No. 18-_____

In the Supreme Court of the United States

CARLOS DONJUAN
Defendant – Appellant,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Carlos Donjuan, Pro Se Petitioner
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QUESTION PRESENTED

I. The U.S. Court of Appeals for the Tenth Circuit, in review, sustained the Federal District Court Judge's (FDDJ) denial of Petitioner's Petition for Writ of Error *Coram Nobis* to withdraw his guilty plea, and thus failed to allow the Petitioner to withdraw his guilty plea under *Padilla v. Kentucky,* 559 U.S. 356 (2010), and *Strickland v. Washington,* 466 U.S. 688, under circumstances which the guilty plea statutorily required the removal of an alien yet unauthorized to, but eligible to remain in the United States as a legal permanent resident of the United States with employment authorization, under 8 U.S. C. § 1229b(b)(1) INA § 240A(b)(1) Cancellation of Removal and Adjustment of Status of Certain Nonpermanent Residents, alien whose U.S.

citizen daughter will suffer exceptional and extremely unusual hardship, here suffering from the most extreme form of spina bifida, if her alien father is removed from the United States, and where it is impossible for the Petitioner, as Defendant in the criminal case, to have committed the crime of which he was accused and to which he pled guilty, because he is not an employer, as an element of the crime, or in collusion with an employer, but rather merely used false documents bearing his own name to obtain employment, and could not have used the documents to "verify" his employment as that confusing, technical term is meant pursuant to INA § 274A(b), 8 U.S. C. §1324a(b), and thereby, as a practical matter, eliminating the INA § 240A, 8 U.S. C § 1229b(b)(1) humanitarian remedy from the law. The conviction was void on its face because with its several references, only an employer, or employing agency, can "verify" and thus commit this crime, and, as the record

shows, the alien only used false documents to obtain employment and was not in collusion or conspiracy with the employer to defraud the government's Unlawful Employment of Alien's program.

PARTIES TO THE PROCEEDING

The parties to the proceeding are set forth in the case caption.

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OPINION BELOW

Petitioner filed a timely Petition for Rehearing. The Petition for Rehearing was denied on January 30, 2018. The Order is attached hereto as Appendix A.

The opinion of the U.S. Court of Appeals for the Tenth Circuit was entered on January 3, 2018, under the caption UNITED STATES OF AMERICA, V. CARLOS DONJUAN, No. 16-8096 (10th Cir. 2016). The ORDER AND JUDGMENT is attached hereto as Appendix B.

The U.S. District Court for the Federal District of Wyoming decision under the caption of

United States of America v. Carlos Donjuan, entitled ORDER DENYING DEFENDANT'S PETITION FOR ISSUANCE OF WRIT OF ERROR CORAM NOBIS, Case No. 11-CR-00169-F, was issued on July 7, 2016, is attached as Appendix C.

STATEMENT OF JURISDICTION

The U.S. Supreme Court has jurisdiction in this matter as the honorable Tenth Circuit exercised jurisdiction under 28 U.S.C. § 1291, reviewing a denial of a U.S. District from the Federal District of Wyoming Criminal Court Judge denying the Petitioning Defendant's Petition for Writ of Error *Coram Nobis* denying the Petitioning Defendant's motion to withdraw his guilty plea pursuant

to *Padilla v. Kentucky,* 559 U.S. 356 (2010) and *Strickland v. Washington,* U.S. 466 U.S. 668, 687 (1984).

The Petitioner filed this Petition for Writ of *Certiorari* by sending it U.S. mail postmarked on or about April 30, 2018, within the 90-day time limit prescribed from the date of the Tenth Circuit Court's Order January 30, 2018, denying the timely filed Petition for Rehearing. This honorable U.S. Supreme Court has jurisdiction in this matter.

This honorable U.S. Supreme Court also has jurisdiction because, as the sole result of the Petitioner's uninformed, and therefore unknowing,

guilty plea as the criminal Defendant, the Immigration Judge (IJ) pre-terminated, and consequently denied, Petitioner's immigration application for Cancellation of Removal under Immigration and Nationality Act (INA §240A(b)(1); 8 U.S.C. § 1229b(b)(1), and "[T]he IJ and this Board [the BIA] cannot entertain a collateral attack on a judgment of conviction unless that judgment is void on its face, and cannot go behind the judicial record to determine the guilt or innocence of the alien." (*Matter of Madrigal-Calvo,* 21 I&N Dec. 323, 327 (BIA 1996).

The IJ issued the Petitioner, as Respondent in immigration proceedings, a voluntary departure

order, which as a matter of law[1], as a result of his appeals, has become a removal order.

The Board of Immigration Appeals (BIA) sustained the IJ's order. 8 U.S.C. § 1252(a) and § 1252(b) provide for judicial review of all final removal orders, specifically § 1252(a)(2)(D) permitting the review of constitutional claims or questions of law raised upon petition for review implicating 28 U.S. C. §2403(a), requiring upon docketing pursuant to Rules of the Supreme Court of the United States, Rule 29.4(b), that certification to the U.S. Attorney General the fact that the constitutionality

[1] Pursuant to 8 C.F.R. § 1240.26(i) Petitioner's voluntary departure order terminated upon filing a petition for review under 8 U.S. C. § 1252 , results in a removal order, with a 10 year bar to return without possibility of pardon. *See* 8 U.S.C. § 1182(a)(9)(A) Aliens Previously Removed.

of an act of Congress was drawn into question, implicating U.S. Constitutional Rights of the Fifth Amendment Due Process and Equal Protection, - including void for vagueness, and Sixth Amendment of Ineffective Assistance of Counsel.

STATUTORY PROVISIONS

The Statutory provisions are stated in Appendix D of this Petition.

STATEMENT OF THE CASE POSTURE AND MATERIAL FACTS

CASE POSTURE

This is a petition of a sustained appeal of a denial of a Petition for Writ of Error *Coram Nobis* denying the Petitioner's motion to withdraw his

guilty plea, and as a direct consequence of that guilty plea, without knowing it, the Defendant in Immigration Court statutorily lost his right to the remedy of Cancellation of Removal and Adjustment of Status. On February 28, 2014, the IJ denied the Petitioner's EOIR 42B Application for Cancellation and Adjustment of Status filed on December 20, 2011 (received by the Immigration Court on January 4, 2012), pursuant to INA § 240A(b)(1)(C). The IJ found that Petitioner's conviction was an offense under section 237(a)(3), which made the Petitioner deportable and thus removable, and statutorily ineligible for Cancellation of Removal and Adjustment of Status.

INA § 237(a)(3)(B)(iii) states that any alien

who at any time has been convicted of a violation of, or an attempt or a conspiracy to violate, section 1546 of title 18, United States Code (relating to fraud and misuse of visas, permits, and other entry documents), is deportable.

