CrimImmAdvisal.com
PADILLA ADVICE FOR ATTORNEYS

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a: *1669 Indian Falls Road, Corfu NY 14036*
(By appointment only)

MEMORANDUM

Date: _____

Client: _____

From Daniel E. Jackson

Re: Immigration Consequences

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INTRODUCTION AND OVERVIEW

1. This memorandum is prepared for the use of _____, Esq. in his representation of his client in criminal proceedings. This advisal is provided to comply with Mr. _____' client's 6th amendment right to the effective assistance of counsel pursuant to *Padilla v. Kentucky* 130 S. Ct. 1473 (2010) and *People v Peque* 22 NY3d 168.

2. Unlike similarly situated United States Citizens, non-citizen defendants in criminal courts may suffer dramatic collateral consequences as a result of contact with the criminal justice system.

3. The consequences of criminal court for a citizen may well end with the disposition and / or punishment ordered. However, a non-citizen of any type (ranging from refugees to long-term permanent residents) may suffer consequences up to and including deportation from the United States. Likewise, immigration consequences can be counter-intuitive and may ***not*** be linked to the severity of the offense as held by the criminal court.

CASE INFORMATION

YOU ARE

- _____
- _____
- _____
- _____
- _____

YOUR CLIENT

- Canadian citizen; US Lawful Permanent Resident
- No criminal history whatsoever anywhere in the world
- No previous immigration problems.
- Has been a US LPR for more than 30 years (but definitely more than 5 years)
- Has been physically present in the US for more than 30 years (but definitely more than 7 years)
- Has not left the United States for more than 180 days at any point since obtaining LPR status
- Client's son – who was born a US citizen - is in the police academy.

CASE AGAINST YOUR CLIENT

I. SUMMARY OF FACTS STATED AT THEIR WORST (NOT NECESSARILY WHAT CAN BE PROVED)

- Client is an Accountant; bought a firm and essentially took over the duties of a CFO.
- Paid as independent contractor; he is an employee.
- In the course of his work, he took a couple of shortcuts.
- He talked about some tax initiatives to avoid paying NYS and federal tax.
- He may have made some 18 USC 1001 – type violations.
- His son is also implicated as a bad actor, albeit in a secondary capacity.
- The revenue loss is likely to be far above $10,000 (more likely in the $100,000 territory)

II. CHARGES

[In our conversation, you mentioned that this case is in a pre-charge posture. Can you confirm that I understood that correctly?]

In the meantime, the types of charges we are likely to see is 1) a Federal Felony for father to hopefully exonerate son or 2) federal misdemeanors to cover both

Potential charges we could see are:

- 26 USC 7201 – Attempt to evade or defeat tax (felony; 5 year max sentence)
- 18 USC 1001 – Statements or entries generally (5 year max sentence)

III. LIKELIHOOD OF CONVICTION

High; no obvious suppression issues. This will be more about what they are guilty of than if something can be proved

IV. POTENTIAL PLEA OFFERS

None have been offered yet, but you and I discussed the possible alternatives of:

- 26 USC 7202 – Willful failure to collect or pay over tax (felony; 5 year max sentence)
- 26 USC 7203 – Willful failure to file return, supply information or pay tax (misdemeanor; 1 year max sentence **OR** felony; 5 year max sentence if the underlying failure related to failure to file a return based on cash received in trade or business)

IMMIGRATION CONSEQUENCES OF CURRENT (I.E. ASSUMED) CHARGES

I. REMOVABILITY (YOU ARE IN THE COUNTRY; CAN THEY KICK HIM OUT)

Aggravated Felony Analysis

26 USC 7201

A conviction for 26 USC 7201, where the revenue loss involved was more than $10,000 is a perfect, categorical match to an aggravated felony because it is an offense that "*is described in section 7201 of title 26 (relating to tax evasion) in which the revenue loss to the Government exceeds $10,000*" [8 USC 1101(a)(43)(M)(ii)].

Obviously the conviction itself would prove the first prong. The loss amount can be proved by a factual inquiry – which allows immigration authorities to go behind the criminal record and look at things like arrest reports and supporting declaration. As such, it is very difficult to insulate this conviction by obscuring the loss amount.

