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Practice Alert

Protecting the Materiality Requirement in False Citizenship Claim Cases Outside the Eleventh Circuit[1]

November 12, 2020

Introduction

In August, the Eleventh Circuit issued *Patel v. U.S. Att'y Gen.*,[2] a blockbuster en banc decision that included two holdings adverse to immigrants. The court's first holding expanded the reach of the jurisdiction-stripping provision at section 242(a)(2)(B)(i) of the Immigration and Nationality Act (the "INA"), 8 U.S.C. § 1252(a)(2)(B)(i), which covers "judgments" relating to certain forms of immigration relief.[3]

This Practice Alert addresses *Patel*'s second holding: that false claims to U.S. citizenship render noncitizens removable even if the claim had no possible impact on the decision or application at issue—that is, even if the false citizenship claim is *immaterial*.

In this Alert, we explain several key flaws in that holding. First, we outline the statutory provisions addressing false citizenship claims and *Patel*'s holding that these provisions incorporate no materiality element. Next, we examine errors in the Eleventh Circuit's reasoning. We hope that this Alert will assist attorneys in representing clients charged with removability based on false citizenship claims. While contrary agency precedent should help cases outside of the Eleventh Circuit, this Alert anticipates that the Department of Justice could seek to rely on *Patel* as persuasive authority, and provides arguments to counter any such effort.

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[2] *Patel v. U.S. Att'y Gen.*, 971 F.3d 1258 (11th Cir. 2020) (en banc). A petition for certiorari is under preparation.

[3] In a break with almost every other circuit to address the question, the Eleventh Circuit held that the "judgment[s]" covered by this provision include not only discretionary determinations, but *any* eligibility determinations—even objective ones involving no discretion. For a discussion of this aspect of *Patel*'s holding, see *Full 11th Circ. Splits on Indian National's Deportation Case*, LAW360 (Aug. 20, 2020), https://bit.ly/3jY79hg.

I. Materiality in False Citizenship Claim Cases

A. Background on False Claims to Citizenship

The INA renders both inadmissible and deportable "[a]ny alien who falsely represents, or has falsely represented, himself or herself to be a citizen of the United States for any purpose or benefit under . . . Federal or State law."[4] In the precedential decision *Matter of Richmond*, the Board of Immigration Appeals ("BIA") held that these provisions incorporate a materiality element—that is, to trigger removability, a false citizenship claim must have "actually affect[ed] or mattered" to the purpose or benefit the noncitizen sought.[5] For example, if a noncitizen falsely claims citizenship on a U.S. passport application, the claim is material: U.S. citizenship is required to qualify for a U.S. passport. On the other hand, if a noncitizen falsely claims U.S. citizenship on a driver's-license application in a state like New York that issues licenses regardless of immigration status, the claim is *not* material: U.S. citizenship has no bearing on the applicant's eligibility for the driver's license.

B. The Eleventh Circuit's Ruling

The Patel three-judge panel opinion rejected *Richmond* and held that a false-citizenship claim need *not* be material to trigger inadmissibility.[6] In brief, the panel held that because the word "material" is absent from the statute, the statute must not include a materiality element. The en banc majority affirmed this holding without further analysis, stating only that "[w]e need not disturb the panel's ruling that the statute lacks a materiality element."[7]

II. Why the Eleventh Circuit Was Wrong on Materiality

Patel's discussion of materiality ignored one critical aspect of the inadmissibility and deportability provisions at issue: their use of common-law language that incorporates materiality.

Under the common-law language canon, phrases with common-law origins are understood to incorporate their common-law meaning: "[W]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates,

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[4] INA § 212(a)(6)(C)(ii), 8 U.S.C. § 1182(a)(6)(C)(ii) (inadmissibility ground); INA § 237(a)(3)(D), 8 U.S.C. § 1227(a)(3)(D) (deportability ground).

