No. 04-74313, 05-74408

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

AKIO KAWASHIMA, et. al.,

Petitioners,

v.

ERIC HOLDER, United States Attorney General

Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE BOARD OF IMMIGRATION APPEALS

AMICUS BRIEF IN SUPPORT OF PETITIONERS

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Introduction

On June 15, 2009, the Supreme Court published its decision in *Nijhawan v. Holder*, 129 S. Ct. 2294, and resolved the circuit split that had developed over the interpretation of the aggravated felony definition at 8 U.S.C. § 1101(a)(43)(M)(i). In so doing, the Supreme Court overruled the decision in the case at bar, *Kawashima v. Mukasey*, 530 F.3d 1111 (9th Cir. 2008).

The *Nijhawan* decision, however, does not mark the end of the *Kawashima* case. Nor does it mean much by way of the *en banc* decision in *Navarro-Lopez v. Gonzales*, 503 F.3d 1063 (9th Cir. 2007). As for *Kawashima*, despite eight years of litigation, two published opinions, and an on-point Supreme Court opinion, it is clear that there remain difficult questions that must yet be settled before the matter may be resolved. This is not unusual, of course because in administrative law, "[c]ourts are expert at statutory construction, while agencies are expert at statutory implementation." *Negusie v. Holder*, 129 S.Ct. 1159, 1171 (2009) (Stevens, J., concurring and dissenting). Here, the Supreme Court explained in *Nijhawan* what the statute means. The Supreme Court interpreted § 1101(a)(43)(M)(i) and held that the categorical approach applies in determining whether an offense involves the generic elements of fraud or deceit and that a

circumstance specific approach applies to determine if the amount of loss exceeds $10,000.

But that is where the Supreme Court's decision in *Nijhawan* ends. The pragmatic and prudential concerns of implementing *Nijhawan* in the nation's immigration courts are not matters for the federal courts to decide in the first instance. To be sure, the counseling of the Supreme Court on these pragmatic and prudential issues cannot be ignored – they set forth bedrock principles that will guide future decision-making on these topics. The federal courts will, in the end, be the final arbiters of the extent of questions of law in *Nijhawan*.

Prudence cautions that on this record, and in this posture, the Board should have a chance to implementation *Nijhawan*. *Nijhawan* abrogated, in part, the Board's only published opinion on the procedural question governing proving amount of loss, *Matter of Babaisakov*, 24 I&N Dec. 306 (BIA 2007). Consequently, there is no authoritative agency pronouncement and the record is unfit for the court to review.

As for *Navarro-Lopez*, the Supreme Court opinion reaffirms the categorical approach as the correct analytical framework for determining removability. *Nijhawan* adds a dimension to *Navarro-Lopez*: for aggravated felonies, a generic crime may also include a description of a specific circumstance that may be proven outside the record of conviction.

To aid the Court of Appeals, Amicus, the American Immigration Lawyers Association, proffers this brief setting forth the critical principles underlying *Nijhawan* and, more importantly, the procedural and pragmatic questions regarding *Nijhawan*'s implementation. As explained below, the Board of Immigration Appeals, both in its supervisory role over the immigration court system and in its delegated role of administering the Immigration and Nationality Act ought to determine in the first instance how *Nijhawan* will be implemented. Accordingly, the Court of Appeals should grant the petition for rehearing, vacate its holding and remand the matter to the Board for further proceedings consistent with the Supreme Court's opinion in *Nijhawan*.

Statement of Interest

The American Immigration Lawyers Association ("AILA") is a national association with more than 11,000 members throughout the United States, including lawyers and law school professors who practice and teach in the field of immigration and nationality law. AILA seeks to advance the administration of law pertaining to immigration, nationality and naturalization; to cultivate the jurisprudence of the immigration laws; and to facilitate the administration of justice and elevate the standard of integrity, honor and courtesy of those appearing in a representative capacity in immigration and naturalization

matters. AILA's members practice regularly before the Department of Homeland Security and before the Executive Office for Immigration Review (immigration courts), as well as before the United States District Courts, Courts of Appeal, and the Supreme Court of the United States.