Additionally, the loss amount can be aggregated, so if he advised two people to avoid paying $9,000 in taxes, this would still trigger the aggravated felony. *See Nijhawan v. Holder* 557 U.S. 29 (2009).

Consequently, he would ***definitely*** become removable for having committed an aggravated felony [8 USC 1227(a)(2)(A)(iii)].

18 USC 1001

An offense that "involves fraud or deceit in which the loss to the victim or victims exceeds $10,000" is an aggravated felony [8 USC 1101(a)(43)(M)(i)].

All three subsections of 1001 include as an element some variation of "fraud". As a result, it is definitely a match to 'involves fraud or deceit'.

The same *Nijhawan* analysis would apply to the loss amount and in this client's circumstances, it is very likely to render a conviction for 1001 an aggravated felony.

<u>As such, convictions for either of these expected charges must be avoided at all costs.</u>

Consequences would include:

- almost certain deportation (he would eligible for very limited forms of relief),
- a permanent bar from returning to the United States and
- mandatory detention in the Buffalo Federal detention Facility for the duration of his case (which could last for 3-4 months even if he did not want to fight it).

Crime Involving Moral Turpitude Analysis

In addition to the aggravated felony grounds, both of these convictions would constitute a Crime Involving Moral Turpitude ("CIMT"):

- 18 USC 1001 is a CIMT: *Matter of Pinzon*, 26 I&N Dec. 189 (BIA 2013);
- 26 USC 7201 is a CIMT *Costello v. INS*, 311 F.2d 343, 348-349 (2d Cir. 1962) (tax evasion necessarily a crime involving moral turpitude), rev'd on other grounds, 376 U.S. 120 (1964).

Whether or not this would make him removable would depend on how many convictions he ends up with (including what happens in any New York State Case).

This is because the conduct occurred more than 5 years after his admission to the US. Consequently, he is only removable if he is convicted of two or more CIMT's "not arising out of a single scheme of criminal misconduct" [8 USC 1227(a)(2)(A)(ii)].

The definition of single scheme, however, is very expansive. *See Matter of Islam*, 25 I&N Dec. 637 (BIA 2011). My analysis on these limited facts is that any subsequent NYS conviction would likely qualify as sufficiently attenuated as to ***<u>NOT</u>*** arise out of a single scheme. Therefore, the CIMT ground of removability **could** apply if he is later convicted of a NYS offense.

II. INADMISSIBILITY (YOU ARE ASKING FOR A LEGAL ADMISSION; CAN THEY KEEP YOU OUT?)

Two things come into play here:

1. LPR's are not "applicants for admission" unless one of the exceptions of 8 USC 1101(a)(13)(C) applies. *See Matter of Pena, 26 I&N Dec. 613 (BIA 2015).* As such, unless, for example, the conviction constitutes a crime involving moral turpitude [8 USC 1101(a)(13)(C)(v)], or he has been outside the country for more than 180 days [8 USC 1101(a)(13)(C)(ii)] he does not need to worry about admissibility.

2. Even if he is an applicant for admission, aggravated felonies are (weirdly) not a bar to admission. As such, the agg fel analysis is not relevant – it would be whether the crimes constitute a Crime Involving Moral Turpitude ("CIMT").

That having been said, conviction of these charges would be very likely to make him 1) an applicant for admission and 2) inadmissible (see the CIMT analysis above).

This is because, unlike the grounds of removal, you become criminally inadmissible for conviction of 1 CIMT, rather than 2. [8 USC 1182(a)(2)(A)(i)(I).[1]

III. GOOD MORAL CHARACTER

In order to be granted naturalization (citizenship) one of the elements you must establish is you are a person of good moral character. You must prove you not subject to any of the statutory bars [8 USC 1101(f); 8 CFR 316.10], then you are generally a good person.

Regardless of any action you take in disposing of this case, the underlying facts will be a HUGE negative factor militating against naturalization in the 'general' category.

Conviction of either of these charges would most likely ***bar*** him as well:

- If he is convicted of a CIMT, he will be statutorily barred from naturalizing for 5 years;
- Being sentenced to a period of incarceration of 180 days or more is a statutory bar for 5 years;
- Conviction of an aggravated felony, is a **permanent** bar to naturalizing.

[1] Additionally, the petty offense exception in 8 USC 1182(a)(2)(A)(ii)(II) would not apply because the maximum sentence for both is more than 1 year.