Upon a finding of the Petitioner's "good moral character," the IJ granted voluntary departure until April 29, 2014 upon posting a voluntary departure bond in the amount of $500.00 to DHS within five business days. Petitioner paid the Immigration Bond on March 5, 2014. (attached to Notice to Appeal to the BIA). The BIA sustained the "good-moral-character" based voluntary departure order.

STATEMENT OF MATERIAL FACTS

Petitioner, Carlos Israel DONJUAN, is a 36 year-old (DOB 4/20/1982), male, native and citizen of Mexico. The Petitioner went to Antonio Díaz Soto y Gama Elementary School in San Luis Potosi, Mexico and graduated from 9th grade.

He entered the United States in February 1999 in Brownsville, Texas, now 18 years ago. Since his first arrival, Petitioner departed the United States once in late November 2004, before Thanksgiving (Thanksgiving was on November 25, 2004), and returned just before his mother's birthday in late January 2005 (his mother's birthday is on January 27). Since Petitioner arrived in February 1999,

Petitioner lived in Florida, Michigan, Tennessee and Wyoming.

Petitioner has one U.S. citizen daughter named Adriana Musser; she was born on November 15, 2006 in Denver, Colorado. Petitioner's daughter was born with Spina Bifida, a congenital and hereditary disease. Adriana was born with Myelomeningocele, the most serious form of Spina Bifida, and is paralyzed from the mid-stomach down. Petitioner's daughter had to have a shunt placed in her brain. Since she was born, she was treated with life threatening medical complications, and she has had six major surgeries. She cannot walk and talk, and the

prognosis for her Spina Bifida is that it is expected to be permanent.

Petitioner originally lived together with his daughter and the mother of his daughter, U.S. citizen Julie Christine Musser.[2] Julie Musser and Petitioner are not married. Because of Petitioner's daughter's disease, daycare is not possible, and Julie

[2] In the beginning of the proceedings it was stated that Petitioner and Julie Musser are common law married. However, they decided not to get married, as stated in the hearing before the IJ on April 16, 2013. They are no longer living together. Petitioner Carlos Donjuan is presently married to a U.S. citizen, Shanese Donjuan. They were married on October 15, 2015. Carlos is presently sharing custody of his daughter Adriana Musser with the daughter's mother, Julia Musser. Carlos presently travels on his construction jobs and has Adriana every other weekend. He continues to have a wonderful relationship with his daughter. Carlos and Shanese are presently willing to accept full custody of Adriana and Shanese is willing to adopt Adriana, of course with the permission of Julia. Shanese has a great relationship with Adriana at this time as well.

Musser has to stay home to take care of Petitioner's daughter. Petitioner is the only person earning money in the household, and thus he supports his daughter and his daughter's mother financially. In addition to that he is a mental and an emotional support for the mother and daughter. The national social insurance program, Medicare, has helped to pay for Petitioner's daughter's surgeries.

PETITIONER'S CRIMINAL CONVICTION

Arrested in July 2011, Petitioner was convicted of a crime on September 12, 2011 in Cheyenne, Wyoming, at which time he pleaded guilty to Use of False Immigration Documents pursuant to 18 U.S.C. 1546(b)(1) when appearing before the District

Court Judge. Pursuant to Level One Sentencing Guidelines, United States District Court for the District of Wyoming sentenced Petitioner to 79 days, time-served, plus up to ten days for immigration hold to transfer the Petitioner to Department of Homeland Security pursuant to an immigration hold. The maximum sentence under the level one guidelines was six months.

Petitioner used a falsified Form I-551, Permanent Legal Resident Card and a Social Security Card with his own name on them to obtain employment. The falsified documents did not belong to anyone else. Petitioner knew that the documents were not

issued lawfully for his use. The Petitioner's only purpose of using the falsified documents was to obtain employment, and he could not have used the documents for his perspective employment to satisfy the employer's requirement of the employment verification system set forth in subsection 1324a(b) of Title 8 of the United States Code, INA § 274A(b).

During the sentencing proceedings on October 6, 2011, in Cheyenne, Wyoming, his counsel Mr. Weiss stated "I was very pessimistic at the time I got the case that a plea to this would mean automatic deportation for Mr. Donjuan. With more research and talking with immigration in Denver, there is some pretty good hope that, given the circumstances

in this very specific charge, that he will be eligible for legal permanent resident status, and has a good chance of receiving that, which I think he would be an excellent candidate." Shortly after that, the Court stated "We hope that he [Mr. Donjuan] will be entitled to stay within the United States and work so that he may see his daughter through this."

TENTH CIRCUIT COURT DECISION

The Tenth Circuit concluded that *Padilla* does not extend and apply to the district court judge fifth amendment due process claims.

In regards to the sixth amendment ineffective assistance of counsel claim, the Tenth Circuit Court decision then stated that *Padilla and Strickland* do

not apply in the present case, avoiding *de novo* review, and permitting clear error and abuse of discretion review, because in *Padilla* the Petitioner was a legal permanent resident (LPR) and his criminal conviction required the Attorney General to rescind that status, whereas here, the Petitioner was not a legal permanent resident when he was picked up[3], served a Notice to Appear in immigration court, and pled that he was removable, and applied for cancellation of removal[4], which he was otherwise eligible

[3] The Court found that this was not Petitioner's first interaction with the DHS, however, it was. DHS picked Petitioner up in July 2011 and issued the NTA and then decided to prosecute him criminally and then returned him to DHS detention in September 2011 after Petitioner's guilty plea.

[4] On February 2009, after being a resident and present in the United States for over 10 years, Petitioner was eligible for legal permanent resident (LPR) status as a result of the birth of his severely mentally and physically challenged daughter, November 15, 2006, and would have

since November 15, 2006.[5] The Court found that the Petitioner's plea thus did not render him removable, as the petitioner in *Padilla*, but already subject to removal and merely ineligible for discretionary relief[6].

The Court also found that the clear court record of conviction, the plea hearing and the sentencing hearing, contradicted the Petitioner's affidavit

become an LPR, as was Mr. Padilla, but for USCIS/DHS Policy the eligible applicant cannot submit himself for removal hearing to file the application before the IJ in removal proceedings.

[5] The Court found Cancellation of Removal to be discretionary, however the IJ found the Petitioner eligible for relief based upon the discretionary factors, good moral character, no violation of INA § 212(a)(2)(b), but found the Petitioner statutorily ineligible for the relief expressly and specifically because of the conviction of 18 U.S.C. § 1546(b)(1).

