

Department of Health and Human Services

DEPARTMENTAL APPEALS BOARD

Civil Remedies Division

In the Case of:)	
Rosalyn Saba Khalil, M.D.,)	DATE: January 25, 1995
Petitioner,)	
- v. -)	Docket No. C-94-370
The Inspector General.)	Decision No. CR353

DECISION

On June 10, 1994, the Inspector General (I.G.) notified Petitioner that she was being excluded from participating in the following programs: Medicare, Medicaid, Maternal and Child Health Services Block Grant and Block Grants to States for Social Services.¹ The I.G. told Petitioner that she was being excluded because she had been convicted of a criminal offense related to the delivery of an item or service under the Medicaid program. The I.G. cited section 1128(a) of the Social Security Act (Act) as authority for the I.G.'s determination to exclude Petitioner.

The I.G. further notified Petitioner that the Act requires that individuals who are excluded pursuant to section 1128(a) be excluded for not less than five years. The I.G. told Petitioner that she was being excluded for 15 years in light of circumstances specified in the I.G.'s notice to Petitioner.²

¹ In this Decision, I refer to all programs from which Petitioner has been excluded, other than Medicare, as Medicaid.

² The circumstances specified by the I.G. are the following:

1. Petitioner's participation in criminal activity caused \$8 million in financial damage to the New York Medicaid program.

Petitioner requested a hearing and the case was assigned to me for a hearing and a decision. I conducted a prehearing conference, at which the parties agreed that there was no need for an in-person hearing. The parties agreed that the case could be decided based on their submissions of exhibits and arguments. The parties each submitted proposed exhibits and briefs.³

I have considered the evidence, the applicable law, and the parties' arguments. I conclude that Petitioner was convicted of a criminal offense, as defined by section 1128(a)(1) of the Act. The I.G. is required to exclude her. I conclude also that the 15-year exclusion imposed by the I.G. is reasonable, and, accordingly, I sustain it.

I. Issues, findings of fact, and conclusions of law

There are two issues in this case. I make specific findings of fact and conclusions of law in deciding each of these issues. These findings and conclusions are set forth below, beneath the relevant issue. In setting forth these findings and conclusions, I cite to relevant portions of my decision at which I discuss my findings and conclusions in detail.

A. Is the I.G. required to exclude Petitioner from participating in the Medicare and Medicaid programs?

1. Under section 1128(a)(1) of the Act, the Secretary of the United States Department of Health and Human Services (Secretary) is required to exclude any individual or entity who has been convicted of a criminal offense related to the delivery of an item or service under the Medicare or Medicaid programs. Page 4.

2. Petitioner was ordered to pay restitution to the New York Medicaid program in the amount of \$1,900,000.

3. Petitioner was sentenced to imprisonment for a term of 41 months.

³ The I.G. submitted 12 exhibits (I.G. Ex. 1 - 12). Petitioner submitted five exhibits (P. Ex. 1 - 5). Neither party objected to the admission into evidence of the other party's exhibits. Therefore, I admit into evidence I.G. Ex. 1 - 12 and P. Ex. 1 - 5.

2. Petitioner was convicted of criminal offenses related to the delivery of items or services under the New York Medicaid program. Pages 4 - 9.

3. The I.G., acting as the Secretary's delegate, is required to exclude Petitioner. Pages 4 - 9.

B. Is the 15-year exclusion which the I.G. imposed reasonable?

4. The Act requires the Secretary, or the I.G., acting as the Secretary's delegate, to exclude for at least five years any individual or entity who is convicted of an offense described in section 1128(a)(1) of the Act. Pages 6, 9.

5. Regulations provide that an exclusion of more than five years may be imposed in any case where there exist factors which the regulations define as aggravating, and that are not offset by factors which the regulations define as mitigating. Pages 9 - 10.

6. In this case, the I.G. proved that there exist three aggravating factors. Petitioner did not allege or prove that there exist any mitigating factors. Pages 11 - 12.

7. The evidence which is relevant to the aggravating factors proves that Petitioner is a highly untrustworthy individual. Pages 11 - 17.

8. The degree of untrustworthiness established in this case proves that an exclusion of 15 years is reasonably necessary to protect the integrity of federally financed health care programs. Pages 11 - 17.