IV. DISCRETION

The concern we need to focus on is whether or not he will become deportable in the first place. If we can avoid an aggravated felony, but he is deportable for another ground, he will be eligible for cancellation of removal, and as such in need of the favorable exercise of discretion.

As with any criminality whatsoever, this will of course negatively impact him. Having a solid narrative in the criminal record (like "I was in over my head and I didn't start out with the intention to defraud; I will pay it all back etc.") will help.

Likewise, placing good character evidence into the criminal record – even if not specifically helpful to the criminal case – can make a big difference to a subsequent immigration proceeding.

IMMIGRATION CONSEQUENCES OF PROPOSED PLEA OFFER

As discussed, we do not have a plea offer on the table, but we discussed 26 USC 7202 and 7203 as possible options. These are discussed below.

I. REMOVABILITY (YOU ARE IN THE COUNTRY; CAN THEY KICK HIM OUT)

Aggravated Felony Analysis

26 USC 7202

We are still concerned about the same aggravated felony as above here, namely fraud or deceit with a loss of $10,000 or more. In applying this statute, the Supreme Court has analyzed tax crimes fairly expansively:

> *"to determine whether the Kawashimas' offenses involve fraud or deceit within the meaning of Clause (i). Section 7206(1) provides that any person who "[w]illfully makes and subscribes any return . . . which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter," shall be guilty of a felony. Although the words "fraud" and "deceit" are absent from §7206(1) and are not themselves formal elements of the crime, it does not follow that Mr. Kawashima's offense falls outside Clause (i).* ***Clause (i) is not limited to offenses that include fraud or deceit as formal elements. Rather, it refers more broadly to offenses involving fraud or deceit meaning offenses with elements that necessarily entail fraudulent or deceitful conduct.*** *Mr. Kawashima's conviction under §7206(1) involved*

> *deceitful conduct in that he knowingly and willfully submitted a tax return that was false as to a material matter. Mrs. Kawashima was convicted of violating §7206(2), which declares that any person who "[w]illfully aids or assists in . . . the preparation or presentation . . . of a return . . . which is fraudulent or is false as to any material matter" has committed a felony. She committed a felony involving deceit by knowingly and willfully assisting her husband's filing of a materially false tax return. Pp. ___ - ___, 182 L. Ed. 2d, at 7-8."*[emphasis added]
>
> *Kawashima v. Holder*, 565 U.S. 478, 480, 132 S. Ct. 1166, 1169, 182 L. Ed. 2d 1, 4, 2012 U.S. LEXIS 1084, *1, 80 U.S.L.W. 4147, 63 A.L.R. Fed. 2d 735, 23 Fla. L. Weekly Fed. S 121, 2012 WL 538277

As such, we turn to the statute. 26 USC 7202 states in relevant part:

> "Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax [commits this offense]"

The elements of 26 USC 7202 consequently appear to be:

- Any person required under title 26 to
- collect, account for, and pay over any tax imposed by title 26
- who willfully fails to
  - collect; ***or***
  - truthfully account for and pay over such tax
- [commits the offense]

Based on *Kawashima* it is clear that if he allocuted to failing to "truthfully account for" the tax he was supposed to pay, this would make the crime "involve fraud or deceit" and thus turn it into the aggravated felony.

My initial impression, however, is that willfully failing pay over tax may not *necessarily* involve fraud or deceit. If, for example, an individual covered by this provision simply decided that they did not want to pay otherwise payable tax (for example as an act of civil disobedience) this does not inherently involve any fraud or deception.

This interpretation is not without risks. In particular, any interpretation of the statute is subject to the "realistic probability test".

The Supreme Court cautioned that an immigrant may not simply imagine some possible minimum conduct for an offense, but must demonstrate a "realistic probability" that the conduct actually would be prosecuted under the criminal statute. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186, 193 (2007), cited in *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013) at 1684.

While there has been much development of the realistic probability standard,[2] I would not be comfortable with you proceeding with a plea to this statute unless:

1) You can affirmatively allocate to "willfully failing to collect - without any dishonesty" (as opposed to truthfully accounting); **AND**
2) We can find a concrete case law example of a prosecution involving no fraud or deceit (for example refusing to pay as an act of civil disobedience).

More research will be needed.

