Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:	
Syed Hussaini,	DATE: May 5, 1992
Petitioner,	Docket No. C-317
- v. -	Decision No. CR193
The Inspector General.	

DECISION

By letter dated October 22, 1990, the Inspector General (I.G.) notified Petitioner that he was being excluded from participation in the Medicare and State health care programs for five years.[1] Petitioner was advised that his exclusion resulted from his conviction of a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct. Petitioner was further advised that his exclusion was authorized by section 1128(b)(1) of the Social Security Act (Act).

By letter dated October 26, 1990, Petitioner requested a hearing. This case was originally assigned to Administrative Law Judge (ALJ) Charles E. Stratton for hearing and decision. At Petitioner's request, Judge Stratton initially stayed this case pending a decision from the United States Court of Appeals for the Second Circuit (Second Circuit) on Petitioner's appeal of his criminal conviction. Following the Second Circuit's affirmance of Petitioner's conviction, Petitioner requested that the action in this case proceed. On

---

[1] "State health care program" is defined by section 1128(h) of the Social Security Act to cover three types of federally-assisted programs, including State plans approved under Title XIX (Medicaid) of the Act. I use the term "Medicaid" hereafter to represent all State health care programs from which Petitioner was excluded.

April 17, 1991, this case was reassigned to me for hearing and decision.

I held a prehearing conference on April 29, 1991, at which time I set a hearing date of August 22, 1991, in New York, New York. The I.G. presented his case on that date. Petitioner presented his case on October 30, 1991.[2] Both parties submitted post-hearing briefs and replies, and responded to the question as to what, if any, effect new regulations promulgated on January 29, 1992 (57 Fed. Reg. 3298) might have on this case.

I have carefully considered the evidence introduced by both parties at the hearing, as well as the applicable law. I conclude that the five year exclusion originally imposed and directed against Petitioner is excessive, as is the I.G.'s determination under the new regulations to exclude Petitioner for three years. I.G. Reg. Br. at 1.[3]

---

[2] It was agreed at the hearing on August 22, 1991, that the hearing would be bifurcated and Petitioner would present his case at a later date. Tr. 1 at 19.

[3] The parties' exhibits, briefs and the transcript of the hearing will be cited as follows:

I.G.'s Exhibits	I.G. Ex. (number/page)
I.G.'s Brief	I.G. Br. at (page)
I.G. Reply Brief	I.G. R. Br. at (page)
I.B. Brief on New Regulations	I.G. Reg. Br. at (page)
Petitioner's Exhibits	P. Ex. (number/page)
Petitioner's Brief	P. Br. at (page)
Petitioner's Reply Brief	P. R. Br. at (page)
Petitioner's Brief on New Regulations	P. Reg. Br. at (page)
Transcript of August 22, 1991 Hearing	Tr. 1 at (page)
Transcript of October 30, 1991 Hearing	Tr. 2 at (page)
Findings of Fact and Conclusions of Law	FFCL

I conclude further that the remedial and deterrent purposes of section 1128 of the Act will be served in this case by a two year exclusion, and I modify the exclusion accordingly.

ISSUES

The issues in this case are whether:

1) Petitioner was convicted of a criminal offense within the meaning of section 1128(b)(1) of the act; and

2) whether the length of the exclusion directed and imposed against Petitioner by the I.G. is reasonable.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Petitioner graduated from the University of Karachi, School of Pharmacy, in Pakistan. Petitioner has not yet passed the pharmacy licensing examination in New York, but has recently passed the first part of the examination which entitles him to work as an intern in a pharmacy. P. Br. 2; Tr. 2 at 23; P. Ex. 1/A.

2. On June 18, 1990, Petitioner was convicted of one count of Conspiracy to Commit Medicaid Fraud (18 U.S.C. § 371). I.G. Ex. 2.

3. Pursuant to this conviction, Petitioner was sentenced to four months of home detention, two years of probation, and was ordered to pay a $250 fine and a special assessment of $50. I.G. Ex. 2.

4. Petitioner's conviction was based on a Grand Jury indictment which charged that Petitioner and a co-defendant, Curtis Evans (Evans)[4], had violated 18 U.S.C. § 641, 42 U.S.C. § 1320a-7(b)(1) and (2), and 18 U.S.C. § 371. I.G. Ex. 1.