II. Discussion of the issues

A. Background

The following facts are not disputed. Petitioner is a physician who specializes in anesthesiology. P. Ex. 2, page 11. She was a participating provider in the New York Medicaid program. I.G. Ex. 6, page 5. Beginning in October 1990 and continuing through April 1991, Petitioner associated with clinics in New York City that were operated by Mohammed Sohail Khan (Khan). I.G. Ex. 1, pages 16 - 17. The clinics presented reimbursement claims to the New York Medicaid program for services allegedly provided by Petitioner. P. Ex. 6, pages 5 - 7.

Petitioner, Khan, and other individuals were indicted in United States District Court for the Southern District of New York on federal criminal offenses related to the operation of Khan's clinics. I.G. Ex. 6. After a trial, Petitioner was convicted of 25 separate criminal offenses. I.G. Ex. 9, page 1. Petitioner was convicted of conspiring with Khan and the other named defendants to engage in a pattern of racketeering. I.G. Ex. 6, pages 1 - 16; I.G. Ex. 9, page 1. An element of the conspiracy was a scheme to defraud the New York Medicaid program by submitting reimbursement claims for unnecessary medical services and unnecessary diagnostic tests ostensibly performed at Khan's clinics. I.G. Ex. 6, pages 9 - 10, 15. Additionally, Petitioner was convicted of engaging in a pattern of racketeering activity to implement the conspiracy. I.G. Ex. 6, pages 16 - 17; I.G. Ex. 9, page 1.

Petitioner was convicted also of 13 counts of mail fraud. I.G. Ex. 6, pages 17 - 18, 22 - 23; I.G. Ex. 9, page 1. These offenses involved fraudulently obtaining through the mail reimbursement checks from the New York Medicaid program. I.G. Ex. 6, pages 17 - 18. Petitioner was convicted of fraudulently obtaining from the New York Medicaid program reimbursement checks totalling more than \$135,000. I.G. Ex. 6, pages 22 - 23; I.G. Ex. 9, page 1. Finally, Petitioner was convicted of ten counts of money laundering. I.G. Ex. 6, pages 25 - 28; I.G. Ex. 9, page 1. These offenses involved depositing checks that had been obtained by defrauding the New York Medicaid program to specified bank accounts, and withdrawing funds from those accounts, with the intent to disguise the nature, location, source, ownership and control of the proceeds of unlawful activity. I.G. Ex. 6, pages 25 - 26.

Petitioner was sentenced to 41 months' imprisonment on each count of which she was convicted, with the sentences to be served concurrently. I.G. Ex. 9, page 2. She was sentenced to serve a term of three years' supervised release upon completion of her prison sentence. Id. at 3. She was sentenced also to pay restitution in the amount of \$1,931,992 to the New York Department of Social Services. Id. at 4.

B. The I.G.'s duty to exclude Petitioner

Section 1128(a)(1) of the Act mandates the exclusion from participation in the Medicare and Medicaid programs of any individual convicted of a criminal offense related to the delivery of an item or service under the Medicare or Medicaid programs. The I.G., acting as the Secretary's delegate, must exclude any individual or entity who is

convicted of an offense described by section 1128(a)(1). In this case, the I.G. contends that Petitioner was convicted of criminal offenses described by section 1128(a)(1). Petitioner asserts that she was not convicted of such offenses.

The evidence in this case establishes that Petitioner was convicted of participating in a criminal enterprise whose purpose was to defraud the New York Medicaid program. I.G. Ex. 6, 9. The essence of the scheme for which Petitioner was convicted was to defraud the New York Medicaid program into making payments for unnecessary services provided to Medicaid recipients. Id. Petitioner was not only a co-conspirator, but was convicted of engaging in acts intended to further the conspiracy. Id. I conclude that Petitioner plainly was convicted of criminal offenses which were related to the delivery of items or services under the New York Medicaid program. The I.G., acting as the Secretary's delegate, was required to exclude Petitioner.

According to Petitioner, her crimes are not program-related, but are, instead, "financial offenses." The gravamen of her argument is that she did not engage in acts which defrauded the New York Medicaid program. She argues that, while others may have defrauded the New York Medicaid program, her criminal involvement was limited to receipt of the avails of that fraud. Petitioner characterizes her crimes as errors of omission and negligence that are unrelated to the delivery of Medicaid items or services. Petitioner contends that she was merely the passive and uninformed recipient of reimbursement checks from the New York Medicaid program and that the payments she received were attributable to the fraud of other persons.

