th Cir. 1998)*.

I. INTRODUCTION

1. The Respondent contends that an I-130 petition was filed on his behalf by his U.S. mother on July 11, 2018 and such application was approved on July 31, 2019. (See, hereto hereby approved notice, receipt # LIN1890519581).

2. ICE lodges a detainer against the Respondent on May 3, 2012 to begin the Respondent removal only due he was charged with an offense on Southern District Florida pursuant to 18 U.S. C. § 1341.

3. On February 26, 2014, Scotton lost a trial and was therefore adjudicated guilty of twenty-seven counts of mail fraud pursuant to 18 U.S.C. § 1341, in which was wrongfully described as theft of shipping services affecting FedEx, UPS and DHL companies. See, *UNITED STATES v. ROGERIO CHAVES SCOTTON, CASE NO: 12-Cr-60049-KMW*.

Scotton filed timely his notice of Appeals, and on April 12, 2016, the Eleventh Circuit affirmed the conviction.

4. On October 20, 2016, Scotton submitted his petition for Writ of Certiorari without the benefit of counsel and was denied on December 12, 2016.

5. On December 11, 2017, Scotton filed his petition for habeas corpus pursuant to 28 U.S.C. §2255 which the Southern District of Florida wrongfully denied on December 28, 2017. Scotton

appealed the Court's error and on March 7, 2019, the Eleventh Circuit vacated the Southern District of Florida Court's denial of Scotton's section 2255.

6. On April 19, 2019, the Southern District of Florida reopened Scotton's section 2255, in which the government subsequently responded by filing a 91 pages to the Court. Scotton's 2255 is currently pending the Court's resolution.

7. On February 27, 2020, Scotton was released from federal prison and subsequently placed under the ICE custody based on an detainer lodged against him on May 3, 2012.

The Department of Homeland Security ("DHS") claimed that the Respondent is an "aggravated felony" under the INA Act 1101(a)(43)M)(i) based solely on the restitution order by the Southern District of Florida as a judicial finding.

8. On March 20, 2020, the Respondent submitted his petition for judicial review on the Appeal Court for the Eleventh Circuit challenging the DHS argument that the Respondent is an "aggravated felony" under § 1101(a)(43)(M)(i).

9. On March 20, 2020, the Respondent filed to the Middle District of Georgia his habeas corpus pursuant to 28 U.S.C. § 2241 requesting his release from ICE custody which could be clearly determined under the law that in this case constitute double incarceration. Under this petition to adjustment of status, the Respondent outline that he is currently incarcerated under eight years old ICE detainer. ICE ignored and failed to prosecute such detainer upon the Respondent's request.

10. The Respondent removal would continue to bring "EXTREME HARDSHIP" (as this double incarceration has) to his U.S. Citizen mother who is extremely ill and is legally blind. The Respondent also asserts that his U.S. stepfather has been also subjected to "extreme hardship" as

he was enduring numerous medical issues. (See, Carlos Colon and Marina Colon affidavit and medical records hereto hereby attached).

11. The Respondent has very strong family ties in the United States and have live here for over thirty (30) years.

12. The Respondent did not pose any danger to any person or any danger to the community. In fact, the Respondent was a community leader during his career as of professional race car driver. (See, hereto hereby Respondent race career news and events history).

13. The Respondent is requesting the exercise of discretion under § 212(h) of the Act.

II. OVERVIEW

The Respondent Rogerio Chaves Scotton came to the United States for the first time on November 13, 1989 through New York, JFK under B1/B2 visa. He is a native and citizen of Brazil.

On May 3, 2012, ICE lodged a detainer against Scotton after he was charged with an offense pursuant to 18 U.S.C. § 1341 on March 8, 2012 by a federal indictment. This despite innocent until proven guilty.

On May 8, 2014, Scotton was sentenced in the Southern District of Florida to a total term of 108 months imprisonment and three years of supervised release and an judicial finding order to pay $2,582,935.60 in restitution for the alleged offense of mail fraud under § 1341.