[5] *Matter of Richmond*, 26 I&N Dec. 779, 787 (BIA 2016). This decision was issued following a remand by the Second Circuit in *Richmond v. Holder*, 714 F.3d 725 (2d Cir. 2013). In that decision, the Second Circuit determined that the statute is not clear on "the important question" whether (A) a noncitizen's false representation of citizenship must "actually affect" the possibility of receiving a benefit such as a loan application, (B) the noncitizen must simply "intend[]" it to have that effect, or (C) both. In light of its finding of ambiguity, the Second Circuit remanded to the BIA "to explain in the first instance" its understanding of the statutory requirements. *Id.* at 731. After the BIA issued its precedential decision in response to the remand, the Second Circuit deferred to the BIA's interpretation. *Richmond v. Sessions*, 697 F. App'x 106, 107 (2d Cir. 2017). Apart from the Eleventh Circuit in *Patel*, no other circuit has addressed *Matter of Richmond*'s validity.

[6] *Patel v. U.S. Att'y Gen.*, 917 F.3d 1319, 1332 (11th Cir. 2019).

[7] Patel, 971 F.3d at 1284.

that Congress means to incorporate the established meaning of those terms."[8] Applying this canon, a statute incorporates a materiality element if it uses language understood to include such an element at common law. That is true even if, as here, the statute doesn't explicitly use the word "material."

Interpreted using this well-established canon, the false-citizenship-claim provisions incorporate a materiality element. These provisions use a version of the phrase "false representation"—a phrase which incorporates materiality at common law.[9] The statute should therefore be construed to contain a materiality element, unless the statute contains language that "dictates" a contrary result.[10] And there is no such language.

Without addressing the meaning of "false representation" under common law, the *Patel* three-judge panel held based on negative implication that the false-citizenship-claim grounds incorporate no materiality element. The court reasoned that a neighboring generic "material misrepresentation" provision[11] *explicitly* uses the word "material," while the false-citizenship-claim provision at § 212(a)(6)(C)(ii)(I) does not.[12] From this, the court reasoned that Congress's use of the word "material" in the generic misrepresentation provision reflects its intent *not* to incorporate materiality with respect to the false-citizenship-claim provision.[13] This negative-implication argument fails for several reasons:

1. **The Supreme Court has held that common-law language takes precedence over negative implication.** As the Supreme Court has stated, negative implication is "weakest" when pitted against "common-law language at work in [a] statute."[14] In fact, the Court has repeatedly declined to apply the negative-implication canon to strip the words "false representation" or "misrepresentation" of their common-law materiality element; Congress's "drafting choice" not to enumerate the elements implied in common-law

[8] *Neder v. United States*, 527 U.S. 1, 21 (1999).

[9] *See Field v. Mans*, 516 U.S. 59, 69 (1995) ("[f]alse representation" is a common-law "term[] of art" that "impl[ies] elements that the common law has defined [it] to include"); *United States v. Wells*, 519 U.S. 482, 494 (1997) (a false "representation" can imply "a materiality element") (citing *Kungys v. United States*, 485 U.S. 759, 781 (1998)). As another example, the Fair Debt Collection Practices Act prohibits debt collectors from using "any false, deceptive, or misleading representation" and identifies numerous "false representations" that violate the law, with no reference to materiality. 15 U.S.C. § 1692e. Yet a false statement must be material to be actionable under the statute. *See Bryan v. Credit Control, LLC*, 954 F.3d 576, 582 (2d Cir. 2020); *Jensen v. Pressler & Pressler*, 791 F.3d 413, 421 (3d Cir. 2015); *Powell v. Palisades Acquisition XVI, LLC*, 782 F.3d 119, 126 (4th Cir. 2014); *Van Hoven v. Buckles & Buckles, P.L.C.*, 947 F.3d 889, 894 (6th Cir. 2020); *Hahn v. Triumph P'ships LLC*, 557 F.3d 755, 757 (7th Cir. 2009); *Hill v. Accounts Receivable Servs., LLC*, 888 F.3d 343, 346 (8th Cir. 2018); *Donohue v. Quick Collect, Inc.*, 592 F.3d 1027, 1033 (9th Cir. 2010).

[10] *Field*, 516 U.S. at 70 ("It is . . . well established that '[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'" (citations omitted)).

[11] INA § 212(a)(6)(C)(i), 8 U.S.C. § 1182(a)(6)(C)(i).