To support her argument, Petitioner asserts that there is no evidence that she ever personally delivered the Medicaid items or services which are the basis for the indictment and convictions. Petitioner's Brief at 17 - 18. Petitioner asserts also that there is no evidence that she ever made reimbursement claims to the New York Medicaid program for those items or services. Id.

Petitioner concedes that she has been convicted of offenses which would give the I.G. authority to exclude her under the permissive exclusion authority contained in section 1128(b)(1) of the Act. Petitioner's Brief at 17 - 18. Petitioner's aim in characterizing her conviction as being for offenses that fall within section 1128(b)(1) is to support her argument that the I.G.

should have exercised discretion, either to not exclude her at all, or to exclude her for less than five years.

Section 1128(b)(1) permits the I.G., acting as the Secretary's delegate, to exclude an individual or entity who has been convicted of a criminal offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct, either in connection with the delivery of a health care item or service or with respect to any act or omission in a program operated by or financed in whole or in part by any federal, State, or local government agency. The authority to exclude under section 1128(b)(1) is permissive, not mandatory. In contrast to the mandatory exclusion requirements of section 1128(a)(1), section 1128(b)(1) gives the I.G. discretion to determine whether to exclude an individual or entity. Section 1128(b)(1) permits exclusions to be for less than five years, whereas exclusions imposed under section 1128(a)(1) must be for at least five years. Social Security Act, § 1128(c)(3)(B).

Petitioner's description of her crimes ignores the criminal charges of which she was convicted. Contrary to Petitioner's argument, she was not convicted of being merely a passive beneficiary of fraud. Petitioner was convicted of being an active participant in a conspiracy. While Petitioner's role in the conspiracy did not include providing unnecessary services or personally making reimbursement claims for those services, she was nonetheless a key player in the conspiracy.

Petitioner's primary role in the conspiracy of which she was convicted was to agree to allow her co-conspirators to make use of her name and Medicaid provider number to generate fraudulent Medicaid reimbursement claims for unnecessary items and services. I.G. Ex. 6, pages 9 - 10. Petitioner's participation gave her co-conspirators a vehicle by which to claim reimbursement for unnecessary services to Medicaid recipients. But for Petitioner's consent to allow her co-conspirators to use her name and her provider number, her co-conspirators would not have been able to present fraudulent Medicaid claims in her name, using her Medicaid provider number. But for this consent, Petitioner would not have received checks totalling more than \$135,000 from the New York Medicaid program as reimbursement for fraudulent Medicaid claims. I.G. Ex. 6, pages 22 - 23.

Petitioner's characterization of her conduct as that of a passive bystander to the fraud of others constitutes an attempt to look behind the jury's findings in her case.

In a sense, she is asserting that she is not really guilty of the crimes of which she was convicted. However, the I.G.'s authority to exclude Petitioner under section 1128(a)(1) derives from the crimes of which Petitioner was convicted, and not from her conduct. Paul R. Scollo, D.P.M., DAB 1498, at 14 (1994); Peter J. Edmonson, DAB 1330, at 4 (1992). In view of the fact that Petitioner was convicted of actively participating in a conspiracy, her attempt to now characterize her involvement in the conspiracy as being only passive is not relevant to the I.G.'s authority to exclude Petitioner. In Edmonson, an appellate panel of the Departmental Appeals Board stated:

It is the fact of the conviction which causes the exclusion. The law does not permit the Secretary to look behind the conviction. Instead, Congress intended the Secretary to exclude potentially untrustworthy individuals or entities based on criminal convictions. This provides protection for federally funded programs and their beneficiaries and recipients, without expending program resources to duplicate existing criminal processes.

Id. (emphasis in original).⁴

Furthermore, Petitioner would stand convicted of offenses as described by section 1128(a)(1) even if I accepted her characterization of her conviction as being of "financial offenses" resulting from her unlawful receipt of Medicaid reimbursement that had been obtained fraudulently. Petitioner's conviction plainly is of offenses related to the delivery of Medicaid items or services, even under her own characterization of those convictions.