Scotton was sent to an private prison namely D. Ray James C.F. located at Folkston, Georgia.

Scotton attempted to contact the Department of Homeland Security ("DHS") as well as ICE/ERO officer at the Savannah officer on many occasion to prosecute the detainer which was lodged against him on May 3, 2012. None of his attempts was responded.

On November 13, 2019, DHS charged the Scotton with administrative removability and SDDO Jeffrey Grant found Scotton removable for having been convicted of an "AGGRAVATED FELONY" pursuant to 101(a)(43)(M)(i) of the INA act 1101(a)(43)(M)(i).

Scotton asserts that his conviction did not qualify as an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(M)(i) solely based on the loss amount stated in the restitution order.

This Honorable Court will see that the restitution order was the only document that referred to any loss in his conviction of mail fraud and as such was based on judicial finding regarding conduct and loss amounts that were not charged, proven or admitted in the indictment.

Because the sentencing Court based its restitution order on judicial findings made by lower standard of proof, it was an error for the DHS officers to conclude that the restitution order, standing alone, constituted "clear, unequivocal, convincing" proof of the loss necessary under 1101(a)(43)(M)(i) to transform Scotton's conviction an aggravated felon under the INA act.

The Respondent's U.S. citizen mother filed on his behalf an I-130 application which was approved on July 31, 2019. This approval notice allows Scotton to adjust his immigration status under 212(h). Specially because his removal from United States would bring extreme hardship to his U.S. citizen mother who is legally blind and very ill.

The DHS also claiming that the Respondent entered the United States on August 2008 without inspection. However, on September 14, 2009, USCIS granted the application I-140 that was filed

by a NASCAR Racing Team on Scotton's behalf. Around the year of 2008, the Respondent also was granted by USCIS an visa for individuals with extraordinary ability, "VISA O1".

On November 01, 2010, USCIS also grant and issue on Scotton's behalf an EMPLOYMENT AUTHORIZATION CARD which was also renewed on August 23, 2011. This clear shows that the Respondent was not living under the shadows and thus, have attempted and/or have obtained some status in the United States.

Although the Respondent attempted to resolve his immigration issue before the expiration of his imprisonment terms, ICE ignored the detainer act as well as laws, regulations and Scotton's numerous requests. The urge to resolve his immigration issue in a time mater was to avoid unnecessary waste of tax resource and this DOUBLE INCARCERATION which he is now enduring.

The Respondent contends that he is denied meaningful opportunity to access the Courts by way of unreasonably frustrating his ability to perform proper research to located the proper laws and case citations to support this memorandum of law; to obtain and inspect the necessary evidence; to obtain the assistance of an attorney and to confront the validity and accuracy of the DHS underlying charges in the removal proceedings as well as this ICE incarceration. As a direct result, not all jurisdictional and other legal citations etc., are provided in this memorandum of law and some of those provided are from memory or personal notes. Thus, the Respondent asks that these circumstances not prejudice this petition and relief hereby requested.

The Respondent also respectfully reminds the Court that this is a Pro Se litigation that should be deserving of the less stringent standard of consideration mandated under *UNITED STATES v. JONES, 125 f.3D 1418, 1428 (11TH Cir. 1997)*, held that a Pro Se prisoner's pleading is held to a

"less stringent standards than formal pleadings drafted by lawyers*". HAINES v. KERNER, 404 U.S. 519, 520, 92 S> Ct. 594, 30 L. Ed. 2d 652 (1972)(per curiam)*, and the Court "must look beyond the labels of petitions filed by Pro Se inmates to interpret them under whatever statute would provide relief". See, *MEANS v. ALABAMA, 209 F.3d 1241, 1242 (11th Cir. 2000)(per curiam)*; *ANDREW v. UNITED STATES, 373 U.S. 334, 337-38, 83 S. Ct. 1236. 10 L. Ed. 2d 383 (1963)*. [A]djudication upon the underlying merits of claims is not hampered by reliance upon the title's Respondents put upon their documents. (quotation omitted). This practice acknowledges the importance of allowing meritorious claims to be heard and decided regardless of mere pleading defects introduced by legally unsophisticated litigants.