5. Petitioner and Mr. Evans were partners in a business leasing office space to physicians. Tr. 2 at 82 - 88.

6. Mr. Evans introduced Petitioner to Michael Tartack, a pharmacist. Mr. Tartack was a Federal Bureau of

---

[4] Mr. Evans was acquitted of the charges against him. Tr. 1 at 53; I.G. Ex. 9/2.

Investigation informant who taped his conversations with Petitioner. Tr. 1 at 60; Tr. 2 at 89 - 90, 97; I.G. Ex. 9/2.

7. Petitioner and Mr. Evans agreed to supply Mr. Tartack with prescriptions. Petitioner got 11 prescriptions for nebulizers from his brother-in-law, who received the prescriptions from someone named Tony. Tony worked in a medical lab and collected these prescriptions from patients. Tr. 2 at 90 - 96, 99; I.G. Br., Appendices A - C.

8. Petitioner states that he thought that the prescriptions, which he obtained from his brother-in-law, were legal and valid. Tr. 2 at 94, 112, 114 - 118.

9. Notwithstanding Petitioner's belief at the time, Petitioner has since stipulated that these prescriptions were false. I. G. Br., Appendices A - C.

10. The Second Circuit found that Petitioner had conceded that the prescriptions sold to the government informant at the pharmacy were false. I.G. Ex. 9/2.

11. Mr. Tartack was to pay Petitioner and Mr. Evans $100 for every prescription provided to him. Tr. 2 at 105.

12. Mr. Tartack gave Petitioner $1,000 for the 11 prescriptions. Tr. 2 at 108 - 109.

13. Petitioner only received $250 of the $1,000; the rest went to Mr. Evans and/or to Petitioner's brother-in-law and Tony. I.G. Ex. 1; Tr. 2 at 98 - 109.

14. The Second Circuit, in affirming Petitioner's conviction, held that there was sufficient evidence in Petitioner's case to convict Petitioner of either: 1) stealing government property (where the government informant to whom Petitioner gave the prescriptions could have submitted fraudulent prescriptions to Medicaid for reimbursement); or 2) receiving a kickback after the prescriptions were filled. Although the decision as to whether or not to fill the prescriptions was up to the pharmacist, the Second Circuit held that the evidence showed Petitioner intended either result. I.G. Ex. 9/2.

15. The Secretary of the United States Department of Health and Human Services (the Secretary) delegated to the I.G. the authority to determine, impose, and direct exclusions pursuant to section 1128 of the Act. 48 Fed. Reg. 21662 (May 13, 1983).

16. The I.G. may exclude individuals convicted of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct, within the meaning of section 1128(b)(1) of the Act.

17. The permissive exclusion provisions of section 1128 of the Act, which include section 1128(b)(1), do not establish minimum or maximum periods of exclusion. Act, sections 1128(b)(1)-(14).

18. The Secretary did not make the regulations promulgated on January 29, 1992 concerning permissive exclusions under section 1128(b) of the Act, 42 C.F.R. § 1001 Subpart C, apply retroactively to I.G. permissive exclusion determinations in cases in which ALJ hearings or decisions were pending at the time the regulations were promulgated.

19. The remedial purpose of section 1128 of the Act is to protect the integrity of federally-funded health care programs and the welfare of beneficiaries and recipients of such programs from individuals and entities who have been shown to be untrustworthy.

20. An ancillary remedial objective of section 1128 of the Act is to deter individuals from engaging in conduct which jeopardizes the integrity of federally-funded health care programs.

21. Petitioner's conviction is a criminal offense related to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct, within the meaning of section 1128(b)(1) of the Act. FFCL 1 - 7.

22. The I.G. properly excluded Petitioner from participation in the Medicare and Medicaid programs. FFCL 16, 17, 22.

23. In determining the reasonableness of the length of Petitioner's exclusion, I am guided by the regulations as set forth in 42 C.F.R. § 1001.125(b). In making my decision, I take into consideration: 1) the number and nature of the program violations and other related offenses; 2) the nature and extent of any adverse impact the violations have had on beneficiaries; 3) the amount of damages incurred by the Medicare, Medicaid, and the social services programs; 4) whether there are any mitigating circumstances; 5) the length of the sentence imposed by the court; 6) any other factors bearing on the nature and seriousness of the program violations; and

7) the previous sanction record of the suspended party under the Medicare or Medicaid program.