26 USC 7203

26 USC 7203 states in relevant part:

> "Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure. In the case of a willful violation of any provision of section 6050I, the first sentence of this section shall be applied by substituting "felony" for "misdemeanor" and "5 years" for "1 year"."

26 USC 6050I in turn states in relevant part:

> "(a) Cash receipts of more than $10,000
> Any person—

[2] See, for example *Esquivel-Quintana v. Sessions*, 581 U.S. ___ (2017) and *Harbin v. Sessions*, No. 14-1433 (2d Cir. June 21, 2017) where there was no reference to whether any prosecutions were ever brought under the statute when the statutory language appeared to criminalize conduct falling outside the generic definition on its face.

(1) who is engaged in a trade or business, and
(2) who, in the course of such trade or business, receives more than $10,000 in cash in 1 transaction (or 2 or more related transactions), shall make the return described in subsection (b) with respect to such transaction (or related transactions) at such time as the Secretary may by regulations prescribe."

As such, were he to plead to the felony, my assessment of the necessary elements would be:

- Any person who is engaged in a trade or business
- And who, in the course of such trade or business, receives more than $10,000 in case in 1 transaction or 2 or more related transactions
- Who willfully
- Failed to make the return required by 26 USC 6060I(b) at such time as the secretary provided by regulation

The same considerations of whether this "involves" fraud or deceit are paramount. My biggest concern with this as a plea would be that his facts seems to fit squarely within 26 USC 6050I(f) relating to structuring transactions. 6050I(f) is obviously incorporated into the felony version of 26 USC 7203, and as such could render it the fraud or deceit aggravated felony.

Careful allocution as to the fact that the "willful failure" required for 7203 was **NOT** a structuring transaction under 6060I(f), but giving a return under 6060I(a) could insulate you.

Crime Involving Moral Turpitude Analysis

All of the considerations discussed in the preceding CIMT analysis above likewise apply here.

The analysis of whether the proposed pleas constitute CIMT's tracks that of the aggravated felony; if they include an element of fraud or deceit, they are most likely CIMT's. If they do not, they are not CIMT's.

The benefit of the CIMT analysis - as opposed to the aggravated felony - is that it must include as an ***element*** the use of fraud – unlike the aggravated felony which must only "involve" it; a much more tangential standard.

As such, what we would attempt to with the proposed pleas is to keep him from being convicted of something that necessarily includes him having 1) lied or 2) purposely created a scheme in order evade taxes.

Simply failing to pay taxes – or even refusing to pay they when you know you have to – is not necessarily a CIMT. See for example, *Matter of Mazza-Alas*, File No. A13-408-039, 15 Immigr. Rep. B1-88 (BIA Oct. 27, 1995) (willful failure to file income tax return is not necessarily a crime involving moral turpitude because fraud is not inherent in the crime).

As such, I think it is possible that 7202 or 7203 ***could*** avoid being designated as CIMT's, but I cannot guarantee this based on the caselaw; I have not been able to find anything expressly on point yet.

Even if the eventual plea is a CIMT, then whether or not this would make him removable would again depend on how many convictions he ends up with (including what happens in any New York State Case). He is only removable if he is convicted of two or more CIMT's "not arising out of a single scheme of criminal misconduct" [8 USC 1227(a)(2)(A)(ii)].

II. INADMISSIBILITY (YOU ARE ASKING FOR A LEGAL ADMISSION; CAN THEY KEEP YOU OUT?)

As discussed above, the question of whether this ground could apply to him and whether he would be inadmissible for this crime would turn on whether or not the conviction itself could be considered a CIMT.

If it was a CIMT (on which see above), he w***ould*** become inadmissible.[3]

III. GOOD MORAL CHARACTER

See above.

[3] Again, if he pleads to either felony, the petty offense exception in 8 USC 1182(a)(2)(A)(ii)(II) would not apply because the maximum sentence for both is more than 1 year.

IV. DISCRETION

See analysis of the favorable exercise of discretion above.

NEXT STEPS

Basically, get back to me based on your exploration of possible dispositions. In particular, it is much, much easier to analyze a proposed disposition that has been fleshed out a little than to prospectively guess.

No matter what disposition you are able to obtain, this case will still require careful management of what goes into the pre-sentence report; the documents in the criminal record and the allocution.

- Dan

Daniel Jackson