The Respondent is now inadmissible under section 237(a)(2)(iii) and 237(a)(2)(i) of the Act. The Respondent is now applying for relief from removal, therefore he must file a concurrent adjustment of status application, before the Immigration Court.

III. ARGUMENT FOR RELIEF FROM REMOVAL

Under section 212(h) of the Act; 8 C.F.R. § 1245, 1(F)(2013), "providing that an adjustment of status application in the sole method of requesting the exercise of discretion under § 212(h) of the Act". As it relates to the inadmissibility of an alien in the United States has consented that a "waiver' under § 212(h) is provided for certain exclusion grounds.

When an alien like the Respondent Rogerio Chaves Scotton is applying or re-applying for a visa and for admission to the United States. In this case, the respondent Rogerio Chaves Scotton is in the United States and is applying for adjustment of his status, concurrently with a waiver for relief from removal. The Respondent contends that he can prove "EXTREME HARDSHIP" to

himself , to his U.S. citizen mother and stepfather at an Master Hearing before this Honorable Court.

The Respondent's U.S. citizen Mother is 76 years old and has several illness and is on several medications. She has had surgery for colostomy, for colon perforation and two incisional hernias repair surgery times. Respondent's mother recently has stent proceeding which the last done on October of 2019. She has a history of hemorrhagic retinal stroke. She has been declared legally blind with now only the ability to see shadows. She has a history of hypothyroidism and malignity hypertension. (See hereto hereby doctors and medical records).

In the *MATTER OF Y-N-P, 26 I&N, Dec. 10, 16 (BIA 2012)* "stating that an inadmissible alien in removal proceedings ca only file a section 212(h) waiver application to adjust his status under section 245 of the Act 8 U.S.C. § 12255 (2006) or one of the other regulation provision. *MATTER OF BUSNTAMANTE, 25 I&N 25 Dec. 564, 567 (BIA 2011)*, which states that "the purpose of section is to overcome a ground of inadmissibility that would otherwise preclude an alien line the Respondent Rogerio Chaves Scotton from obtaining admission or adjustment of his status".

In this case, the Respondent Rogerio Chaves Scotton is applying for adjustment of status by way of his U.S. citizen Mother Marina Colon who has filed on his behalf. He also seeks a waiver, regarding his inadmissibility based on his conviction and the "extreme hardship" his removal would bring to himself and to his U.S. citizen Mother and U.S. citizen stepfather. His mother needs him to take-care of her on a daily basis which currently his stepfather has hard-time doing. She is unable to travel to Brazil or even travel to Georgia during the Respondent incarceration for a visitation due her medical condition. Respondent's stepfather, Carlos Manuel Colon also has health issues and his suffering from Alzheimer. (See, Carlos Colon medical record hereto hereby).

The Respondent also request that this Court consider the "emotional and "psychological" impact that his removal would bring to his ill mother Marina Colon.

The Respondent's mother has started the process of applying for a family-sponsored Immigration visa petition, I-130 which was approved on July 31, 2019. See, C.F.R. § 204 19(e)(1). And which is why this Court should apply the [LIFE] Act to the Respondent's case. The Legal Immigration Family Equity [LIFE] Act states that certain family-based immigration can entered or remain in the United States while their immigration petition is pending.

The Respondent has lived in the United States for some thirty (30) years. He did not know another county and only when to Brazil on two occasions. He was community leader as records clearly shows here.

IV. CRITERIA FOR EXTREME HARSHIP

The Respondent Rogerio Chaves Scotton contends that he can demonstrate under section 244(a) of the Act that his deportation would in fact, result in fact, result in "EXTREME HARDSHIP" to his U.S. citizen mother Marina Colon who is 76-year-old ill and legally blind, and the *MATTER OF ANDERSON, SUPRA*, should apply to his case. When assessing hardship, this Court should also apply *SANTANA FIGUERRA v. INS, 644 F.2d 1354, 1357 (9th Cir. 1981)*; *BRIDGES v. WIXON, 326 U.S. 135, 147, (1945)(quoting NG FUNG HO v. WHITE, 259 U.S. 276, 284 (1922)*. The Respondent also request a stay of removal.