[6] By DHS policy Mr. Donjuan could not apply for LPR status without being arrested by DHS. He can not turn himself in to DHS to receive the remedy congress intended for him to have..

and evidence, as Petitioning Defendant in the criminal case, and the court record supersedes less clear, non-overriding contradictory evidence, especially regarding the review of proof in the remedy of a Petition for Writ of Error *Coram Nobis,* requiring 1) an error; 2) not known at time of trial [pleading]; 3) altering the outcome; and 4) resulting in a complete miscarriage of justice. *Citing Klein v. United States,* 880 F.2d, 254 (10th Cir. 1989) (quotations omitted), and stating that "federal courts may only entertain *Coram Nobis* applications in extraordinary cases presenting circumstances compelling its use to achieve justice." *Citing Rawlins v. Kansas,* 714 F.3d 1189, 1196 (10th Cir. 2013).

After determining that the other requirements of a grant *Coram Nobis* were met, as did the district court judge, the Tenth Circuit decision also concluded that, as a result of the conflict between the court-record, presumption of accuracy and verity of the adverse consequences, including the **"risk"** (my emphasis) of deportation (removal) and risk of ability to obtain lawful reentry, having committed fraud, a potential crime of moral turpitude, after the Petitioner admitted that he had been "satisfactorily" advised by his defense counsel and not promised anything apart from the plea agreement to get Mr. Donjuan to plead guilty, and the Petitioner's affidavit, stating that he was not accurately informed and

properly advised of the statutorily, **absolute, certainty** (my emphasis) of removal, of having pled guilty unwittingly to 18 U.S.C. § 1546(b)(1), a very serious violent felony, a potential crime of violence, and accompanying section (a) of the statute including even charges of breach of security and terrorism, the substitute, District Court Magistrate Judge was satisfied that the Defendant, the Petitioner here, knowingly and voluntarily pled guilty, and the Petitioner did not overcome the discrepancy to be granted the extraordinary writ of Error *Coram Nobis.*

EQUAL PROTECTION AND UNCONSTITUTIONALLY VAGUE

The Tenth Circuit decision adopts the District Court analysis of the Petitioner's claims that his prosecution under 18 U.S.C. §1546(b)(1) did not subject the Petitioner to selective prosecution and thus a fifth amendment equal protection violation as applied to him, and that 18 U.S.C. § 1546(b)(1) is not unconstitutionally vague as applied to him. The Tenth Circuit adopted opinion stated that Equal Protection requires that the federal prosecutorial policy have a discriminatory effect and motivated by a discriminatory purpose, such that the Petitioner, as the Defendant, was unfairly singled out or treated differently from other defendants, and that there was no such demonstration, and thus no Equal Protection violation.

The Tenth Circuit adopted decision stated that 18 U.S.C. § 1546(b)(1) is not unconstitutionally vague because an ordinary person can understand and know what knowingly using a false identification document "for the purpose of satisfying a requirement of section 274A(b) of the Immigration And Nationality Act" means in reference to disobeying this law.

The Tenth Circuit Court concluded that the "Defendant [Petitioner] was advised correctly that his guilty plea would likely result in his deportation (removal)." (Order and Judgment p. 7. Appx. B.)

SUMMARY OF ARGUMENT REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

This Petition first argues that the honorable Tenth Circuit Court erred in stating that 1) *Padilla* only applies to defendant's who are LPR's of the United States, rather then merely eligible to become LPR's through a discretionary remedy, INA § 240A(b)(1), 8 U.S.C. S 1229b(b)(1), here cancelation of removal of nonresident aliens, especially here where the plea conviction is what made the otherwise discretionary remedy, statutorily, mandatorily, ineligible. There is no indication in *Padilla* that *Padilla* does not include aliens who have remedies to

become LPR's in the United States by virtue of their family circumstances; legal history indicates that that is not a distinguishing factor. *see* **Mathews v. Eldridge**, 424 U.S. 319 (1976).

The honorable Tenth Circuit Court also erred in stating that the *Padilla* requirements do not extend to the court to be sure that the *Padilla* advisements meet the *Padilla* requirements, especially here where the requirements involve clear mandatory removal upon acceptance of a guilty plea, especially under such known circumstances, and where on the face of the statutes, 8 U.S.C. § 1324a(b), INA § 274A(b) employer verification purposes, the Petitioner is not an employer, an employing agency and

on this record, he did not collude or conspire with his employer, so that his employer could forward such document to any third party, here specifically the U.S. government. However, the Federal District Court Judge accepted the Petitioner's guilty plea, and the Petitioner was none the less convicted of this crime specifically listed in INA §§ 240A(b)(1)(C) and 237(b)(3), when, on the record before the District Court, it is impossible for the Petitioner to have committed this crime.

This Petition argues that the honorable Tenth Circuit Court erred in finding, as the basis of its decision, that the factual statement in the Petitioner's affidavit, that his defense counsel lead him to believe

and he always thought he had a reasonable chance to remain in the United States in spite of his guilty plea to this crime 18 U.S.C. § 1546(b)(1), was contradictory to the statements the Petition made in court during the plea hearing.

This Petition argues, as well, that the Tenth Circuit Court erred in stating that immigration consequences are merely collateral consequences of criminal pleadings in complete disregard of the *Padilla* treatment on the issue.

This Petition also argues that the Tenth Circuit Court adaption of the Federal District Court reasoning that this case does not violate the Petitioner's U.S. Constitution Equal Protection rights

and, void for vagueness regarding the technical term "verify" in 18 U.S.C. § 1546(b)(1) referencing the 8 U.S.C. § 1324a(b), INA § 274A(b) employer verification purposes is in error.

ARGUMENT

I. *PADILLA* ONLY APPLIES TO DEFENDANT'S WHO ARE LPR'S OF THE UNITED STATES RATHER THAN ALL ALIENS WHO ARE OTHERWISE FOUND ELIGIBLE FOR A DISCRETIONARY REMEDY

The honorable Tenth Circuit first found that *Padilla* only applies to defendant's who are LPR's of the United States, rather than aliens merely eligible to become LPR's through a discretionary remedy,

here cancelation of removal of nonresident aliens, especially here where the plea conviction is what made the Petitioner statutorily, mandatorily ineligible for otherwise favorably-determined, discretionary remedy. There is no indication in *Padilla* that *Padilla* does not include aliens who have remedies to become LPR's in the United States by virtue of their family circumstances.