Section 1128(a)(1) has never been interpreted so narrowly as to limit the authority to exclude to only those individuals who have been convicted of crimes involving

⁴ The Edmonson case involved an exclusion imposed pursuant to section 1128(a)(2) of the Act, which mandates exclusions of individuals convicted of criminal offenses relating to neglect or abuse of patients in connection with the delivery of health care items or services. However, both sections 1128(a)(1) and 1128(a)(2) mandate that exclusions be imposed based on convictions for offenses described within those sections. Therefore, the derivative authority for exclusions under the two sections (convictions for specified offenses) is the same.

their personal delivery of Medicare or Medicaid items or services, or their personal presentation of reimbursement claims for Medicare or Medicaid items or services. See, e.g., Napoleon S. Maminta, M.D., DAB 1135, at 7.⁵ The statutory phrase "related to the delivery of" a Medicare or Medicaid item or service has been interpreted to encompass any crime where there exists some reasonably perceivable nexus between the crime and the delivery of a Medicare or Medicaid item or service. Berton Siegel, D.O., DAB 1467 (1994); Thelma Walley, DAB 1367 (1992). Section 1128(a)(1) encompasses the circumstance where the delivery of a Medicare or Medicaid item or service is an element in the chain of events leading to the commission of the criminal offense.

There exists an obvious nexus between Medicaid items and services and Petitioner's crimes which satisfies the Act's requirement that, for a conviction to fall within the purview of section 1128(a)(1), it be of an offense related to the delivery of a Medicare or Medicaid item or service. That nexus lies in the relationship between Medicaid items and services and Petitioner's receipt of reimbursement checks for those items and services. Items or services which Petitioner's co-conspirators unnecessarily provided to Medicaid recipients caused the New York Medicaid program to issue reimbursement checks which Petitioner accepted. That nexus exists despite the fact that Petitioner may not have provided items or services to Medicaid recipients personally or made reimbursement claims for those items or services.

Thus, Petitioner was convicted of criminal offenses which are program-related, within the meaning of section 1128(a)(1). Even though these offenses might arguably be characterized as "financial crimes" within the meaning of section 1128(b)(1), that does not relieve the I.G. of the

⁵ In Maminta, the petitioner's crime did not relate to any Medicare or Medicaid item or service that he provided personally, nor did it relate to any reimbursement claim that he presented or caused to be presented for a Medicare or Medicaid item or service. Petitioner was convicted of unlawfully converting to his benefit a Medicare reimbursement check that had been intended for another entity, but which had been sent to him inadvertently. The requisite nexus was found to exist because Petitioner's crime related to a Medicare item or service, even though the item or service had been provided by someone other than Petitioner, and even though someone other than Petitioner had made the reimbursement claim for that item or service.

duty to exclude Petitioner under the mandatory exclusion authority of section 1128(a)(1). Congress did not intend the permissive exclusion authority of section 1128(b)(1) to supersede the mandatory exclusion requirement it enacted for individuals and entities convicted of program-related offenses. Travers v. Sullivan, 801 F.Supp. 394, 405 (E.D. Wash. 1992).

C. The basis for the 15-year exclusion

The preponderance of the evidence in this case establishes that the 15-year exclusion imposed against Petitioner is reasonable. I conclude that Petitioner has, by her conduct, shown herself to be a highly untrustworthy individual. The lengthy exclusion imposed against Petitioner is necessary to protect federally funded health care programs and program beneficiaries and recipients from possibly damaging conduct by Petitioner in the foreseeable future.

Section 1128 is a remedial statute. Its purpose is to protect the integrity of federally funded health care programs, and the welfare of program beneficiaries and recipients, from individuals and entities who have been shown to be untrustworthy. Exclusions imposed pursuant to section 1128 (including exclusions of more than five years imposed under section 1128(a)(1)) have been found reasonable only insofar as they are consistent with the Act's remedial purpose. Robert Matesic, R.Ph., d/b/a Northway Pharmacy, DAB 1327, at 7 - 8 (1992); William F. Middleton, DAB CR297, at 8 (1993).⁶

Prior to 1993, there were no regulations governing the administrative adjudication of exclusions imposed pursuant to section 1128. In cases decided prior to 1993, appellate panels of the Departmental Appeals Board and administrative law judges held that the criteria used to evaluate the trustworthiness of excluded parties, and the reasonableness of exclusions, were derived from the Act itself. These criteria encompassed any evidence relevant to an excluded party's trustworthiness to provide care. Matesic, at 7 - 8.