Argument

(1) In *Nijhawan*, the Supreme Court examined the range of offenses classified as aggravated felonies and determined that the statute's provisions can be divided into two groups. Some provisions describe "generic" crimes, which require interpretation under the categorical approach, while others describe the specific circumstances surrounding a particular crime, which do not require such an approach. The Supreme Court explained:

> The question here, as we have said, is whether the italicized statutory words "offense that involves fraud or deceit in which the loss to the . . . victims exceeds $10,000" should be interpreted in the first sense (which we shall call "categorical"), i.e., as referring to a generic crime, or in the second sense (which we shall call "circumstance specific"), as referring to the specific way in which an offender committed the crime on a specific occasion. If the first, we must look to the statute defining the offense to determine whether it has an appropriate monetary threshold; if the second, we must look to the facts and circumstances underlying an offender's conviction.

Nijhawan, 129 S.Ct. at 2298. The Supreme Court held that "Congress did not intend subparagraph [8 U.S.C. §

1101(a)(43)](M)(i)'s monetary threshold to be applied categorically, i.e., to only those fraud and deceit crimes generically defined to include that threshold. Rather, the monetary threshold applies to the specific circumstances surrounding an offender's commission of a fraud and deceit crime on a specific occasion."

(2) Under the circumstance specific approach, the type of evidence that may be relied on to ascertain the nature of a conviction is not limited in the same way that evidence is limited under the categorical approach. Whereas under the categorical approach the type of evidence that may be used to determine deportability is restricted to either "the indictment or information and jury instructions," *Taylor v. United States*, 495 U.S. 575, 602 (1990), or, if a guilty plea is at issue, a trier of fact may also examine "the plea agreement, plea colloquy or 'some comparable judicial record' of the factual basis for the plea." *Shepard* v. *United States*, 544 U.S. 13, 26 (2005).[1]

Instead of these restrictions, the Supreme Court held that a circumstance-specific approach permits the trier of fact to

[1] The Ninth Circuit refers to this methodology as the "modified categorical approach" when the record of conviction is examined. The Supreme Court makes no distinction and refers to the methodology as the "categorical approach" in all instances. In this brief, AILA adopts the terminology used by the Supreme Court.

inquire into the facts underlying the conviction when (a) those facts are "tied to the specific counts covered by the conviction" and (b) after a fundamentally fair procedure in which the noncitizen has an opportunity to dispute the evidence of loss. As the decision in *Nijhawan* acknowledged, there are pragmatic and prudential concerns that preclude the relitigation of the conviction itself and that uncertainties caused by the passage of time are likely to count in the non-citizen's favor. *Nijhawan*, 129 S.Ct. at 2303. In the end, the evidence that is admitted to the record must in the totality demonstrate the loss amount by a clear and convincing standard. *Id.*

The procedural rules set forth by the Board in its published opinion in *Matter of Babaisakov* are incompatible with *Nijhawan*'s constrained evidentiary rules. In *Matter of Babaisakov*, the Board rejected any limitation on the type of evidence that could be considered by Immigration Judges in ascertaining the circumstance-specific amount of loss. "[W]e discern no sound reason for prohibiting Immigration Judges from considering other reliable evidence that bears on [the question of loss], including but not limited to the testimonial admissions of the respondent made during the removal hearing." *Matter of Babaisakov*, 24 I&N Dec. at 321. The Board held that "an Immigration Judge may consider any evidence, otherwise admissible in removal proceedings, including witness testimony,