In no place in the *Padilla* decision does the case mention the distinction between applying that case to only LPR's. The decision mentions several times applying the case to noncitizens, and includes several references to noncitizen offenders and alien

defendants, even those who are under threat of removal or deportation who have discretionary claims to remain in the United States, as the Petitioner here. *Padilla* applies to non-LPR, aliens as well as LPR aliens, as do the other cases referenced in *Padilla.*

The Respondent, as an alien, has due process rights. True, "The scope of judicial review into immigration legislation is limited; over no conceivable subject is the legislative power of Congress more complete than it is over the admission of aliens." *See* **Fiallo v. Bell,** 430 U.S. 787 (1977). Nevertheless, the exercise of such power is still subject to constitutional limitations, including the protection of due

process rights. The Supreme Court states in **Landon v. Plasencia**, 495 U.S. 21, 34 (1982):

This Court has long held that an alien seeking initial admission to the United States requests a privilege, and has no constitutional rights regarding his application, for the power to admit or exclude aliens is a sovereign prerogative. *See*, e.g., **United States ex rel. Knauff v. Shaughnessy**, 338 U. S. 537, 338 U. S. 542 (1950); **Nishimura Ekiu v. United States**, 142 U. S. 651, 142 U. S. 659-660 (1892). Our recent decisions confirm that view. *See*, e.g., **Fiallo v. Bell**, 430 U. S. 787, 430 U. S. 792 (1977); **Kleindienst v. Mandel**, 408 U. S. 753 (1972). As we explained in **Johnson v Eisentrager**, 339 U. S. 763, 339 U. S. 770 (1950), however, once an alien gains admission to our country and begins to develop the ties that go with permanent residence, his constitutional status changes accordingly. Our cases have frequently suggested that a continuously present resident alien is entitled to a fair hearing when threatened with deportation, *see*, e.g., **United State ex rel. Tisi v. Tod**, 264 U. S. 131, 264 U. S. 133, 264 U. S. 134 (1924); **Low Wah Suey v. Backus**, 225 U. S. 460, Page 459 U. S. 33 225 U. S. 468 (1912) (hearing may be conclusive "when fairly conducted"); *see* also **Kwong Hai Chew**, 344 U.S. at 344 U. S. 598, n. 8,

and, although we have only rarely held that the procedures provided by the executive were inadequate, we developed the rule that a continuously present permanent resident alien has a right to due process in such a situation. *See*, e.g., **United States ex rel. Vajtauer v. Commissioner of Immigration**, 273 U. S. 103, 273 U. S. 106 (1927); **The Japanese Immigrant Case**, 189 U. S. 86, 189 U. S. 100-101 (1903); *see also* **Wong Yang Sung v. McGrath**, 339 U. S. 33, 339 U. S. 49-50 (1950); **Bridges v. Wixon**, 326 U. S. 135, 326 U. S. 153-154 (1945).

Both a continuously present resident alien and a continuously present [legal] permanent resident alien have the same due process rights and are covered by *Padilla*. Here it is especially, equally true, when the Petitioner has legal rights to become a legal permanent resident, and but for the USCIS policy that he not be permitted to turn himself in and apply for the benefits, he is entitled to protect his physically- and-mentally-challenged, U.S. Citizen

daughter from the time she entered the world after he had achieved the required 10-year alien residence.

The degree of judicial review depends on the interest involved, *see* **Mathews v. Eldridge**, 424 U.S. 319 (1976). According to the Supreme Court

> identification of the specific dictates of due process generally requires consideration of three distinct factors: Fist, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, in any, of additional or substitute procedural safeguards, and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

In the present case, the consideration results in a clear preponderance of Respondent's interest.

The first factor, the private interest affected by the official action, is very high. The official action is the IJ's decision prompted by the Federal District Court Judge's improper acceptance of the unknowing guilty plea, and affects Respondent in all circumstances of his life and his daughter's life: If deported, he would not be able to see and support his already, severly-challenged, U.C. citizen daughter, Adrian; he would lose his job, and would be forced to give up his whole life here in the United States supporting his daughter. The second factor, the risk of an erroneous deprivation of such interest is very high too. The IJ already denied Respondent's LPR application.

In contrary, the government's interest is very low or nonexistent, as the government cannot have any interest in illegal consequences of an illegal conviction. In addition to that, as the Respondent is the only financial supporter for his disabled daughter and her mother, the government's interest in keeping him as a financial supporter is very high. The mother needs to take care of the child and will not be able to work. Thus, without the support of Respondent, she would be dependent on social welfare. Those social costs lower the government's interest even more.

The result of the preponderance of Respondent's interest is that his case calls for procedural protection of due process. The degree of judicial review is comprehensive.

II. *PADILLA* APPLIES TO THE COURTS APPLYING DUE PROCESS RIGHTS OF THE NONCITIZEN-ALIEN DEFENDANTS DURING THE PLEA BARGAIN PROCEDURE

The Board also stated in **Matter of Garcia-Flores**, 17 I&N Dec 325 (BIA 1980), that due process requires that the "agency government must scrupulously observe rules, regulations, or procedures which it has established, and that when 'it fails to do so, its action cannot stand and courts will

strike it down'. ...*citing* **United States v. Heffner,** 420 F. 2d 809, 811 (4th Cir.1969), and the cases cited therein." The Bard states: "Thus, in **Bridges v. Wilson,** 326 U.S. 135, 152-53 (1945) the Court ruled invalid a deportation order on the basis of statements which were not taken in compliance with rules (my emphasis) designed 'to afford the alien due process of law' by providing 'safeguards against essentially unfair procedures." ."Thus, where agency action is required by constitutional or statutory law, violation of an implementing regulatory requirement is subject to serious challenge.

In **Matter of Flores Garcia,** the Board adopted the two-prong test that the whether a deportation proceedings should be invalidated. "First, the regulation [or rule] in question must serve a 'purpose of benefit to the alien,' c*iting* **United States v. CalderonMedina,** 591 F.2d 529 (9th Cir. 1979). Secondly, if it does, the Ninth Circuit has held that the regulatory [rule] violation will render the proceeding unlawful 'only if the violation prejudiced interests of the alien which were protected by the regulation [rule]'." In that case the aliens were required to specifically identify any prejudice resulting from the violation, that is, to determine whether the violation 'harmed the aliens' interests in such a way

as to affect potentially the outcome of their deportation proceedings.' **CalderonMedina,** at 532.

The Board further stated:

> We will adopt this `prejudice' test set forth by the Ninth Circuit. In those cases where agency action has been invalidated by the Supreme Court there has either been an expressed or clearly apparent prejudice to the individual as a result of a violation of a rule or regulation promulgated at least in part to bestow a procedural or substantive benefit on the individual in question. Where compliance with the regulation is mandated by the Constitution, prejudice may be presumed. Similarly, where an entire procedural framework, designed to insure the fair processing of an action affecting an individual is created but then not followed by an agency, it can be deemed prejudicial. *See* **Vitarelli v. Seaton,** *supra*; **Service v. Dulles,** *supra*; **U.S. ex rel. Accardi v. Shaughnessy,** *supra*. As a general rule, however, prejudice will have to be specifically demonstrated.