24. Petitioner was convicted of a serious criminal offense. FFCL 2.

25. Petitioner was confined to his home for a brief period (although during this time he was allowed to go to work) and received a lengthy period of probation. FFCL 3; I.G. Ex. 2.

26. Petitioner's criminal conduct was of a short duration, consisting of one illegal transaction which took place over a brief period of time. Tr. 1 at 71 - 74.

27. Petitioner has no record of criminal offenses, including previous Medicare or Medicaid sanctions, other than the charge for which he was convicted.

28. No damages to program recipients or beneficiaries occurred as a result of Petitioner's conduct. Tr. 1 at 70 - 71.

29. Petitioner was not the principal in this scheme. Petitioner appears to be a naive individual who entered into the conspiracy at the direction of, and in reliance on, Curtis Evans. Tr. 2 at 88 - 109, 116, 119 - 120.

30. Petitioner is unlikely to re-offend, given his religious beliefs, strong family background, and the testimony of those who know him that he is a man of high moral character who would never again commit a criminal act. Tr. 2 at 25 - 28, 40, 48 - 51, 60 - 61, 71 - 72, 122; P. Ex. 1.

31. Either the five year exclusion originally imposed and directed against Petitioner, or the three year exclusion suggested by the I.G. following promulgation of the new regulations, is excessive. A two year exclusion is reasonable and appropriate in light of factors demonstrating Petitioner's low risk of repeating conduct which might threaten program recipients and beneficiaries.

RATIONALE

1. Petitioner was convicted of a criminal offense within the meaning of section 1128(b)(1) of the Act.

Petitioner does not dispute the fact that he was convicted. P. Br. 6. Moreover, under section

1128(b)(1), the I.G. does not have to establish a direct link between a conviction and the adverse impact on a federal program or beneficiary in order to establish his authority to exclude. The I.G. has only to show that Petitioner has been convicted of a criminal offense falling within the language of section 1128(b)(1) of the Act. See Robert Matesic, R.Ph., d/b/a Northway Pharmacy, DAB 1327 at 8 (1992).

Section 1128(b)(1) authorizes the I.G. to exclude individuals who have been convicted of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in connection with the delivery of a health care item or service. The determination as to whether Petitioner's conviction fits within the language of section 1128(b)(1) requires an examination of: 1) the criminal offense for which Petitioner was convicted; and 2) the actions which formed the basis for that offense.
In this case, Petitioner was convicted of conspiracy to commit Medicaid fraud. Petitioner's specific criminal actions included receiving false prescriptions (a health care item) and conspiring to furnish these false prescriptions to another individual, who paid Petitioner for the prescriptions in order to then submit those false prescriptions for payment by Medicaid. As a result of this, according to the Second Circuit, Petitioner committed a criminal act which would lead to his enrichment, independently of whether the prescriptions were ever filled. He either was to receive an illegal kickback for filled prescriptions or an illegal payment for prescriptions not filled. Clearly, Petitioner's conviction falls within the language of section 1128(b)(1) and gives the I.G. the authority to exclude Petitioner. Finally, Petitioner offers no arguments in his post-hearing brief to contest a finding that the I.G. has authority to exclude him. The essence of his brief relates solely to the reasonableness of the length of the exclusion. See, P. Br. 1 - 7.

2. Reasonableness of the length of Petitioner's exclusion.

Petitioner contends that either the original five year exclusion imposed by the I.G., or the I.G.'s apparent modification of the exclusion to comport with the three year exclusion contemplated by the new regulations, is too long. Instead, Petitioner contends, the evidence in this case shows him to be a trustworthy and rehabilitated individual for whom exclusion serves no justifiable purpose. P. Br. 6; P. Reg. Br. 1.

a. Applicability of new regulations to this case

Effective January 29, 1992, the Secretary promulgated new regulations (Parts 1001 - 1007) pertaining to his authority under the Medicare and Medicaid Patient and Program Protection Act (MMPPPA), Public Law 100-93, to exclude individuals and entities from reimbursement for services rendered in connection with the Medicare and Medicaid programs.[5] These regulations also included amendments to the civil money penalty authority of the Secretary under MMPPPA. For purposes of this proceeding, the specific regulatory provisions relating to permissive exclusions under section 1128(b)(1) of the Act (Section 1001.201) and appeals of such exclusions (Part 1005) must be considered in terms of their applicability to this case.