[12] *Patel*, 917 F.3d at 1329.

[13] *Id.*

[14] *Field*, 516 U.S. at 75–76; *id.* at 67–69 (rejecting the negative-implication inference because of the common-law language at play in 11 U.S.C. § 523(a)(2)).

language does not "deprive" those common-law phrases "of a significance richer than the bare statement of their terms."[15]

2. **The Supreme Court has held that immigration statutes incorporate materiality, even when they do not use the word "material."** Specifically, "misrepresentation" under 8 U.S.C. § 1451(a), a denaturalization statute, has been read to require materiality even though the word "material" is absent.[16] The same is true of a provision in the Displaced Persons Act of 1948, which rendered inadmissible "[a]ny person who shall willfully make a misrepresentation for the purposes of gaining admission into the United States as an eligible displaced person." The Court construed that provision to incorporate materiality because "the word 'misrepresentation' . . . has been held to have [a materiality] implication in many contexts," including at common law.[17]

3. **Even on its own terms, the case for negative implication is especially weak.**

    a. Although the generic misrepresentation inadmissibility provision and the false-citizenship-claim provision are statutory neighbors, they were enacted more than forty years apart.[18] This gap erodes any negative-implication inference, as "negative implications raised by disparate provisions are strongest in those instances in which the relevant statutory provisions were considered simultaneously."[19]

    b. The force of negative implication is also diminished because the language and structure of the two provisions are not closely parallel. As the Supreme Court has explained, the presumption "grows weaker with each difference in the formulation of the provisions under inspection."[20] And the false-citizenship-claim provision at § 212(a)(6)(C)(ii)(I), in relevant part, bears little resemblance to the generic misrepresentation provision at § 212(a)(6)(C)(i).

    c. In fact, given § 212(a)(6)(C)(ii)(I)'s phrasing, the word "material" cannot be inserted in a way that renders the provision both grammatically and semantically accurate. For example, the three-judge panel opinion suggested that Congress could have inserted the word "material" before the phrase "purpose or benefit" as follows: "Any alien who falsely represents . . . himself or herself to be a citizen of the United States for any *material* purpose or benefit under this chapter . . . or any other

[15] *Id*. at 69.

[16] *See Fedorenko v. United States*, 449 U.S. 490, 507–08, 507 n.28 (1981).

[17] *Id.*; *Kungys*, 485 U.S. at 781.

[18] Subsection (i) traces its roots (with only minor changes) to the Immigration and Nationality Act of 1952. *See* Pub. L. No. 414, § 212(a)(19), 66 Stat. 163, 183. Subsection (ii)(I), by contrast, was not enacted until 1996. *See* Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C, § 344(a), 110 Stat. 3009.

[19] *Gomez-Perez v. Potter*, 553 U.S. 474, 486 (2008) (declining to apply presumption to provisions enacted seven years apart).

[20] *City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 435–36 (2002).

Federal or State law is inadmissible."[21] But in that formulation, the word "material" modifies the wrong concept; it is not the "*purpose or benefit*" that must be "material," but the *false representation of U.S. citizenship* that must be material *to* the purpose or benefit. This makes the negative-implication inference here especially weak.

d. Applying the negative-implication canon across the entire statutory scheme leads to a construction of the generic misrepresentation provision at § 212(a)(6)(C)(i) at odds with even its own longstanding meaning. The three-judge panel highlighted the mismatch in use of the word "material" between subsections 212(a)(6)(C)(i) and 212(a)(6)(C)(ii)(I). But it ignored a similar mismatch *within* § 212(a)(6)(C)(i) itself. That provision renders inadmissible "[a]ny alien who, by fraud or willfully misrepresenting a material fact, seeks to procure" specified immigration benefits. By its plain terms, the provision reaches *two* kinds of conduct: (1) "fraud," and (2) "willfully misrepresenting a material fact." If negative implication overrides common-law language, then "fraud" would contain no materiality element because the word "material" does not modify "fraud." But "fraud" under § 212(a)(6)(C)(i) has long been held to incorporate a materiality element.[22] Thus, applying the common-law language presumption across both provisions yields an interpretation of § 212(a)(6)(C)(i) that accords with its settled meaning.[23]