The *Padilla* requirements do extend to the court to be sure that the *Padilla* advisements meet

the *Padilla* constitutional, knowing-and-voluntary-plea-bargain requirements, especially here where the requirements involve clear, presumptive, mandatory removal upon acceptance of a guilty plea, especially under such known circumstances, and where on the face of the statutes, 8 U.S.C. § 1324a(b), INA § 274A(b) employer-verification-program purposes, the Petitioner is not an employer, an employing agency and on this record, he did not collude or conspire with his employer, so that his employer could forward such document to any third party, here specifically the U.S. government. However, the Federal District Court Judge accepted the Petitioner's guilty plea, and the Petitioner was none the less convicted of this crime specifically listed in

INA §§ 240A(b)(1)(C) and 237(b)(3), when, on the record before the District Court, it is impossible for the Petitioner to have committed this crime. ***Hoffman Plastic Compounds, Inc., v. NLRB,*** 535 U.S. 137 (2002)

III THE COURT RECORD IS NOT CONTRADICTORY TO THE STATEMENTS IN THE PETITIONER'S AFFIDAVIT REGARDING HIS EXECTATIONS AT THE PLEA HEARING.

The honorable Tenth Circuit Court erred in finding, as the basis of its decision, that the factual statement in the Petitioner's affidavit, that his defense counsel lead him to believe and he always thought he had a reasonable chance to remain in the

United States in spite of his guilty plea to this crime 18 U.S.C. § 1546(b)(1), was contradictory to the statements the Petition made in court during the plea hearing.

The honorable Tenth Circuit Decision that the District Court's advisement that the Petitioner's guilty plea may or even will adversely affect the Petitioner's rights to remain in the United States, while the Petitioner's affidavit states that the Petitioner always thought that he would have a chance to remain in the United States to help his daughter, illustrates the importance of the *Padilla* requirement to state that the predicate guilty plea will presumptively mandate removal, if in fact as here, it

does. The statements are not mutually exclusive; the plea and resultant conviction did not preclude the Petitioner's right to the "discretionary" relief in INA § 204A(b), as a crime of fraud and thus a crime of moral turpitude under INA § 212(a)(2), 8 U.S.C. § 1182, as it did not in this present case. The IJ found in this case however, that the Petitioner's use of false document to merely to obtain employment, was not a violation of INA § 212(a)(2). And both statements are true.

Here the IJ could have found that the conviction for use of a falsified document or document for the sole purpose of obtaining employment could have

been a fraudulent act, and disqualified the Petitioner from cancellation-of-removal, relief, a very popular issue at the time of the Petitioner's immigration hearing, that is still splitting the U.S. Circuit Courts today, considering an alien's employment history has historically been considered for discretionary purposes as a positive factor, in immigration law. *See* ***Arias v. Lynch,*** No. 14-2839 (7th Cir. 2016). It is highly likely that the Federal Defense attorney stated that the Petitioner's guilty plea may have an adverse effect on his cancelation claim without being presumptively mandatory, and in fact it was. So, 1) the court record and affidavit are not in conflict; 2) the advisement was not adequate under the requirements of *Padilla;* and the 3) affidavit of

the Petitioner is presumptively sufficient to explain his understanding at the time of his unknowing, violative, guilty plea.

As the FDCCJ's decision accurately quotes *Padilla, Padilla* states:

> Padilla's counsel provided him false assurance that his conviction would not result in his removal from this country. This is not a hard case in which to find deficiency (my emphasis). The consequences of Padilla's plea could easily be determined from reading the removal statute, his deportation was presumptively mandatory, (my emphasis) and his counsel's advice was incorrect.

The FDCC's decision further quotes *Padilla:*

> There will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain. (my emphasis). The duty of the private practitioner in such cases is more limited. When the law is not succinct and straightforward . . . a criminal defense attorney

need do no more than advise a noncitizen client that pending criminal charges may (my emphasis) carry a risk of adverse immigration consequences. But when the deportation consequences is truly clear, as it was in this case, the duty to give correct advice is equally clear. (my emphasis).

Padilla 559 U.S. 366, 369. (FDCCJ Dec. pp. 5-8). (Dist. Ct. Doc. 46, At. Ap. at 169-72).

As the FDCCJ decision concluded, the *Padilla* established the clear mis-advice on the risks (my emphasis) associated with deportation sufficiently satisfies the first prong of *Strickland. Strickland v. Washington,* 466 U.S. 668 (1984); *Padilla* 559 U.S. 366, 369 (2010).

The FDCCJ's decision further states: "The Supreme Court established two duties for a criminal

defense attorney when advising their client. First, when the deportation consequences are truly clear, the attorney has the duty to provide correct advice to their client. Second, when the deportation consequences are unclear or uncertain the attorney must advise his client that a guilty plea could carry a risk (my emphasis) of adverse immigration consequences." Here the FDCCJ analysis errs.

Padilla states in its case that this is not a hard case in which to find deficiency. In that case the defense attorney stated there would be no immigration consequences and there actually were. In the present case, however, as the FDCCJ points out, the criminal court advised that the guilty plea would "likely" result in the Defendant's removal or deportation, and in fact it did. However, this advice is not correct advice under the circumstances in the present case pursuant to *Padilla.*

Here, under the clear dictates of the immigration statute, deportation is "presumptively mandatory," but even pursuant to the FDCCJ's findings, both the criminal court advisement and the Defense Counsel's advice, prior to the Defendant's, the Appellant's here, change of plea, was only that he was "likely" to be removed from the United States as a result of his guilty plea. The Defendant was entitled to be advised by the court that his removal would be "presumptively mandatory" as a result of his guilty plea. As a result neither provided the client with the correct advice, and the FDCCJ's analysis and decision errs in this regard. Had the statute not clearly "presumptively mandated" the Appellant's removal, and removal was not succinct and straightforward,

the federal criminal court's advisement would have been sufficient under *Padilla*. However, had the Appellant's Defense Counsel advised the Appellant, as well as the Federal District Criminal Court, prior to the plea agreement, as he was required to do to provide effective assistance of counsel, that the Appellant had a good chance of receiving legal permanent resident status, as it appears that the he did, then the advisement was not sufficient.

Thus, the FDCCJ's decision notwithstanding, under the *Strickland* two-prong inquiry, counsel's representation fell below an objective standard of reasonableness under *Padilla,* and the court's ad-

visement did not rehabilitate defense counsel's error. And but for the counsel's unprofessional errors, the result of the proceeding would have been different, especially as here when it is not possible for the Appellant to have committed the crime, 18 U.S.C. § 1546(b)(1) referencing INA § 274A(b), 8 U.S.C. § 1324a(b), since he, as an employee only, had no duty under the statute he was convicted of, of "verifying" his employment to the U.S. Government. And thus, he did not commit the crime.