The I.G. asserts that the length of Petitioner's exclusion has been altered by the new regulations, inasmuch as the benchmark for exclusions absent aggravating or mitigating circumstances has been changed from five years under the proposed regulations (55 Fed. Reg. 12,205 (1990) to three years under the new regulations, although the basis for consideration of aggravating and mitigating circumstances has not been changed (57 Fed. Reg. 3304). I.G. Reg. Br. 1 - 2. The I.G. argues that the new regulations govern this case, and are binding on me in determining the reasonableness of the exclusion imposed against Petitioner and apply even though the hearing was held prior to the effective date of the regulations. The I.G. further cites section 1005.4(c)(5) to demonstrate that I have no authority to review either the I.G.'s exercise of discretion to exclude or the scope or effect of such exclusion. The logical conclusion of the I.G.'s argument is that once I rule that the I.G. has authority to exclude Petitioner under section 1128(b)(1) and the I.G. adopts as his exclusion the minimum set forth in the new regulations, there is nothing left for me to hear or decide, as I have no authority to review or alter the period of exclusion imposed by the I.G.

While attempting to take advantage of the new regulations to reduce his exclusion to three years, Petitioner argues that other mitigating factors than those set forth in the new regulations can be considered in determining the reasonableness of the length of the exclusion. Petitioner cannot have it both ways. Either the new

---

[5] These regulations can be found at 42 C.F.R. § 1001 et seq., 57 Fed. Reg. 3298 et seq.

regulations apply, with a minimum of three years, using the specified mitigating factors or the regulations do not apply and the usual factors of trustworthiness and remedial purposes of the Act must be used in considering the appropriate length of the exclusion.

If it were not for the new regulations, the I.G. might not have reduced Petitioner's exclusion to three years. However, if I find that the new regulations do apply in this case, I would not be free to consider the evidence of trustworthiness adduced at the hearing, since I would be compelled to find that the I.G.'s three year exclusion of Petitioner is reasonable.

To apply the new regulations to this case when the effective date of the regulations occurred after 1) the I.G.'s decision to exclude Petitioner and 2) a full hearing on the reasonableness of that exclusion had been held, would result in the improper retroactive application of the new regulations and result in the substantial deprivation of Petitioner's hearing rights under section 205(b)(1) of the Act. I have previously addressed this issue in depth in my decision in Charles J. Barranco, M.D., DAB CR187 at 16 - 27 (1992). For purposes of this case, I incorporate the rationale in Barranco that Petitioner's hearing rights would be substantially adversely affected and it would be manifestly unjust to apply the new regulations.[6] Moreover, the Court of Appeals for the Fourth Circuit held in Varandani v. Bowen, 824 F.2d 307, 312 - 313 (4th Cir. 1987), that regulations implementing section 1156 of the Act would not apply retroactively even where the new regulations arguably placed the excluded party in a better position to defend against the I.G.'s exclusion. As here, the new Peer Review Organization (PRO) regulations specified a specific effective date and were silent on the issue of retroactivity. In such circumstances, the court applied the "usual rule that laws are not retroactive unless they expressly so provide". Id at 312.

The applicable DAB precedent in section 1128(b)(1) cases is similar to those cited for section 1128(b)(4) proceedings. The essence of my position is that there is no legislative history or DAB precedent in section 1128(b) permissive exclusion cases to support the application of minimum specified periods of exclusion.

---

[6] It is my understanding that neither the Petitioner nor the I.G. have filed exceptions to my decision in Barranco during the appeal period.

