Cleansing Fraud and Deceit Convictions to Avoid the Aggravated Felony of Attempt

by Karl Krooth*

The Immigration and Nationality Act (INA) defines attempt[1] as an aggravated felony. The uncertain breadth [2] of attempt includes convictions of attempted fraud or deceit. This article offers ideas for attorneys to help their clients avoid attempted fraud or deceit.

While the aggravated felony of fraud or deceit[3] requires actual loss in excess of $10,000, attempted fraud or deceit permits substitution of projected loss.[4] A statute that incorporates intent to defraud or deceive, labels such an offense as attempt, and projects a loss of more than $10,000 will qualify under the aggravated felony of attempt. This strict categorical approach focuses only on the elements of the statute of conviction, rather than the record of conviction or factual circumstances of the crime to which the foreign national may have inadvertently stipulated.[5]

The absence of actual loss opens the door to analysis of the statute of conviction for a specific intent to defraud or deceive or a label of attempt. Absent a label of attempt in the underlying statute, the modified categorical approach may apply to authorize review of the record of conviction.[6]

If the intent element in the record does not correspond to one contemplated by the statute, then the Immigration Court cannot rely on that intent to issue a removal order.[7] To the extent that the statute lacks a label of attempt but imputes specific intent, the Immigration Court may have authority to review the record for a substantial step.[8]

The substantial step inquiry provides a ripe opportunity to challenge the statute's divisibility.[9] Divisibility depends on whether the statute defines at least one offense that would qualify as a basis for removal and another offense that would not.[10]

To the extent that the Office of Chief Counsel (OCC) relies on the record of conviction as proof of projected loss, two decisions from the Ninth Circuit Court of Appeals may undermine that position.[11] In the context of an innocuous statute, these Ninth Circuit decisions strike at the Achilles heel of the charging document; those foreign nationals who are receptive to the prospect of jury trial may benefit from this caselaw.

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[1] INA § 101(a)(43)(U).

[2] While the published case law on attempt is exclusive to attempted offenses of INA § 101(a)(43)(M)(i), the Office of Chief Counsel (OCC) has charged attempted offenses of INA § 101(a)(43)(B) where alleged controlled substances violations did not fit the aggravated felony definition of drug trafficking. Matter of Mejia, File # A34 656 207 (unpublished) 26 Immig. Rptr. B1-69 (BIA 2002).

[3] INA § 101(a)(43)(M)(i).

[4] Matter of Onyido, 22 I. & N. Dec. 552 (BIA 1999). The Immigration Court may not rely on the record of conviction for a prospective amount of loss unless the statute contemplates a loss. Matter of Pichardo, 21 I. & N. Dec. 330, 335 (BIA 1996).

[5] Taylor v. U.S, 495 U.S. 575 (1990); Matter of R, 6 I. & N. Dec. 444, 448 (BIA 1954).

[6] The modified categorical approach only permits consideration of the record of conviction if the statute is divisible. INA § 240(c)(3)(B) defines the record as a narrow scope of criminal court documents.

[7] Matter of Pichardo, 21 I. & N. Dec. 330, 335 (BIA 1996).

[8] Sui v. INS, 250 F.3d 105 (2nd Cir. 2001).

[9] Matter of Short, 20 I. & N. Dec. 136, 137-138 (BIA 1989).

[10] Hamdan v. INS, 98 F.3d 183, 187 (5th Cir. 1996).

[11] Chang v. INS, 307 F.3d 1185 (9th Cir. 2002) (conviction based on plea bargain; plea bargain agreement trumps restitution order and presentence report), Li v. Ashcroft, 389 F.3d 892 (9th Cir. 2004) (conviction by jury trial; loss alleged in charging document is irrelevant unless otherwise confirmed by statute or record of conviction).

This issue also arises in the similar context of crimes involving moral turpitude (CIMT). Unless a CIMT qualifies for the so-called "petty offense exception," [12] it may subject the foreign national to inadmissibility[13] and/or removal.[14]

Prosecutors frequently add elements that the statute of conviction did not anticipate. An inconsistency in charging documents provides further ammunition against these extra-statutory elements.

These inconsistencies often arise in the context of state felonies because, while the U.S. Attorney may only charge a defendant by convening a grand jury for an "indictment," California and similar states have instituted the popular alternative of preliminary hearings before a single judge in a court of limited jurisdiction. The defendant receives notice of preliminary hearing by "complaint." The judge may hold a defendant to answer upon proof of probable cause, a standard of proof that parallels the prosecution's burden before the grand jury. Such a judicial finding authorizes the prosecutor to file an "information" before a court of unlimited jurisdiction. Inconsistencies between these charging documents may yield a strong additional argument against extra-statutory language in the record of an alleged attempt.

The foreign national may also rely on conviction of a completed offense as a defense to an alternative charge in the Notice to Appear (NTA) of attempt. On one hand, many jurisdictions define "attempt" as a lesser included crime of the completed offense.[15] On the other hand, unless the statute defines the completed offense of fraud or deceit as a specific intent crime, [16] conviction of a completed offense should rebut any attempt charge in the NTA.