As *Padilla* states, "But when the deportation consequence is truly clear, as it was in this case, the duty to give correct advice is equally clear." Not even the substitute Federal District Criminal Court

Judge was aware of the "presumptive mandatory" removal of the Defendant during the Sentencing Hearing as he stated: "We hope that he will be entitled to stay within the United States and work so that he may see his daughter through this." (Dist. Ct. Doc. 21 p. 6, ll. 21-26, At. Ap. at 50 or 121). The Appellant's Defense Counsel's pre-plea-hearing advice, as well as the Federal District Court's pre-plea hearing "likely" advisement was incorrect, especially as to the extent of the risk of removal remaining as a result of the plea, -presumptively mandatory- clearly stated in the statute.

IV IMMIGRATION DEPORTATION CONSEQUENCES OF A GUILTY PLEA ARE NOT

MERELY COLLATERAL CONSEQUENCES OF A GUILTY PLEA

The Tenth Circuit Court erred in stating that immigration consequences are merely collateral consequences of criminal pleadings in complete disregard of the *Padilla* treatment on the issue.

In **Chaidez v. United States**, 133 S. Ct. 1103 (2013), the Supreme Court discussed its *Padilla*-decision, *supra*, and states, that "*Padilla* considered a threshold question: Was advice about deportation 'categorically removed' from the scope of the Sixth Amendment right to counsel because it involved a 'collateral consequence' of a conviction, rather than a component of the criminal sentence?" As

cited earlier, in *Padilla v. Kentucky*, the U.S. Supreme Court answered that question as follows: "deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. (...) We conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel." Thus, the Supreme Court concluded that deportation is not a collateral consequence of a conviction. In *Chaidez v. United States*, the Supreme Court stated "It [removal] is a 'particular severe' penalty, and one 'intimately related to the criminal process'; indeed, immigration statues make it 'nearly an automatic result' of some convictions."

As removal is not a collateral consequence of a conviction, *Pedilla* requires the Federal District Court, as well as the honorable Tenth Circuit Court of Appeals to question the conviction in the present case. That especially, when he sees the conviction is obviously illegal because of the lack of Respondent's ability to comply with one element of the crime, and to perform the required purpose of an immigration statute, INA § 274A.

V. THE COURT'S PLEA BARGAIN PROCEDURES IN THE PRESENT CASE VIOLATE THE PETITIONER'S CONSTITUTIONAL EQUAL PROTECTION RIGHTS – SELECTIVE PROSECUTION.

The Tenth Circuit Court adoption of the Federal District Court reasoning that this case does not violate the Petitioner's U.S. Constitution Equal Protection rights is in error.

The FDCCJ denied the Petitioner's claim of Fifth Amendment Equal Protection because of the government's selective prosecution, stating that the claimant must demonstrate that the federal prosecutorial policy was motivated by discriminatory purpose, and that it had a discriminatory effect, and the FDCCJ indicated that the government has broad latitude in their charging decisions. The FDCCJ adds that the Petitioner, as Defendant, during the pleading hearing acknowledged the factual basis for the

charge. The FDCCJ found that there is absolutely nothing to suggest that by charging Defendant under the section selected by the Government that Defendant was unfairly singled out, or treated differently from other defendants.

The FDCCJ's adopted analysis is in error. Here to be convicted by the statute 18 U.S.C. § 1546(b)(1) referencing INA § 274A(b), 8 U.S.C. § 1324a(b), requires the accused, as an employer or employing agency, to violate a "good faith duty" to verify the employment of their employees to the federal government. Here the Petitioner never was under that duty. Even though, as the Defendant, the Petitioner stated that he used the false documents

to "verify" his employment, he was mistaken disregarding the technical, legal, meaning of that term as it is meant in the statute. He had no duty under the statute to verify his employment. The Defendant merely indicated that he was knowingly attempting to use the falsified documents to "verify" (as an ordinary person would understand the normal meaning of the word) to his employer, that the Defendant was eligible to be employed in the United States. So the Defendant's acknowledgement of a factual basis was not the same meaning of the word "verify" as was meant in the statute and constituted a miscommunication, and in his acknowledgement of a factual basis in error. And even though the prosecutors have broad discretion in charging decisions, the Federal

District Court should have denied the charges on the face of the statutory requirements themselves making it impossible for the Defendant, the Petitioner here, to commit this crime.

This prosecution and conviction discriminated against the Defendant because in fact he was otherwise eligible for the benefits of the immigration remedy of cancellation of removal under INA § 240A(b)(1); 8 U.S.C. § 1229b(b)(1), for otherwise unauthorized aliens in the United States, and this prosecution and the eventual unconstitutional conviction due to selective prosecution illegally rendered the Defendant, as the Respondent in the immigration hearing, ineligible for the immigration

remedy set forth by the U.S. Congress for these exact cases.

More troubling is that, under the definition of conviction in the immigration statute, INA § 101(a)(48), 8 U.S.C. § 1101(a)(48)[7] if this conviction, and this definition of "verification" is permitted to stand, all other aliens who are eligible for the cancellation of removal remedy because of the needy, and "exceptional and extremely unusual hardships and circumstances," regardless of whether they have

[7] (48) (A) The term "conviction" means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where- (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or *nolo contendere* or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed. (my emphases).

been formally prosecuted or not, will be ineligible for the remedy as well, for virtually every alien since 1996 has been required to produce false documentation to be employed in the United States. This conviction will render the entire section of the law without meaning.

Under the definition of "conviction," the immigration judge need only know that the alien, otherwise convicted of any use-of-false-documents crime, and the alien admitted facts which would have permitted the alien to be convicted of this crime to render the alien ineligible for the immigration benefit, to deny the benefit to that specific alien because he could have also been prosecuted for 18 U.S.C. §

1546(b)(1). But the fact that all aliens presenting false documents to their prospective employees are not charged under this statute, when they could be in the federal prosecutor's broad discretionary policy, demonstrates discriminatory purpose and discriminatory effect as against the Petitioner here, as the Defendant, and thus selective prosecution. The Federal Court Criminal Judge should have rejected the Petitioner's, as the Defendant's guilty plea.

VI. 18 U.S.C. § 1546(b)(1) IS UNCONSTITUTIONALLY VAGUE. AS APPLIED AGAINST THE PETITIONER IN THIS CASE BECAUSE OF THE TECHNICAL TERM "VERIFY" DOES NOT APPLY TO THE PETITIONER

A. Technical Term "Verify"

For the same reasons Petitioner argues in Section V, 18 U.S.C. § 1546(b)(1) is void for vagueness. The FDCCJ concludes in her decision that 18 U.S.C. § 1546(b)(1) referencing INA § 274A(b), 8 U.S.C. § 1324a(b) is not unconstitutionally vague. In her decision FDCCJ quotes 18 U.S.C. 1546(b)(1) "[w]hosoever uses an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor, . . . for the purpose of satisfying a [employer verifiction] requirement of section 274A(b) of the Immigration and Nationality Act, (my emphasis) shall be fined under this title, imprisoned not more than 5 years, or both." (FDCCJ Dec. pp. 11, Dist. Ct. Doc. 46, At. Ap. at 175).