4. **Statutory context reinforces the incorporation of a materiality element**. Congress enacted the false-citizenship-claim provisions to discourage noncitizens from evading employment-verification laws or "abus[ing] . . . the welfare system through fraudulent applications for public benefits."[24] Congress was, in other words, concerned with preventing noncitizens from making false citizenship claims to obtain benefits they were ineligible to receive. This is precisely the sort of legislative purpose for which a materiality requirement is most appropriate.[25]

   Moreover, the provision is decidedly *unlike* the "good moral character" provision at INA § 101(f)(6), 8 U.S.C. § 1101(f)(6), to which the *Patel* three-judge panel analogized. Section 101(f)(6) provides that "a person who has given false testimony for the purpose of obtaining any benefits under [immigration law]" is not of "good moral character" and thus is ineligible for naturalization.[26] The Supreme Court in *Kungys v. United States* held that provision does *not* incorporate materiality, both because the term "good moral character" uses no common-law language, and because so-called "bad moral character" "appears to

[21] *Patel*, 917 F.3d at 1328.

[22] *See Ortiz-Bouchet v. U.S. Att'y Gen.*, 714 F.3d 1353, 1356 (11th Cir. 2013) (per curiam) ("[T]he BIA has held that fraud" under this provision "'consist[s] of false representations of a material fact made with knowledge of its falsity and with intent to deceive the other party.'" (quoting *Matter of G–G–*, 7 I&N Dec. 161, 164 (BIA 1956)).

[23] *See Neder*, 527 U.S. at 22 ("the well-settled meaning of 'fraud' required a misrepresentation or concealment of material fact" at common law) (emphasis in original).

[24] *Castro v. Att'y Gen. of U.S.*, 671 F.3d 356, 368–69 (3d Cir. 2012) (citing legislative history).

[25] *See Kungys*, 485 U.S. at 780, 782 (a materiality requirement makes sense for statutes enacted "to prevent false pertinent data from being introduced" or "to punish and thereby deter misrepresentation").

[26] *Patel*, 917 F.3d at 1329 (citations omitted).

some degree whenever there is a subjective intent to deceive, no matter how immaterial the deception."[27]

In contrast, the false-citizenship-claim provision has been held to cover even noncitizens who *genuinely believe* they are U.S. citizens and have therefore engaged in no willful deception.[28] It is one thing to bar noncitizens for life when their false (but good-faith) citizenship representations result in benefits for which they are ineligible. It is quite another when their good-faith representations result in no benefit at all. Context thus strongly supports the materiality element Congress included through its use of common-law language.

5. **Any remaining doubt about materiality is resolved by the canon that ambiguity in removal statutes is resolved in favor of noncitizens.** The false-citizenship-claim provision functions as a permanent, unwaivable bar—on par with aggravated felony offenses like murder or drug trafficking. Without a materiality element, these consequences would be "draconian,"[29] particularly because the provision has been held to cover noncitizens who *genuinely believe* they are U.S. citizens.[30] Thus, reading § 212(a)(6)(C)(ii)(I) to include a materiality element based on its use of common-law language adds an important limitation and accords with "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the [noncitizen]."[31]

Conclusion

In affirming the original *Patel* panel's opinion on materiality, the en banc Eleventh Circuit ignored the false-citizenship-claim provisions' common-law language, the Supreme Court's approach, and other considerations discussed above. While *Matter of Richmond* still controls outside the Eleventh Circuit, so long as the BIA or Attorney General do not revisit it, the Government and other circuits may rely on *Patel* to question whether the provisions include materiality. Our hope is that this Alert will help practitioners faced with these situations.

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[27] *Kungys*, 485 U.S. at 780.

[28] *Matter of Zhang*, 27 I&N Dec. 569, 571 (BIA 2019) (holding that "an alien is not required to know that a claim to citizenship is false" for this inadmissibility ground to apply).

[29] *Kungys*, 485 U.S. at 780 (declining to read a materiality element into § 101(f)(6) in part because "[a] literal reading of the statute does not produce draconian results").

[30] *See Zhang*, 27 I&N Dec. at 571.

[31] *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987).