However, in January 1993, regulations published originally in January 1992, became binding on administrative adjudicators. 42 C.F.R. Part 1001; 42 C.F.R. § 1001.1(b). The regulations established criteria

⁶ Exclusions imposed under section 1128(a)(1) of the Act must be for at least five years. Social Security Act, § 1128(c)(3)(B).

by which the length of exclusions imposed pursuant to section 1128 are to be evaluated. These regulations provide that, in cases involving exclusions imposed pursuant to section 1128(a) of the Act, the reasonableness of the length of any exclusion imposed for a period of more than five years will be decided based on the presence of, and the weight assigned to, certain aggravating and mitigating factors which the regulations identify. 42 C.F.R. § 1001.102(b)(1) - (6), (c)(1) - (3).

One consequence of the regulations is to limit the factors which I may consider as relevant to an excluded party's trustworthiness to provide care. I may no longer, for example, consider evidence as to a party's remorse for his or her crimes, or rehabilitation, as evidence of that party's trustworthiness. See Matesic, at 7 - 8. Such evidence does not fall within any of the aggravating or mitigating factors contained in the regulations. In any case in which the reasonableness of an exclusion is at issue, I am obligated to decide, using the factors contained in the regulations, whether an exclusion of a particular length is reasonably necessary to protect the integrity of federally financed health care programs and the welfare of the programs' beneficiaries and recipients. Middleton at 8.

The presence of aggravating factors in a case is not in and of itself a basis to exclude a party for a particular length of time. In a case involving an exclusion imposed pursuant to section 1128(a)(1), the presence of an aggravating factor does not automatically justify an exclusion of more than five years.⁷ Nor is the presence of mitigating factors an automatic ground to reduce an exclusion. The regulations contain no formula for assigning weight to aggravating and mitigating factors once the presence of any of such factors is established. It is apparent both from the regulations themselves, and from the Act's remedial purpose that, I must explore in detail, and assign appropriate weight to, those factors which are aggravating or mitigating. At bottom, an exclusion must not be punitive. It must comport with the Act's remedial purpose.⁸

⁷ Nor must an exclusion of more than five years necessarily be imposed due to the presence of more than one aggravating factor in a case.

⁸ The I.G. argues that a lengthy exclusion is necessary here in part because it might deter others from engaging in the crimes which Petitioner engaged in. I do

The evidence in this case establishes the presence of three aggravating factors alleged by the I.G. There were no mitigating factors alleged or proven by Petitioner. The aggravating factors are as follows:

○ The acts resulting in Petitioner's conviction resulted in financial loss to the New York Medicaid program of more than \$1,500. 42 C.F.R. § 1001.102(b)(1). The New York Medicaid program issued reimbursement checks to Petitioner totaling more than \$135,000, which were the ultimate consequence of Petitioner's fraud. I.G. Ex. 6, pages 22 - 23. The impact of Petitioner's fraud extended beyond the amount paid to her by the New York Medicaid program. The services allegedly provided by Petitioner were used by the conspirators as the basis for additional fraudulent claims, including claims for laboratory services, diagnostic tests, and prescription drugs. In sentencing Petitioner, United States District Court Judge John S. Martin found that Petitioner participated in a massive fraud from which it was reasonable to foresee that the New York Medicaid program would be defrauded of more than \$1,900,000. I.G. Ex. 10, page 45. Accordingly, he sentenced Petitioner to pay restitution in the amount of \$1,931,992. I.G. Ex. 9, page 4.