V. **WHETHER THE RESPONDENT IS AN AGGRAVATED FELON UNDER 8 U.S.C. § 1101(a)(43)(M)(i) OF THE INA ACT.**

On November 2013, January 17, 2020 and March 13, 2020 Department of Homeland Security ("DHS") issue two notices against the Respondent , I-851 and I-851A. DHS alleged under the notices that the Respondent is an aggravated felon pursuant to § 1101(a)(43)(M)(i) which the conclusion was based only on the restitution amount imposed by the Southern District Court as judicial finding. See, *UNITED STATES v. ROGERIO CHAVES SCOTTON, case no: 12-CR-60049-KMW*.

On November 24, 2019, the Respondent filed to the Appeal Court his petition for judicial review the DHS final administrative removal order. See, *ROGERIO CHAVES SCOTTON v. WILLIAM P. WILLIAM, case no: 19-14756*.

On January 17, 2020, the government respond and asked the Appeal Court to dismiss the Respondent's petition based on lack of jurisdiction claiming that all removal order against the Respondent were cancelled.

On January 29, 2020, the Respondent reply to the government's motion to dismiss. This because despite the government's assertion that all orders were cancelled. However, on November 29, 2020 the DHS served the Respondent with a new notice of final administrative removal order containing the same wrongfully charge which such was issued on the same January 17, 2020 that the government informed the Appeal Court that all removal orders was cancelled.

On March 13, 2020, ICE Deportation Officer came to the Irwin detention center to serve the Respondent a new notice of Final Administrative Removal Order contained the same wrongfully

charges pursuant to section 1101(a)(43)(M)(I), stating that he is an aggravated felon. The Deportation Office refuse to provide the Respondent with copies of the final orders.

On March 20, 2020, the Respondent submitted to the Appeal Court a new petition for judicial review.

The DHS charges the Respondent with administrative removability and the DHS officer found the Respondent removable for having been convicted of an "AGGRAVATED FELONY".

The Respondent asserts that his conviction did not qualify as an "aggravated felony" under 8 U.S.C. § 1101(a)(43)(M)(i) based on the loss amount stated in the restitution order alone.

This Honorable Court will see that, the restitution order was the only document that made reference to any losses in his conviction of mail fraud and as such was based on judicial finding regarding conduct and losses amounts that were not charged, proven or admitted in the indictment.

Because the sentencing Court based its restitution order on judicial findings made by lower standard of proof, it was an error for the DHS officers to conclude that the restitution order, standing alone, constituted "clear, unequivocal convincing" proof of the loss necessary under 1101(a)(43)(M)(i) to transform the Respondent's conviction an aggravated felony under the INA Act.

The DHS in this case, made a wrong determination that the Respondent's mail fraud conviction and imposed restitution qualifies as an aggravated felony under § 101(a)(43)(M)(i) of the Immigration and Nationality Act ("INA")(codified as 8 U.S.C. § 1101(a)(43)(M)(i)) because it involved "fraud and deceit" in which the loss to the victim or victims exceed[ed] $10,000. The Respondent asserts that the DHS wrongfully relying on conduct hat was not charged, proven or admitted in the determine that the Respondent has been convicted of an "aggravated felony.

The Respondent was convicted of twenty-seven (27) counts of mail fraud pursuant to 18 U.S.C. § 1341. The indictment did not mention any loss amount. In fact, none of the twenty-seven (27) counts of conviction mentioned any loss amount. The District Court of Southern Florida imposed restitution based on judicial findings which is currently in dispute under the Respondent's section 2255. See, *ROGERIO CHAVES SCOTTON v. UNITED STATES, case no: 17-CV-62428*.