The FDCCJ states, "[T]he void for vagueness doctrine requires that a statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.", *citing United States v. Corrow,* 119 F.3d 796, 802 (10th Cir. 1997)(quoting *Kolender v. Lawson,* 461 U.S. 357, 103 S.Ct. 1855,1858, L.Ed.2d . 903 (1983). (FDCCJ Dec. pp. 11, At. Ap. at 175). The FDCCJ concludes that, "The language of 18 U.S.C. § 1546(b)(1) is clear and ordinary people can understand that knowingly using a false identification document for employment verification purposes (my emphasis) is prohibited under the statute."

The FDCCJ even states earlier in her decisions that, "During Defendant's change of plea he acknowledged that he used a permanent resident card and social security card knowing that the documents were false, that he used them for purposes of employment verification (my emphasis) and that he knew those cards were not issued to him. (Doc. 24 at 21-22). (FDCCJ Dec. pp. 9, Dist, Ct. Doc. 46; At. Ap. at 173).

The FDCCJ does not however state in her decision, nor do the transcripts state how the Federal District Court Judge in the Criminal plea change hearing knew that the Petitioner, as the Defendant, stated that he knowingly used the false documents

for the for the purpose of satisfying the verification requirement of section 274A(b) of the Immigration and Nationality Act (INA) (my emphasis). In fact, as a matter of law, it is impossible for him to do so as that verification requirement duty is only imposed upon an employer or employing agency. An employee such as the Petitioner here, cannot use his false documents for that purpose, knowingly or not. There is nothing on the record that the court or the defense counsel even read the statute to the Petitioner what the technical term meant in the statute.

As an ordinary person, such as the Petitioner here, as a Defendant, to whom the criminal court has

not read INA § 274A(b), would not know that "verification" under the statute applied only to an employer or an employing agency, and that he the employee could not have knowingly used those false documents for those verification purposes. Thus, as 18 U.S.C. § 1546(b)(1) was applied against the Petitioner in this present case, 18 U.S.C. § 1546(b)(1), is unconstitutionally vague. The Petitioner, as Defendant, was mistaken when he acknowledged to the criminal court magistrate judge, that he knowingly used the false documents "for the purposes of satisfying a requirement of INA § 274A(b)."

The only purpose for which the Appellant knowingly used or gave the false documents to his

employer was to attempt to obtain employment. Knowingly giving the documents to the employer for verification purposes would have been a futile act, because those documents were false, and the employer would know that the documents were falsified when he presented them to the federal government pursuant to INA § 274A for verification purposes, and of course, the employer would not have given the Petitioner here, the employment he sought.

B. *Hoffman Plastics Compound, Inc. v. NLRB*, 535 U.S. 137 (2002)

18 U.S.C. §1546(b)(1) referencing INA § 274A(b); 8 U.S.C. § 1324a(b) is unconstitutionally

vague as applied to the Petitioner in the present case.

The Petitioner here used a false Permanent Legal Resident Card and a false Social Security Card in his own name in order to obtain work. When doing so, he did not intend his employer to provide such document to any other third party, his sole intention was to get a job to earn money and support his daughter and her mother. Thus, the Petitioner's did not commit a crime of fraud and misuse of visas, permits, and other documents pursuant to 18 U.S.C. § 1546, although he pled guilty to having done so. *See* Statutory References INA § 240A(b), INA § 237(a)(3)(B)(iii), 18 U.S.C. § 1546(b)(1), INA §

274A(b) and § 274(b)(3). Conviction of fraud and misuse of visas, permits, and other documents pursuant to 18 U.S.C. § 1546

Petitioner's actions do not correspond to the definition of 18 U.S.C. § 1546(b), which requires the use of an identification document by an employer, knowing that the document was not lawfully issued for the employee's use, and for the purpose of satisfying an employer's requirement of 8 U.S.C. §1324a(b), INA § 274A(b). The Legal Permanent Resident Card and the Social Security Card are identification documents.

INA § 274A(b) describes a requirement which must be fulfilled by the employer himself or the hiring entity itself, not by the person who is seeking employment. Thus, the 274A(b)-requirements are not Petitioner's responsibility, and he could never have had the purpose of submitting those documents to satisfy those requirements. This conviction thus constitutes an illegal conviction on its face.

The use of the language in § 1546(b) "Whoever uses-- . . . (2) an identification document knowingly (or having reason to know) that the document is false, . . . for the purpose of satisfying a requirement

of section 274A(b) of the Immigration and Nationality Act," . . . implicates 8 U.S.C. § 1324c(a); INA § 274C(a), most specifically paragraph (4).

Regarding 8 U.S.C. § 1324c(a)(2); INA § 274C(a)(2) PENALTIES FOR DOCUMENT FRAUD:

Hoffman Plastics Compound, Inc. v. NLRB, 535 U.S. 137 (2002), at 146; *See also, Palma v. N.L.R.B.,* 723 F.3d 176 (2013) at 183. states in relevant part:

> Similarly, if an employer unknowingly hires an unauthorized alien, or if the alien becomes unauthorized while employed, the employer is compelled to discharge the worker upon discovery of the worker's undocumented status. § 1324a(a)(2). Employers who violate IRCA are punished by civil fines, § 1324a(e)(4)(A), and may be subject to criminal prosecution, § 1324a(f)(1). IRCA also makes it a crime for an

> unauthorized alien to subvert the employer verification system by tendering fraudulent documents. § 1324c(a). It thus prohibits aliens from using or attempting to use "any forged, counterfeit, altered, or falsely made document" or "any document lawfully issued to or with respect to a person other than the possessor" for purposes of obtaining employment in the United States. §§ 1324c(a)(1)-(3). Aliens who use or attempt to use such documents are subject to fines and criminal prosecution. 18 U. S. C. § 1546(b). There is no dispute that Castro's use of false documents to obtain employment with Hoffman violated these provisions. *Hoffman Plastics,* 535 U.S. 137 (2002), at 146; *See also, Palma v. N.L.R.B.,* 723 F.3d 176 (2013) at 183.

First, it is important to note that *Hoffman Plastics* and *Palma v. NLRB* were decided on the limited principle that the general NLRB labor policies do

not override specific policies of other U.S. statutes including the immigration law.

Second, the immigration law establishes a specific statutory policy regarding aliens eligible for the cancelation of removal remedy in INA § 240A(b)(1) 8 U.S.C. § 1229b(b)(1) referencing INA § 237(a)(3) for U.S. citizen children who will suffer "exceptional and extremely unusual hardship" if their alien parent is otherwise deported or removed from the United States. So the NLRB cases do not override a specific immigration policy or statutory provision overriding the general policy of stopping illegal and unauthorized employment in the United States.