bearing on the loss to the victim[.]" *Id.*

This broad range of evidence is surely not permitted under *Nijhawan* where only evidence tethered to convicted counts is allowed. Moreover, a fair reading of *Nijhawan* indicates that only sentencing-related evidence can be considered. *Nijhawan*, 129 S.Ct. at 2303 (citing to *Babaisakov*'s discussion of sentencing-related evidence and noting that "the Board of Immigration Appeals, too, has recognized that immigration judges must assess findings made at sentencing 'with an eye to what losses are covered and to the burden of proof employed.'") It is difficult to reconcile the Supreme Court's acknowledgement that the point of the circumstance-specific approach is not to relitigate the conviction with the Board's far-ranging invitation to make "independent assessments" using "any evidence" of the "fact that was part of the crime[.]" *Babaisakov*, 24 I&N Dec. at 321. Obviously, the Supreme Court's opinion on the matter controls and the Board is back to the drawing board on *Babaisokov*.

(3) The panel decision regarding the generic aspect of § (M)(i) that was and is governed by *Navarro-Lopez* is undisturbed by *Nijhawan*.[2] Applying *Nijhawan* to the circumstance-specific

[2] AILA takes no position on the merits of the petitioners' claims that fraud or deceit is not an element of 26 U.S.C. § 7206(1). *See Considine v. United States*, 683 F.2d 1285, 1287 (9th Cir. 1982); Pet'r Opp'n to Rhrg En Banc at 19-20. If this is so,

aspect of *Kawashima* is problematic at this stage given that the record of proceedings was not developed with the *Nijhawan* standard in mind. It may be that the administrative record contains clear and convincing evidence of the amount of loss. *Kawashima v. Gonzales*, 503 F.3d 997, 1002 (indicating a plea agreement of tax loss of $245,126). But that is doubtful for several reasons. First, under *Nijhawan*'s tethering requirement, all of the calculated "amount of loss" must actually be tied to a convicted count. The loss figure in the plea agreement appears to have been calculated based on a negotiation and included amounts unconnected to Mr. Kawashima's conviction. *See* Pet'r Opp'n to Rhrg En Banc at 20. *Nijhawan* also mandates that noncitizens have an opportunity to put forth a defensive case disputing the amount of loss governed by fundamentally fair procedures. It is not clear if this was done below and Mr. Kawashima explains that he has a legitimate complaint that the calculation for the tax loss is not the actual loss. *Id.* These factual concerns are best resolved below. Either the Board or an Immigration Judge, at the Board's direction, ought to weigh the evidence in the first instance under *Nijhawan*. The agency, using fundamentally fair procedures, can then admit only the properly tethered evidence, exclude unsatisfactory evidence, and

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then the case can be resolved at the generic offense level under *Navarro-Lopez* in the Kawashima's favor without worrying about the circumstance-specific inquiry.

develop the factual record for a decision.

Conclusion

The Supreme Court has explained that "courts and agencies play complementary roles in the project of statutory interpretation." *Negusie*, 129 S.Ct. at 1171 (Stevens, J., concurring and dissenting). The judiciary's role has been described as "deciding pure questions of statutory construction and the agency's role as applying law to fact." *Id.* This is all the more important in light of the partial abrogation of *Babaisakov*. Amicus supports the granting of rehearing and remanding the matter to the Board for additional proceedings consistent with the Supreme Court's opinion in *Nijhawan*.

Submitted this 20th day of August, 2009,

__s/Stephen W Manning___

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CERTIFICATE OF SERVICE

I, STEPHEN W. MANNING, certify that on August 20, 2009, I electronically filed a copy of the foregoing document with the Clerk of Court of the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system. In addition, on August 20, 2009, I certify that I served a copy of the foregoing document on the parties by mailing these materials to:

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CERTIFICATE OF COMPLIANCE WITH FORMAT

I, Stephen W. Manning, certify that, pursuant to Fed. R. App. P. 32(a)(7)(C) and Ninth Circuit Rule 32-1, this amicus brief is double spaced, using monofaced typeface of 10.5 characters or fewer per inch and does not exceed 10 pages (not including the table of contents, table of authorities, certificate of service and certificate of compliance).

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