Although title 8 U.S.C. § 1252(i) requires the INS now ICE to begin deportation hearing as soon as possible after conviction resolved before the prisoner's term expires, and after serving his entire conviction, the DHS charges the Respondent with the removability under 8 U.S.C. § 1227(a)(A)(iii), in which provides that "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable. The DHS didn't specify which record of the Respondent's trial were relied upon the convict of aggravated felony involving fraud or deceit in which the loss to the victim or victims exceeded $10,000 nor have provide the Respondent with the records that DHS made they determination that the Respondent is aggravated felon. See, *8 U.S.C. § 1101(a)(43)(M)(i)*.

The Respondent contends that he is not convicted of a offense involving a loss more than $10,000. No one of the twenty-seven counts of conviction mentioned any loss amount.

The Respondent contends that this Court has subject matter jurisdiction over any constitutional claims and question of law raised in this adjustment of status petition as well as the double incarceration he is subjected based on the DHS failure to resolved Respondent's immigration issue in a matter time.

Under this petition requesting adjustment of status and release from ICE custody, the Respondent specified also the errors of laws, fact in which the DHS based they decision now, and

abuse of discretion. *UNITED STATES v. HOFFER, 129 F.3d 1196, 1200 (11th Cir. 1997)(citation omitted)*. In fact, whether the Respondent's conviction qualifies as an "aggravated felony" is a question of law that the Court should review DE NOVO. See, *UNITED STATES v. HOOSHMAND, 931 F.3d 725, 737 (11th Cir. 1991)*; *BALOGUN v. UNITED STATES AG, 425 F.3d 1356, 1360 (11th Cir. 2005)*.

To determine whether Respondent's conviction constitutes an aggravated felony, the DHS office, Immigration Judge or BIA, must first look at the language of the statute of conviction which in this case is 18 U.S.C. § 1341. See, *IN RE AJAMI, 22 I&N Dec. 949, 950 (BIA 1999)*. If the statutory language contains some offense that would qualify as aggravated felonies, and others that would not, then the statute is "divisible", and the DHS must look to the "record of the convictions, meaning the indictment, plea, verdict and sentence, to determine the offense to which the Respondent was convicted. *Id.*; *JAGGERNAUTH v. UNITED STATES AG, 434 F.3d 1346, 1349 N.1 (11th Cir. 2005)*.

The DHS concluded arbitrarily that the Respondent's convictions constituted an aggravated felony but failed to support this conclusion by "clear, unequivocal, and convincing" evidence. *WOODBY v. INS, 385 U.S. 276, 87 S. Ct. 483, 17 L. Ed. 2d 362 (1966)*; *8 U.S.C. § 1229a(c)(3)(A)*.

The Respondent is hereby also respectfully challenging the DHS's determination that his conviction qualifies as an aggravated felony based on the loss amount stated in the restitution order.

The Plain language of INA requires that an alien has been "convicted of aggravated felony" in order to that conviction to form the basis of removal. 8 U.S.C. § 1227(a)(2)(A)(iii)(emphasis added).

For the Court's purposes, this means determining, under INA, whether the Respondent's convictions constituted and "aggravated felony" defined as "an offense that…involves fraud deceit in which the loss to the victim or victims exceeds $10,000. See, 8 U.S.C. § 1101(a)(43)(M)(i). This analogous to the inquiry that a sentencing Court undertakes when determining whether a prior conviction constitutes a "violent felony" for purpose of sentence enhancements under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 942(e). To make this determination in the contest of sentencing, the Supreme Court in *TAYLOR v. UNITED STATES, 495 U.S. 575, 110 S. Ct. 2143, 109 L. Ed. 2d 607 (1990)*, held that the Courts can only look to the statutory elements, charging documents, and jury instructions to determine whether an earlier conviction after trial was for generic burglary, so as to qualify as a "violent felony" under the ACCA because, like the INA, the plain language of the ACCA focuses on conviction conduct. The Court found that the statute generally prohibited Court from looking to the particular facts behind the conviction, leaving the Court normally to look only to the fact of conviction and the statutory definition of the prior offense. The Eleventh Circuit has applied a modified *TAYLOR* approach to the immigration context in *JAGGERNAUTH, 432 F.3d at 1353-55 (vacating order removal where neither the information, plea, judgment and/or sentence provided clear unequivocal an convincing evidence that JAGGERNAUTH was convicted of an aggravated felony)*.