While the new regulations arguably reflect the Secretary's intent to have such minimum exclusions apply in permissive cases, the preamble and comments to the new regulations, as well as the regulations themselves, when considered in relation to such legislative history and applicable DAB precedent, strongly suggest that the Secretary intended that Subpart C, pertaining to permissive exclusions, only applies to the I.G.'s decision to exclude, and did not intend to abrogate any of the hearing rights afforded petitioners under section 205(b)(1) of the Act. Barranco, DAB CR187 at 24 - 27.[7] Until I receive a different interpretation of the application of these regulations, I shall continue to interpret the new regulations consistent with my obligation under the Act to consider a myriad of facts needed to determine, as in this case, the length of time necessary to establish that Petitioner is not likely to repeat the type of conduct which precipitated his exclusion. Matesic, DAB 1327 at 12.[8]

b. A two year exclusion is reasonable.

In deciding whether an exclusion under section 1128(b)(1) is reasonable, I must review the evidence with regard to the purpose of section 1128 of the Act. Davids, DAB CR137; Roderick L. Jones, DAB CR98 (1990); Frank J. Haney, DAB CR81 (1990).

Congress enacted the exclusion law to protect the integrity of federally funded health care programs. Among other things, the law was designed to protect

---

[7] My position in Barranco has been reaffirmed by ALJ Steven T. Kessel in his recent decision in Stephen J. Willig, M.D., DAB CR192 (1992). He provides additional rationale for concluding that Subpart C of the new regulations was not intended to limit the hearing rights afforded by section 205(b)(1) of the Act. He also held that the new regulations could not be applied retroactively to cases pending prior to the effective date of such regulations.

[8] The appellate panel's decision in Matesic was issued after the effective date of the new regulations. While there is no reference in the decision to the new regulations, it appears that this panel does not believe that the regulations alter the basic responsibility of the ALJ to consider the reasonableness of permissive exclusions in section 1128(b) cases. The panel affirmed the ALJ's three year exclusion for reasons other than the new regulations.

program beneficiaries and recipients from individuals who have demonstrated by their behavior that they threaten the integrity of federally funded health care programs or that they could not be entrusted with the well-being and safety of beneficiaries and recipients. S. Rep. No. 109, 100th Cong., 1st Sess., reprinted in 1987 U.S. Code Cong. and Admin. News 682.

An exclusion imposed and directed pursuant to section 1128 of the Act advances this remedial purpose. The principal purpose is to protect programs and their beneficiaries and recipients from untrustworthy providers until the providers demonstrate that they can be trusted to deal with program funds and to properly serve beneficiaries and recipients. As an ancillary benefit, the exclusion deters other providers of items or services from engaging in conduct which threatens the integrity of programs or the well-being and safety of beneficiaries and recipients. H. R. Rep. No. 393, Part II, 95th Cong. 1st Sess., reprinted in 1977 U.S. Code Cong. & Admin. News 3072.

Deterrence cannot be a primary purpose of imposing an exclusion. Where deterrence becomes the primary purpose, section 1128 no longer accomplishes a civil remedial purpose, but punishment becomes the end result. Such a result has been determined by the Supreme Court to contravene the Constitution and is beyond the purpose of a civil remedy statute. United States v. Halper, 490 U.S. 448 (1989).

An exclusion imposed and directed pursuant to section 1128 will likely have an adverse financial impact on the person against whom the exclusion is imposed. However, the law places program integrity and the well-being of beneficiaries and recipients ahead of the pecuniary interests of providers. An exclusion is not punitive if it reasonably serves the law's remedial objectives, even if the exclusion has a severe adverse financial impact on the person against whom it is imposed.

No statutory minimum mandatory exclusion period exists in cases where the I.G.'s authority arises from section 1128(b)(1). By not mandating that exclusions from participation in the programs be permanent, however, Congress has allowed the I.G. the opportunity to give individuals a "second chance." An excluded individual or entity has the opportunity to demonstrate that he or she can and should be trusted to participate in the Medicare and Medicaid programs as a provider. Achalla, DAB 1231.