To the extent that OCC seeks to rely on the record of conviction to demonstrate that specific intent underlies an innocuous statute, the U.S. Supreme Court has recently confirmed the narrow scope of the modified categorical approach in pleaded cases.[17] Distinguishing a prior holding,[18] the Court excluded a police report from the record because defendant had never stipulated to it:

The Court did not, however, purport to limit adequate judicial record evidence strictly to charges and instructions…(discussing the use of these documents as an "example"), since a conviction might follow trial to a judge alone or a plea of guilty.[19]

The limited record calls for exclusion of documents that are incomparable to jury instructions:

In cases tried without a jury, the closest analogs to jury instructions would be a bench-trial judge's formal rulings of law and findings of fact, and in pleaded cases they would be the statement of factual basis for the charge, … shown by a transcript of plea colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea.[20]

The prevalence of Medicare fraud today merits a hypothetical. A foreign national has retained your office as well as separate criminal counsel to defend him against an indictment in federal district court. His single misdemeanor count charges him with presentation of an unpaid Medicare claim of $11,000 and knowledge that the individual who furnished the service was not licensed as a physician.[21] His criminal

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[12] INA § 212(a)(2)(A)(ii)(II).

[13] INA § 212(a)(2)(A).

[14] INA §§ 237(a)(2)(A)(i)-(ii). INA § 237(a)(2)(A)(i) authorizes removal for a single CIMT conviction that has a maximum sentence of at least one year and occurs within five years of admission. In the alternative, the Immigration Court may enter an order of removal under INA § 237(a)(2)(A)(ii) for conviction of two or more CIMTs that do not arise out of a single scheme of criminal misconduct, regardless of sentence and regardless of their proximity to the date of admission.

[15] In the event that the state of conviction defines attempt as a lesser included offense, the *Onyido* dissent provides a provocative argument against reliance by the Office of Chief Counsel (OCC) on a completed offense for proof of that substantial step. Matter of Onyido, 22 I. & N. Dec. 552, 558 (BIA 1999). *See supra* note 5.

[16] While Model Penal Code § 5.01 requires specific intent for an attempt offense, fraud and deceit are general intent crimes. The Second Circuit Court of Appeals has applied the Model Penal Code in this context by citation to Taylor v. U.S, 495 U.S. 575 (1990). Sui v. INS, 250 F.3d 105, 115-116 (2nd Cir. 2001).

[17] Shepard v. U.S., 544 U.S. 13 (2005).

[18] Taylor v. U.S, 495 U.S. 575 (1990).

[19] Shepard v. U.S., 544 U.S. 13 (2005).

[20] *Id.* at 1259-60

[21] 42 U.S.C. § 1320a-7b(a)(5).

defense attorney approaches you about a prospective sentence bargain to a sentence of no more than 364 days and to strike restitution.[22] This agreement avoids the aggravated felonies of fraud or deceit[23] and money laundering[24] provided that the record of conviction will not contain any reference to loss. Further, this agreement does not qualify as a theft offense provided that the Federal District Court sentences him to less than 365 days.[25] The question becomes whether conviction by a plea to this indictment is attempted fraud or deceit.

Since the statute does not label the offense as an attempt, the record of conviction "must offer an alternative yardstick by which to determine whether a conviction renders an alien removable under the aggravated felony provision."[26] Assuming the statute is divisible and the projected loss is more than $10,000, the first inquiry is whether knowledge of a false claim about licensure is specific intent to defraud or deceive. The second question is whether submission of that claim is a substantial step.

The statute defines the intent element as knowledge that the individual who furnished the service was not licensed as a physician. A knowing misrepresentation about licensure is material because of its tendency to influence the official decision to pay the claim.[27] That material misrepresentation creates an inference of specific intent to defraud or deceive.

The last inquiry is whether presentation of an unpaid Medicare claim is a substantial step. On the one hand, simple possession of counterfeit securities is not a substantial step.[28] On the other hand, a substantial step occurs by physical appearance to collect money on a false insurance claim.[29] While physical appearance is certainly not required to convert a false claim into a substantial step, the false claim alone is not a substantial step. This rule emphasizes the importance of keeping any other facts out of the record of conviction.

The aggravated felony of attempted fraud or deceit requires proof of a projected loss, a specific intent, and a substantial step. While projected loss may seem like a cursory element, the Immigration Court may not rely on a prospective amount of loss that appears in the record of conviction unless the statute contemplates a loss.[30] Moreover, the foregoing hypothetical demonstrates that immaterial knowledge about fraud may rebut specific intent. Finally, a substantial step must have a component of substance such that submission of a claim will probably not qualify in the absence of an additional and significant assertion.

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[22] Sentence bargaining is much more common than charge bargaining in federal court.

[23] INA § 101(a)(43)(M)(i). Such a plea should also avoid the aggravated felony offense at INA § 101(a)(43)(M)(ii) for "revenue loss to the Government [which] exceeds $10,000."

[24] INA § 101(a)(43)(D).

[25] INA § 101(a)(43)(G). The U.S. Attorney has authority to move for a downward departure under U.S. Sentencing Guidelines § 5K1.1.

[26] Sui v. INS, 250 F.3d 105, 114 (2nd Cir. 2001).

[27] Kungys v. US, 485 U.S. 759, 771 (1988); Forbes v. INS, 48 F.3d 439, 443 (9th Cir. 1995). A Medicare claim is only valid if the physician has a license.

[28] Sui v. INS, 250 F.3d 105, 114 (2nd Cir. 2001).

[29] Matter of Onyido, 22 I. & N. Dec. 552 (BIA 1999). The majority relied on the record of conviction to find a substantial step by physical appearance to collect on the claim. Physical appearance was the substantial step, as the majority also cited a state case of personally attempting to obtain a watch by fraud.

[30] Matter of Pichardo, 21 I. & N. Dec. 330, 335 (BIA 1996).