In *SHEPARD v. UNITED STATES, 544 U.S. 13, 125 S. Ct. 1254, 161 L. Ed. 2d 205 (2005)*, the Supreme Court applied the *TAYLOR* approach to a prior conviction based on a guilty plea. The Court held that sentencing Court determination the character of a prior, admitted burglary is generally limited to examining the statutory definition, charging document, written plea agreement, transcripts of plea colloquy, and any explicit factual finding by the trial Court to which the defendant asserts. Id. at 20, 25-26.

In the Respondent criminal case, neither the indictment nor records specify any loss amount for the twenty-seven counts of conviction. The indictment did not charge the Respondent with any loss amount no did he admit to any loss amount during the trial or during the sentencing. There was no loss amount attributable to the twenty-seven counts charged in the indictment, to which the Respondent was found guilty by a jury. Contrary to the DHS officer's conclusion on that final administrative removal order, there is no evidence that the mail fraud with which the Respondent was charged on the second superseding indictment "alleged other losses". The DHS officer therefore could not have relied on the statutory element of the offense, the indictment, the trial record or sentencing record to conclude that the Respondent was convicted of an aggravated felony, as define in the INA act.

The DHS officer was not entitled to rely solely on the loss amount contained in the restitution order as "clear, convincing and unequivocal" evidence that the Respondent was "convicted of aggravated felony". On its face, the restitution order only indicated that as part of Respondent's supervised release, he has to pay restitution to FedEx UPS and DHL companies. The restitution order was not based on conviction of the twenty-seven counts of mail fraud or offense to which the Respondent was convicted. Rather, the restitution order was based on additional conduct not alleged on the indictment, but rather, only on government's charts. The Respondent did not admit, adopt, or assent to the factual findings that formed the basis of the restitution order which he submitted under his pending habeas corpus § 2255.

Furthermore, while a sentencing Court in the criminal context may order restitution not only of convicted but also for a broad range of relevant conduct, the plain language of the INA requires that an alien must have been convicted of an aggravated felony to be removable. The INA does not authorize removal on the basis of the relevant conduct that may be considered at sentencing.

Rather, was constitutes an "aggravated felony" for purpose of INA must be tethered to convicted conduct. Relevant conduct for sentencing purpose, on the other hand, may include criminal conduct that was not charged. *UNITED STATES v. IGNACIO MUNIO, 909 F.2d 435, 438-39 (11th Cir. 1990)*. Relevant conduct may also include acquitted conduct. *UNITED STATES v. WATTS, 519 U.S. 148, 117 S. Ct. 633, 136 L. Ed. 2d 554 (1997)*; *UNITED STATES v. AVERI, 922 F.2d 765, 766 (11th Cir. 1991)*. Indeed, the Eleventh Circuit has held that relevant conduct cannot be prosecuted because those acts fall outside the statute of limitation. *UNITED STATES v. BEHR, 93 F.3d 764, 765-66 (11th Cir. 1996)*; *UNITED STATES v. DICKSON, 370 F.3d 1330, 1342-43 (11th Cir. 2004)*.

In *DICKSON*, the Eleventh Circuit has rejected the argument that a restitution order based on conduct that could not be prosecuted was inconsistent with the defendant's plea to a conspiracy charge, observing that "[c]ounsel confuses the separate issues of conviction and restitution. There is no basis in this record from which the DHS officers could have found by "clear, unequivocal, and convincing" evidence that the restitution order was based on a convicted or admitted conduct. See, *e.g., KNUTSEN v. GONZALES, 429 F.3d, 739-40 (7TH Cir. 2005)(vacated removal order based on admission of loss cause by reference conduct and contained in restitution order; holding that inquiry should focus narrowly on losses "particularly tethered to convicted conduct alone")*. See also, *KHALAYLEN v. INS, 287 F.3d 978, 979-80 (10th Cir. 2002)(conviction constituted aggravated felony where although defendant plead guilty to only count incorporated by reference a scheme to defraud that admittedly cause losses in excess of $10,000)*; *CHANG v. INS, 307 F.3d 1185, 1191 (9th Cir. 2020)(vacating removal order based on restitution awarding excess $10,000 where amount loss admitted in the plea agreement was less than the requisite amount)*; *MUNROE v. ASHCROFT, 353 F.3d 225, 227 (3rd Cir. 2003)(conviction constituted aggravated felony where*