This hearing is, by reason of section 205(b)(1) of the Act, de novo. Evidence which is relevant to the reasonableness of an exclusion is admissible, whether or not that evidence was available to the I.G. at the time the I.G. made his exclusion determination. I do not, however, substitute my judgment for that of the I.G. An exclusion determination will be held to be reasonable where, given the evidence in the case, it is shown to fairly comport with legislative intent. "The word 'reasonable' conveys the meaning that . . . [the I.G.] is required at the hearing only to show that the length of the [exclusion] determined . . . was not extreme or excessive." (Emphasis added.) 48 Fed. Reg. 3744 (1983).

Determining the reasonableness of an exclusion is based in large part on the trustworthiness of a petitioner to provide health care to program recipients and beneficiaries in the future. The assessment of trustworthiness in the context of a hearing under section 205(b)(1) of the Act frequently requires consideration of the degree of a petitioner's culpability for the acts and practices arising from criminal offenses or other conduct upon which the I.G. derives his authority to exclude. Such assessment is not relevant to whether the I.G. had authority to exclude in the first place, but only to whether the length of the exclusion mandated and directed by the I.G. is reasonable. Thus, here I considered evidence regarding Petitioner's conviction and the circumstances surrounding it, as well as evidence with regard to Petitioner's character and the likelihood that he would repeat his criminal conduct.

The determination of when an individual should be trusted and allowed to reapply to the I.G. for reinstatement as a provider in the Medicare and Medicaid programs is a difficult issue. It involves consideration of multiple factual circumstances. The appellate panel in Matesic provided a listing of some of these factors, which include:

> the nature of the offenses committed by the provider, the circumstances surrounding the offense, whether and when the provider sought help to correct the behavior which led to the offense, how far the provider has come toward rehabilitation, and any other factors relating to the provider's character and trustworthiness.

Matesic, DAB 1327 at 12.

It is evident that in using these factors I must attempt to balance the seriousness and program impact of the offense with existing factors which may demonstrate trustworthiness. In assessing the reasonableness of the I.G.'s permissive exclusion, it is incumbent upon the ALJ to consider all these matters as well as the remedial purposes of the Act.

The I.G. argues that Petitioner's criminal conviction amply demonstrates his untrustworthiness and supports the exclusion directed and imposed against him. Essentially, the I.G. asserts that Petitioner, who had trained to become a pharmacist in Pakistan, and had been working in pharmacies while attempting to become a registered pharmacist in New York, fully understood the nature and severity of his offense. Thus, the I.G. argues that Petitioner's claims of innocence are dubious. The I.G. argues also that Petitioner has not completed his probation and that his crime was so serious that he was incarcerated at home for four months. The I.G. also asserts that Petitioner has presented no evidence of rehabilitation in the form of counseling or other assistance, and that the character evidence in this case is that which can be expected from one's immediate family and friends. Further, the I.G. asserts that Petitioner's contradictory statements concerning the source of the prescriptions and how he was to be paid for the prescriptions and his refusal at the hearing to admit that the prescriptions were false establishes his lack of credibility and untrustworthiness. I.G. Br. 10 - 12.

Petitioner responds that he is a hard-working man with a large family to support. He came to the United States from Pakistan and has had difficulty in learning English and in passing the exams necessary to become a licensed pharmacist in New York. Petitioner asserts that those who know him have testified that he is a religious man of high moral character, has never been in trouble with the law other than in this one instance, and will never be in such trouble again. Petitioner further asserts in mitigation of his exclusion that the dollar amount of his crime was low, he was not incarcerated, his home detention allowed him to go to work and to prayer services, no damage was done to the Medicare and Medicaid programs, and, finally, the length of time over which his criminal activity occurred was short. P. Br. at 1 - 6.

In this case, I find that while it is true that Petitioner committed a serious crime, there exist circumstances which mitigate against a lengthy exclusion. Petitioner now appears to have recognized the gravity of his criminal conduct and appears to be deeply ashamed

that he contravened the law. Petitioner and his witnesses point to his previous lawful conduct, strong family background, and religious beliefs to buttress a conclusion that he will not break the law again. Further, The I.G. put in no evidence to dispute the character evidence introduced by numerous witnesses with regard to Petitioner's honesty, good character, religious belief, and the unlikelihood that Petitioner would ever again commit a criminal act.