In the notice letter to Petitioner, the I.G. asserts that Petitioner's participation in the conspiracy caused the New York Medicaid program to experience financial damages of \$8 million. I do not conclude from the evidence of record in this case that the I.G. proved that Petitioner was responsible for damages in that amount. Although the total damages caused by the conspiracy may have exceeded \$8 million, not all of this amount was attributable to Petitioner's involvement in the conspiracy. While the I.G. has not proven that Petitioner was responsible for causing financial loss to the New York Medicaid program in the amount of \$8 million, the record shows that the fraudulent claims attributable to Petitioner resulted in a financial loss of almost \$2 million. This is an

not accept the premise that an exclusion may be justified on the basis that it will deter others from engaging in misconduct, if that exclusion does not satisfy the Act's remedial purpose. In other words, an exclusion may not be justified if it cannot be shown that the exclusion is necessary to protect federally financed health care programs from possible future misconduct by the excluded individual. However, if an exclusion that satisfies the Act's remedial purpose serves also to deter others from engaging in misconduct, then that is a legitimate ancillary consequence of the exclusion.

enormous sum of money, and it amply meets the test for the presence of the aggravating factor specified at 42 C.F.R. § 1001.102(b)(1).

○ The sentence imposed on Petitioner for her crimes included a period of incarceration. 42 C.F.R. § 1001.102(b)(4). Petitioner was sentenced to 41 months' imprisonment on each of the 25 counts of which she was convicted, with the sentences to be served concurrently. I.G. Ex. 9, page 2.

○ Petitioner was overpaid more than \$1,500 by the New York Medicaid program as a result of improper billings. 42 C.F.R. § 1001.102(b)(6). Reimbursement checks were paid by the New York Medicaid program to Petitioner for more than \$135,000 as payment for services which were medically unnecessary and for which reimbursement was claimed fraudulently. I.G. Ex. 6, pages 22 - 23.

Petitioner attempts to portray herself as the naive recipient of wrongfully acquired funds from the New York Medicaid program. Throughout her brief, Petitioner attempts to minimize her involvement in the criminal activity or to shift the culpability of her crimes to others. Petitioner argues that a 15-year exclusion is unreasonable because the evidence fails to establish that she is a threat to the integrity of the Medicare and Medicaid programs.

I do not accept Petitioner's portrayal of herself as a naive participant in the criminal activity. While I do not accept Petitioner's assertion that she was merely a naive or passive recipient of monies that were obtained fraudulently, I have considered the evidence Petitioner submitted in support of this contention. Had Petitioner been able to persuade me that she did not knowingly participate in fraudulent activities, then this would have diminished the impact of the aggravating factors and would have been a basis to reduce the length of the exclusion. However, such is not the case here.

I recognize that Petitioner's arguments are tantamount to a collateral attack on the findings made at her criminal trial. It is a settled principle that Petitioner cannot challenge the I.G.'s authority to exclude her by denying that she is guilty of that which she has been convicted. However, the issue of whether the length of an exclusion is reasonable is separate from the issue of whether the I.G. has the authority to impose and direct an exclusion. In evaluating the reasonableness of an exclusion, I am

required to explore in detail, and assign appropriate weight to, those regulatory factors which are aggravating and mitigating.

The aggravating factors which the I.G. alleges to be present in this case are indices of the nature and extent of Petitioner's offenses and the effect her offenses had on the Medicare and Medicaid programs. Evidence related to these factors shed light on an individual's culpability. In promulgating these aggravating factors, the Secretary has determined that evidence related to a provider's culpability is relevant in ascertaining the need for an exclusion remedy. Therefore, I may admit evidence which develops these aggravating factors as long as the evidence sheds light on the ultimate issue of whether an exclusion is reasonably necessary to meet the Act's remedial goals.

Petitioner argues also that a lengthy exclusion ought not to be imposed against her because the I.G. proved the presence of only three of the six aggravating factors identified in the regulations. See 42 C.F.R. § 1001.102(b)(1) - (6). However, in evaluating the length of an exclusion imposed under section 1128(a)(1), the issue is not the number of aggravating factors that have been proven to exist in a given case. Rather, the issue is what the evidence relevant to any aggravating factor says about an individual or entity's trustworthiness. I reach my conclusion about the reasonableness of the exclusion in this case based not on the number of aggravating factors proven by the I.G., but on what the evidence that is relevant to those factors says about Petitioner's lack of trustworthiness.