defendant plead guilty to fraud charges that alleged loss in excess of $10,000 even through sentencing Court later reduced restitution amount to $9,999.00); *FERREIRA v. ASCROFT, 390 F.3d 1019, 199 (9th Cir. 2004)(conviction constituted aggravated felony where charging document alleged loss and plea agreement set restitution at $22,305 for fraud conviction)*.

The Respondent contends that the restitution order was insufficient as a matter of law for the DHS to have meet his burden to show that Respondent's conviction constituted an aggravated felony under INA (as an offense of fraud of deceit involving a loss in excess of $10,000) by "clear, unequivocal convincing" evidence. The restitution order which in this case was the only document that referred to any loss was based on judicial findings regarding conduct and loss amount that where not charged, proven or admitted. The sentencing Court in the underlying criminal case was entitled to make the findings by a "preponderance of the evidence" rather than by "proof beyond a reasonable doubt". *ALSTON, 895 F.2d 1373 (quotation and citation omitted)*. Because the Southern District Court's finding was judicial made by a lower standard of proof, it was an error for the DHS to conclude that the restitution order standing alone, constituted "clear, unequivocal convincing" proof of loss necessary to transform the Respondent's conviction into an aggravated felony under the Act 1101(a)(43)(M)(i).

The plain language and unambiguous of the statute…predicates removal or a convicted offense resulting in losses greater than $10,000. *KNUTSEN, 429 F.3d at 736 (citing U.S.C. § 1227(a)(2)(A)(iii), 1101(a)(43)(M)(i)(emphasis original)*. The $2.5 million plus restitution in this case it is related to unproved and uncharged conduct.

Subparagraph (M)(i)'s $10,000 threshold refers to the particular circumstances I which an offender committed a fraud deceit crime on a particular occasion rather than to an element of the fraud or deceit crime. *ALAKA v. ATTORNEY GENERAL OF UNITED STATES, 456 F.3d 88, 107 (Ca 3*

2006)(loss amount must be tethered to offense of conviction; amount cannot be based on acquitted or dismissed counts or general conduct); *KNUTSE v. GONZALES, 429 F.3d 733, 739 740 (CA7 2005)(same)*.

The Respondent is not an aggravated felony and therefore, the DHS has no jurisdiction to remove him from the U.S. nor had jurisdiction to subjected him to this double incarceration. Thus, the Respondent should be immediate release from ICE custody.

VI. CONCLUSION

For all of the reason and case facts submitted with this motion, the Respondent Rogerio Chaves Scotton now requests this Honorable Court to set Master hearing on his concurrent application before the Immigration Court so his immigration could be adjusted without any further delay. The Respondent submits this motion in good faith and the interest of justice.

Respectfully Submitted,

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ROGERIO CHAVES SCOTTON
ALIEN NO: 203085029
7797 GOLF CIRCLE DRIVE #204
MARGATE, FLORIDA 33063

PROOF OF SERVICE

I Rogerio Chaves Scotton do certify that on this March 25, 2020, I have served the attached motion to adjustment of status concurrent with a waive (which is under the Respondent's constitutional rights) on the Executive Office For Immigration Review, Atlanta Immigration Court in the above proceeding. I have served this motion and applications via, United States Postal Service (USPS) priority mail through, Irwin County Detention Center legal mail.

Respectfully Submitted,

_____

ROGERIO CHAVES SCOTTON
ALIEN NO: 203085029
7797 GOLF CIRCLE DRIVE #204
MARGATE, FLORIDA 33063