There is also undisputed testimony in this case that Mr. Evans, not Petitioner, was the instigator of the criminal conduct. There is testimony that Petitioner is a naive individual. Tr. 2 at 72. Petitioner's uncontradicted testimony is that he was misled by Mr. Evans. Petitioner may have legitimately believed that the transaction constituting the criminal conduct upon which his conviction was based was lawful.

In this case, as in the cases of Joyce Faye Hughey, DAB CR94 (1990), aff'd DAB 1221 (1991) and Frank J. Haney, DAB CR81 (1990), I find that Petitioner's conviction alone is not sufficient evidence of Petitioner's lack of trustworthiness to support a five or a three year exclusion. In Hughey, the petitioner pled guilty to a misdemeanor charge of theft and was sentenced to twelve months' probation and a payment of $350. The I.G. excluded the petitioner for five years. The ALJ reduced this exclusion to one year, finding that the amount of money misappropriated did not constitute a large sum, her conduct was in some respects a consequence of emotional duress and at variance with her record for honesty, her sentence did not include incarceration, and that it was unlikely that she would in the future repeat her criminal conduct. In Haney, the ALJ reduced an exclusion period from five years to three, despite petitioner's conviction for two felonies in a tax fraud scheme spreading over several years, for which he received a lengthy probation. The ALJ considered factors, including character evidence, the petitioner's mother's illness and death, and his otherwise good record, in significantly reducing his period of exclusion.

In this case, like that of Ms. Hughey, the amount of money involved did not constitute a large sum, Petitioner's conduct was at variance with his record for honesty, his sentence did not include incarceration[9] and

---

[9] As I previously noted, Petitioner's in-home detention provided that he could continue his employment.

(continued...)

it is unlikely that he will repeat his criminal conduct. Like Ms. Hughey, whose sister instigated the criminal conduct, Petitioner was not the instigator of the criminal conduct in this case. However, Petitioner did receive a lengthier probation than Ms. Hughey.[10] Petitioner also received four months of home detention. Also, Petitioner's answers to questions with regard to his receipt of the prescriptions and the disbursal of payment for them are equivocal.[11] This may be due in part to his difficulties with the English language and the use of a translator at the hearing, and to his apparent emotional distress at testifying in front of his family members. Overall, I have found Petitioner's testimony to be generally consistent. Petitioner does not appear to have been under emotional distress, as was Ms. Hughey at the time she entered into the unlawful conduct underlying her conviction. However, Petitioner's criminal conduct consisted only of one criminal transaction and was not part of a well thought out scheme which lasted over several years, as was Mr. Haney's.

---

[9] (...continued)
This type of penalty is obviously less severe than incarceration in jail or even a work release program out of a halfway house.

[10] Petitioner's probation apparently was without restrictions.

[11] At the conclusion of the evidentiary hearing, I was concerned that the I.G. had provided a very limited picture of Petitioner's involvement in this criminal scheme. In fact, it was through the testimony of Petitioner that the specifics of the criminal scheme become clear. As his only witness, the I.G. called the special agent who assisted in the development of the case against Petitioner and Mr. Evans, but the agent was able to provide very limited additional information beyond that reflected in the criminal conviction documents. Noting the equivocal nature of Petitioner's testimony and the effort by Petitioner to place the blame for the criminal scheme on Mr. Evans, I suggested to the I.G. that he supplement the record with the transcript from the criminal proceeding so that I could read the testimony that led the jury to convict Petitioner but acquit Mr. Evans. I wanted to compare the explanation provided by Petitioner at the hearing in this case with his testimony in the criminal proceeding. Such a comparison might have revealed contradictions and inconsistencies. The I.G. did not supplement the record with the transcript.

Thus, I find that two years is an appropriate period of exclusion in this case, taking into account the serious nature of Petitioner's offense, coupled with my belief that it is unlikely that this Petitioner will re-offend. A two year exclusion provides a sufficient period of time for Petitioner to demonstrate that he is trustworthy enough to participate in the Medicare and Medicaid programs.

CONCLUSION

Based on the material facts and the law, I conclude that the I.G.'s determination to exclude Petitioner from participation in the Medicare and Medicaid programs for either of three or five years is excessive. I further conclude that a two year period of exclusion is reasonable and appropriate in this case.

/s/

Edward D. Steinman
Administrative Law Judge