The amount of damages which Petitioner's involvement in the conspiracy caused the New York Medicaid program suggests that Petitioner is so untrustworthy as to necessitate a lengthy exclusion. Petitioner was found to have caused the New York Medicaid program to suffer nearly \$2 million in damages in a few months' time as a knowing participant in a massive fraud against that program. I.G. Ex. 10, page 45. The amount of damages caused by Petitioner to the New York Medicaid program demonstrates that Petitioner is an individual who is capable of causing great harm to federally financed health care programs. Damages of nearly \$2 million could not have been caused by simple inadvertence. To the contrary, the quantity of damages created by Petitioner in and of itself leads to the conclusion that she participated knowingly in massive fraud.

My conclusion as to Petitioner's untrustworthiness which I draw from the amount of damages which she caused is reinforced by the evidence in this case that shows the manner in which Petitioner caused the damages to occur. This evidence belies Petitioner's assertion that she was merely a naive or passive recipient of monies that were obtained fraudulently, and belies her assertion that she is trustworthy. To the contrary, the evidence proves Petitioner to have been at the very center of the fraud, and responsible for the damages she caused. I am convinced from this evidence that Petitioner was a willing -- even eager -- participant in massive and protracted fraud against the New York Medicaid program. This evidence satisfies me that Petitioner remains a danger to federally financed health care programs. A 15-year exclusion is necessary to protect these programs against the possibility that Petitioner may engage in additional program-related fraud in the future.

Petitioner helped Khan to operate sham medical clinics whose sole purpose was to generate fraudulent Medicaid reimbursement claims. Petitioner facilitated the sham clinics' operations by knowingly allowing Khan and his operatives to make use of her name and Medicaid provider number to implement their fraudulent scheme. Furthermore, Petitioner participated in transactions which were designed to conceal the true nature of Khan's clinics.

Petitioner's role in causing damages to the New York Medicaid program is described in the indictment of the offenses of which Petitioner was convicted. I.G. Ex. 6. It is described also in excerpts of trial testimony of various witnesses, which the I.G. has offered as exhibits in this case. I.G. Ex. 1 - 4, 7 - 8. To rebut this evidence, Petitioner has offered additional excerpts of testimony. These excerpts offered by Petitioner consist primarily of portions of cross-examination of various witnesses who testified at Petitioner's trial. P. Ex. 1.

I base most of my conclusions as to Petitioner's involvement in the conspiracy on the elements in the indictment of which Petitioner was convicted. Indeed, I could have reached nearly all of the conclusions that I make in this decision without reference to the additional evidence offered by the I.G. However, my analysis is supported also by the testimony excerpts offered by the I.G. I do not find this testimony to have been rebutted substantially by the excerpts of cross-examination offered by Petitioner. More significantly, I do not find that any of the evidence offered by Petitioner rebuts meaningfully the evidence which establishes the extent of

Petitioner's involvement in the conspiracy and the effect that her involvement had on the New York Medicaid program.

The scheme of which Petitioner was an integral participant operated in the following manner. Khan ran clinics at several locations in New York City. I.G. Ex. 6, pages 1 - 2. The purpose of these clinics was to fraudulently claim reimbursement from the New York Medicaid program for unnecessary services to Medicaid recipients. In order to accomplish this objective, the clinics' employees generated sham treatment records and wrote unnecessary prescriptions for Medicaid recipients. I.G. Ex. 6, pages 2 - 6. Petitioner was "employed" at two of these clinics. I.G. Ex. 1, page 16; I.G. Ex. 6, pages 5 - 6.⁹ Her "employment" consisted of allowing her name and Medicaid provider number to be used on treatment records of Medicaid recipients and on Medicaid reimbursement claims. I.G. Ex. 6, page 3.

Petitioner was almost never present at the clinics and, but for one or two instances, never personally examined or treated Medicaid recipients. I.G. Ex. 1, page 24; I.G. Ex. 2, pages 46 - 48; I.G. Ex. 3, pages 14 - 15, 18 - 21, 27 - 28; I.G. Ex. 6, page 3; see I.G. Ex. 8, page 7. However, Petitioner knew, from the very terms of her agreement with Khan, from the monies she was receiving from the New York Medicaid program as reimbursement for services that she had never provided, and from her rare contacts with employees of Khan's clinics, that her agreement with Khan facilitated massive fraud against, and concomitant damages to, the New York Medicaid program.