Third, the quotes from *Hoffman* and *Palma* do not inure against the Appellant here. The appellant

here is specifically liable for the civil offense in INA § 274C(a)(2), 8 USC § 1324c(a)(2) "to use, attempt to use, possess, obtain, accept, or receive or to provide any forged, counterfeit, altered, or falsely made document in order to satisfy any requirement of this Act or to obtain a benefit under this Act."

As *Hoffman* carefully points out, there is no criminal punishment ascribed to paragraphs (1) through (3) or reference to a criminal statute as there is in paragraph (4) "to accept or receive or to provide any document lawfully issued (my emphasis) to or with respect to a person other than the possessor (including a deceased individual) for the purpose of complying with section [INA §] 274A(b) or obtaining

a benefit under this Act,"[8]. Paragraph (4) specifically references INA § 274A(b) and *Hoffman* specifically references "[A]liens who use SUCH DOCUMENTS (my emphasis) are subject to fines AND CRIMINAL PROSECUTION (my emphasis). 18 U.S.C. 1546(b)." The Appellant did not use SUCH DOCUMENTS. He used the "false documents" referenced in paragraph (2) with no specific reference to CRIMINAL PROSECUTION or criminal sentencing.

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[8] There is no evidence on this record that the Appellant even ever knew that §274A existed much less that he produced his documents for the purpose of assisting his employer in complying with the employer's duties under that section of the law and Appellant did not use legally issued documents to do so. He used false documents to obtain employment, not even a crime under §274C(1)-(3) *See Ignacio Carlos Flores- Figuerov. United States,* 556 US ___ (2009); 129 S. Ct. 1886; 2009 LEXIS 3305 .

The employment verification system has particularly serious problems when an alien obtains and submits legally acquired documents to an employer to comply with the employer's verification duties under INA 274A(b). The alien is not ineligible for cancelation of removal for a violation of INA § 274C as is the appellant here, only for a violation of INA § 274A(b), even under INA § 274C(a)(4), without more, submission of compliance with INA §274C(a)(4) would require proof of the alien's knowledge of 274A(b) to be guilty of 18 USC §1546(b), pursuant to *Hoffman* and *Palma,* and other cases cited by the Appellee.

The Appellant did not commit a violation against paragraph (4) because the Appellant did not use or possess "any lawfully issued document, issued

with respect to a person other than the possessor (himself)," he used fraudulently produced document. Nor did he "provide" a "lawfully produced document" to comply with section 274A(b). Nor did he use a "lawfully issued document regarding another person to obtain a benefit (employment) under this Act. The record shows that he used a fraudulent document solely to obtain the employment benefit under the Act in violation of paragraph (2), for which he is liable, not guilty, under the clear dictates of the law. As in the *Hoffman* case "[t]here is no dispute that Castro's use of false documents to obtain employment with Hoffman violated these provisions." However, unlike the Appellant here, neither Castro in *Hoffman,* nor the

unnamed employees in *Palma* were prosecuted under 18 U.S.C. § 1546(b)(1), as Petitioner suggests or intimates that he was or they were.

C. PETITIONER'S MISUSE OF FALSE DOCUMENTS – NOT TO INTENDED TO DEFRAUD THE U.S. GOVERNMENT PROGRAM

Requirements for 8 U.S.C.§ 1227(A)(3)(B)(iii) INA § 237(a)(3)(B)(iii)

The IJ erred in concluding that the Petitioner was not eligible for the relief that he requested. The Petitioner met his burden of proof to show that he met the statutory requirements.

INA § 237(a)(3)(B) parenthetically states that this section applies to aliens convicted of 18 U.S.C. § 1546 "relating to fraud and misuse of visas, permits, and other entry documents". Petitioner was not convicted of fraud at all. He only pleaded guilty to – and therefore has only been convicted of – misuse of a legal permanent resident card. Section 237(a)(3)(B) of the Act, however, refers to fraud as well as misuse. Petitioner did not admit to committing a fraudulent act or to a fraudulent intent. (see sentence transcripts).

The IJ concludes in its oral decision that the Petitioner has "the burden of proof to show that he is eligible for the relief he requests. He must show

that he meets the statutory requirements. (...) The Court therefore finds that because the Petitioner has been convicted of an offense under INA Section 237(a)(3) he is not eligible for cancellation of removal for non-permanent residents." The IJ refers to the BIA decisions of **Matter of Almanza**, 24 I&N Dec. 771 (BIA 2009) and **Matter of Cortez-Canales**, 25 I&N Dec. 301 (BIA 2010). In those two decisions the BIA interpreted the reference in section 240A(b)(1)(C) of the Act to sections 212(a)(2), 237(a)(2), and 237(a)(3) of the Act. Referring to **Matter of Garcia-Hernandez**, 23 I&N Dec. 590 (BIA 2003), the Board stated in **Matter of Cortez-Canales**, *supra,*

> Specifically, we concluded that the plain language of section 240A(b)(1)(C) incorporated the entirety (emphasis added) of section 212(a)(2), including the exception for petty offenses set forth therein.

Thereby, the Board concluded that the reference included the whole description of the offense, but does not include immigration-related elements of those sections referred to.

In the present case, Petitioner pleaded guilty to Use of False Immigration Documents pursuant to 18 U.S.C. 1546(b)(1). Section 237(a)(3)(B) of the Act states that "any alien who at any time has been convicted- (...) (iii) of a violation of, or an attempt or a conspiracy to violate, section 1546 of title 18, United

States Code (relating to fraud and misuse of visas, permits, and other entry documents) (Emphasis added), is deportable." With a view to the above-named BIA decisions **Matter of Almanza**, *supra,* **Matter of Cortez-Canales**, *supra*, and **Matter of Garcia-Hernandez**, *supra,* the whole description of the offense must be met. That includes the part inside the parentheses, which refers to fraud as well as misuse. Petitioner did not admit to a fraudulent intent. (see sentence transcripts). Thus, Petitioner was not convicted of an offense described under section 237(b)(3).

Furthermore, Petitioner provided evidence by presenting the sentence transcripts. Those transcripts show that he did not admit any fraudulent act on intent, as shown above. Thus, Petitioner met his burden of proof.

CONCLUSION

This honorable U.S. Supreme Court should grant certiorari in this present case as the IJ should have declared the conviction void on its face and granted the Petitioner Cancellation of Removal to continue caring for his U.S. Citizen daughter suffering from Spina Bifida as Congress intended.

Respectfully Submitted, this 29th day of April, 2018

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Pro SE
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28 U.S.C. § 1746

I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on October 25, 2017.

s/Patrick C. Hyde,
Attorney at Law