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ETHICAL DIMENSIONS OF PATEL V. GARLAND

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On May 16, 2022, the Supreme Court issued its decision in *Patel v. Garland*, a decision that has devastating implications for the reviewability of U.S. Citizenship and Immigration Services' ("USCIS") actions in federal court. Federal courts, according to the Supreme Court, will no longer be able review factual errors of the USCIS that result in the denial of an application. As there has been plenty of analysis of this decision, see here and here and here, our blog will instead address the ethical implications that *Patel v. Garland* will have on immigration practitioners.

The factual background of the case is strikingly sympathetic. Pankajkumar Patel and his family entered the United States without inspection in the 1990s, and Mr. Patel applied for adjustment of status some years later under § 245(i) of the Immigration and Nationality Act (INA). USCIS, however, became aware that Mr. Patel had checked a box indicating that he was a U.S. citizen on a Georgia driver's license application, and found him inadmissible under § 212(a)(6)(C)(ii)(I) for falsely misrepresenting himself as a U.S. citizen. Mr. Patel was placed in removal proceedings and renewed his adjustment of status application in Immigration Court, testifying that he had checked the wrong box on the driver's license application by mistake. In fact, under Georgia's law, it did not make a difference regarding his eligibility for a license whether he was a citizen or not. He was eligible because he had an application seeking lawful permanent residence had a valid employment authorization document. The Immigration Judge denied Mr. Patel's adjustment application and ordered him removed. The Board of Immigration Appeals ("BIA") denied his appeal. Mr. Patel sought review of the decision at the Eleventh Circuit, but the court held that it § 242(a)(2)(B)(i), a statutory provision which prohibits judicial review of "any judgment regarding the granting of relief" under § 245, prevented it for exercising jurisdiction over

his claim.

By the time the Supreme Court heard the case, Mr. Patel had lived in the United States for some 30 years and his children, now adults, had become lawful permanent residents. Despite Mr. Patel's plight, the Court held that it lacked the jurisdiction to review facts found as part of adjustment of status proceedings under INA § 245. The majority opinion, authored by Justice Amy Coney Barrett, focused on the meaning of the word "judgment" in § 243(B)(2)(B)(i), the statutory provision preventing federal courts from reviewing "any judgment regarding the granting of relief". Mr. Patel argued that this provision, called the jurisdictional bar, applies only to an Immigration Judge's ultimate decision of whether to grant relief. The Government argued that the use of "judgment" refers exclusively to a decision that requires discretion. The majority was not persuaded by Mr. Patel's or the Government's arguments, and instead adopted the interpretation asserted by attorney Taylor Meehan, acting as an amicus, who defined a "judgment" for §1255 purposes as "any authoritative decision—encompassing any and all decisions relating to the granting or denying of discretionary relief".

Finding that it did not have the jurisdiction to review his adjustment of status claim, the Court's decision not only leaves Mr. Patel potentially vulnerable to removal, effectively eviscerates the ability of federal courts to review USCIS errors. Justice Gorsuch emphasized this issue in a surprisingly forceful and stirring dissent, stating: "Today, the Court holds that a federal bureaucracy can make an obvious factual error, one that will result in an individual's removal from this country, and nothing can be done about it. No court will even hear the case." Justice Gorsuch, whose dissenting opinion was joined by Justices Breyer, Sotomayor, and Kagan noted that the Immigration Judge who heard Mr. Patel's case mistakenly asserted that only U.S. citizens and lawful permanent residents are eligible for driver's licenses in Georgia, a mistake that informed his conclusion that Mr. Patel must have intentionally held himself out to be a U.S. citizen on the application in order to obtain a license. In fact, as noted, a broader group of individuals who are not U.S. citizens or LPRs can obtain a driver's license in Georgia. Despite the devastating consequences of this error and others like it, federal courts are powerless to intervene after *Patel*.

Practitioners following *Patel v. Garland* need to be aware of various ethical considerations when representing a client on an I-485 adjustment of status application. ABA Model Rule 1.1 requires the practitioner to provide competent

representation to clients. ABA Model Rule 1.3 requires the practitioner to act with reasonable diligence and promptness in representing the client. There are also parallel grounds for disciplining practitioners who practice before the DHS or EOIR for failing to represent the client competently and diligently at 8 CFR §1003.102(o) and 8 CFR §1003.102(p) respectively. If the USCIS makes a mistake on an applicant's I-485 adjustment application resulting in a denial, every effort must be made to convince the USCIS to correct the error as the practitioner will no longer be able to rely on a federal court to correct it. In an adjustment of status proceeding, there is no administrative appeal after the USCIS denies the application. Therefore, the practitioner would need to file a motion to reopen or reconsider the denial within 30 days of the decision. Although the applicant can seek review of the denial of the I-485 application in removal proceedings, the USCIS does not routinely place the applicant of a denied I-485 application in removal proceedings. While an applicant can request the USCIS to initiate removal proceedings when an I-485 application is denied through a Notice to Appear, the USCIS may choose not to do so. In this case, the practitioner can potentially file another I-485 application and request the USCIS to review its prior determination in the context of a new I-485 application. Alternatively, when removal proceedings have not been initiated, filing an action under the Administrative Procedures Act in federal district court may still be a possible avenue under *Pinhoe v. Gonzales*, 432 F.3d 193 (3rd Cir. 2005) which has likely not been impacted by *Patel v. Garland*.