The clinics employed physicians' assistants. I.G. Ex. 6, page 2. Under New York law, physicians' assistants are permitted to examine and treat patients, and to prescribe certain medications while under the active supervision of physicians. I.G. Ex. 2, pages 4 - 5. The physicians' assistants were told by Khan that, if ever questioned about their employment, they were to say that they were employed by physicians. I.G. Ex. 3, pages 6 - 7.

⁹ One of the two clinics was operated by Khan at 1153 Grand Concourse, in the borough of the Bronx. I.G. Ex. 1, page 16. Up until December 1990, Petitioner was associated also with a clinic operated by Khan at 461 Lenox Avenue, in New York City. Id. In December 1990, Khan relocated this clinic to 2301 Second Avenue. Petitioner remained involved with this clinic at its new address. Id. at 16 - 17.

The physicians' assistants saw from 25 to 40 Medicaid recipients daily at the clinics, but they did not actually examine or treat the recipients. I.G. Ex. 2, pages 14 - 19; I.G. Ex. 6, page 3. They drew blood from the recipients, which would be sent to laboratories for testing. I.G. Ex. 2, pages 40 - 42; I.G. Ex. 6, pages 3 - 4.

The physicians' assistants fabricated examination reports and treatment records to make it look as if the recipients had been examined and treated by the physicians' assistants under the supervision of physicians, including Petitioner. I.G. Ex. 2, pages 46 - 48; I.G. Ex. 6, pages 4 - 5. These fabricated records were used as a basis for fraudulent reimbursement claims that were attributed to physicians, including Petitioner, who were associated with Khan's clinics.

The physicians' assistants wrote prescriptions for the Medicaid recipients that the recipients filled at pharmacies. I.G. Ex. 6, pages 2 - 4. The prescriptions were for medications intended to treat peptic ulcers, high blood pressure, high blood cholesterol, skin rashes, and respiratory problems. I.G. Ex. 2, pages 20 - 23, 32; I.G. Ex. 6, page 2. The recipients were issued these prescriptions without regard to their actual illnesses. I.G. Ex. 2, pages 20 - 23, 32, 37; I.G. Ex. 3, page 12; I.G. Ex. 6, page 2. Once the recipients obtained the drugs from the pharmacies, they were free to sell them on the street. I.G. Ex. 2, pages 25 - 26; I.G. Ex. 6, page 2.

Petitioner knew that the physician assistants were seeing patients on her behalf without supervision, and that they were generating reimbursement claims for services which she had not provided and which were not medically necessary. I.G. Ex. 2, pages 45 - 48; I.G. Ex. 3, pages 19 - 24; I.G. Ex. 6, pages 2 - 6, 9 - 10. She knew also from the checks that she was receiving from the New York Medicaid program that Khan's clinics were committing massive fraud in her name.

Khan's clinics claimed reimbursement from the New York Medicaid program for the sham "services" which physicians, including Petitioner, purportedly provided to Medicaid recipients. I.G. Ex. 6, pages 3 - 6. Petitioner agreed to give Khan 30 percent of New York Medicaid's reimbursement to her for her "services" as compensation for Khan's creation of Medicaid reimbursement claims in her name. I.G. Ex. 1, page 17.

Petitioner helped Khan disguise the true nature of his clinics. Although Khan operated the clinics, Petitioner executed leases for clinic facilities and paid rent on them. I.G. Ex. 1, pages 18 - 21. The effect was to make it appear as if the clinics were run by Petitioner, and not by Khan. Id.

The evidence relevant to the aggravating factors in this case persuades me that Petitioner knowingly and actively participated in a massive fraud against the New York Medicaid program. The seriousness of Petitioner's offenses demonstrates a high level of culpability and convinces me that she is a threat to the Medicare and Medicaid programs. In view of this, I assign great weight to the aggravating factors in this case. Based on the totality of the evidence, I conclude that the 15-year exclusion is reasonably necessary to protect the integrity of the Medicare and Medicaid programs.

III. Conclusion

I conclude that Petitioner was convicted of criminal offenses related to the delivery of items and services under the New York Medicaid program. The I.G. was required to exclude Petitioner. I conclude also, in light of the evidence relating to aggravating factors, that the 15-year exclusion imposed by the I.G. comports with the Act's remedial purposes. Therefore, I sustain the exclusion.

/s/

Steven T. Kessel
Administrative Law Judge