If the applicant is placed in removal proceedings following the denial of an I-485 application, the practitioner must continue to competently and diligently represent the client before an Immigration Judge. Every effort must be made to convince the IJ that the USCIS's denial was based on a factual error. The practitioner must ensure that all evidence is submitted that would convince the IJ to render a favorable decision. If the IJ still denies the application, the respondent in removal proceedings can file an appeal to the Board of Immigration Appeals. Here too, in this proceeding, the practitioner must continue to competently and diligently represent the client and ensure that the record contains evidence and arguments that were submitted in support of client's position. If the BIA affirms the denial, although *Patel v. Garland* forecloses judicial review of factual errors, INA §242(a)(2)(D) makes an exception with respect to judicial review of constitutional claims or questions of law. Therefore, every effort must be made to explore whether there was a

constitutional claim or question of law when seeking review in a court of appeals following the dismissal of the appeal by the BIA. *See*, *e.g*. *Sepulveda v. Gonzales*, 407 F.3d 59 (2d Cir 2005)(there is no bar to reviewing a non-discretionary decision of whether person is eligible as a matter of law under §245(i)); *Billeke-Tolosa v. Ashcroft*, 385 F.3d 708 (permitting review of legal error where IJ looked behind application to deny I-485 based on a police report).

If the practitioner has acted competently and diligently in representing the client, and the I-485 application still remains denied, the practitioner cannot be held responsible for the denial. On the other hand, if it can be demonstrated that a practitioner's representation constituted ineffective assistance to the client, the client can seek to reopen a removal order by following the procedure under *Matter of Lozada*, 19 I&N Dec. 637 (BIA 1988) as set forth below:

> - *The motion must be supported by a declaration from the respondent attesting to the relevant facts. The declaration should include a statement of the agreement between the respondent and the attorney with respect to the representation.*
>
> - *Before the respondent files the motion, he or she must inform counsel of the allegations and give counsel the opportunity to respond. Any response should be included with the motion.*
>
> - *The motion should reflect whether a complaint has been filed with appropriate disciplinary authorities regarding such representation, and if not, why not.*
>
> - *The respondent must show that the representation was ineffective and prejudiced the respondent.*

Therefore, practitioners must maintain a record in their files that they had acted competently and diligently in representing the client notwithstanding that there was a denial of the I-485 to insulate themselves against ineffective assistance of counsel motions under *Matter of Lozada*.

Another ethical consideration is whether disclosure must be made in response to questions on the I-485 application, and this obligation continues even after the I-485 application has been filed and prior to the conclusion of the proceeding. Thus, if a client has made a false claim to citizenship on another application such as for a driver's license, disclosure must be made on the I-485 application at Part 8, Question 66. In *Patel v. Garland*, Patel was prosecuted by Georgia, although the state dropped its prosecution after concluding that it had insufficient evidence that Patel committed a crime. The driver's license application incident arose after Patel filed the I-485 application, and it is not clear whether Patel voluntarily made disclosure or whether the USCIS asked for it after Georgia prosecuted him. Of course, when there has been a criminal prosecution, Part 8 Question 25 also requires a response in the affirmative whether the applicant has been charged, cited or arrested or detained by a law enforcement official for any reason. Under ABA Model Rule 3.3, the practitioner shall not make a false statement or fail to correct a false statement to a tribunal. If a false statement has been knowingly offered, the lawyer is obligated to take reasonable remedial measures, including if necessary, disclosure to the tribunal. In case there is any ambiguity whether USCIS is a tribunal under ABA Model Rule 1.0(m), 8 CFR 1003.102(c) contains an analogous sanction for immigration practitioners that does not distinguish whether any DHS agency is a tribunal or not, as follows:

> *Knowingly or with reckless disregard makes a false statement of material fact or law, or willfully misleads, misinforms, threatens, or deceives any person (including a party to a case or an officer or employee of the Department of Justice), concerning any material and relevant matter relating to a case, including knowingly or with reckless disregard offering false evidence. If a practitioner has offered material evidence and comes to know of its falsity, the practitioner shall take appropriate remedial measures.*

If a practitioner confronts a similar situation with a client who made a false claim to citizenship on a driver's license, would there be an obligation to disclose this on the I-1485 application when the claim was not material to the benefit being sought as in Patel's case? INA §212(a)(6)(C)(ii)(I) renders a noncitizen inadmissible "who by fraud or willfully misrepresenting a material fact seeks to procure (or has sought to procure or has procured) a visa, or other

documentation, or admission into the United States or other benefit provided under this Act." The Supreme Court in *Patel* cited the BIA's decision in *Matter of Richmond*, 26 I&N Dec. 779 (2016), which held that INA §212(a)(6)(C)(ii)(I) is only applicable when a noncitizen 1) makes a false representation of citizenship, 2) that is material to a purpose or benefit under the law and 3) with the subjective intent of obtaining the purpose or benefit.

If the client met the standard under *Matter of Richmond*, and it is determined in good faith that the client did not implicate INA §212(a)(6)(C)(ii)(I), would there be a duty to disclose on the I-485 application that the client made a false claim to citizenship? While not disclosing under these circumstances might be defensible, it would be more prudent to disclose and then explain why the applicant should not be found inadmissible under *Matter of Richmond*.

Hundreds of thousands of noncitizens have filed I-485 adjustment applications based on family and employment-based petitions. Immigration practitioners must be even more vigilant in representing a client competently and diligently in ensuring that the USCIS does not make a mistake when rendering a decision on an I-485 adjustment application, and if that happens, must continue to represent the client competently and diligently in seeking to redress the mistake under the limitations imposed by *Patel v. Garland*. The stakes have never been higher.

(This blog is for informational purposes and should not be viewed as a substitute for legal advice).

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