Framing Motions to Terminate: Relying on the Categorical Approach and Generic Definition

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DEMANDING ADHERENCE TO A CATEGORICAL APPROACH

Elements-Based Test

The Immigration and Nationality Act (INA)[1] enumerates a wide array of immigration consequences that criminal offenses will only trigger upon satisfaction of a traditional "categorical approach." Such an approach requires analysis of a state-legislated statute of conviction against a "generic" definition. This traditional "categorical approach" developed in the analogous context of criminal sentencing under the Armed Career Criminal Act (ACCA).[2]

[1] Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 USC §§1101 *et seq.*).
[2] 18 USC §924(e)(2)(A).

This traditional "categorical approach" is an *elements-based* analysis, a dispassionate endeavor in which underlying facts leading to arrest and conviction are irrelevant -- what matters exclusively are the statute of conviction's elements, on which jurors must reach unanimous agreement for a guilty verdict to be entered.[3] The U.S. Supreme Court (SCOTUS) has, however, developed a non-traditional "circumstance-specific" or "conduct"-based approach, such that a state-legislated statute of conviction defines conduct that is comparable to what a federal statute calls for.[4] SCOTUS has had repeated occasion to construe the machinations of the analytical process for comparing the elements of the state-legislated statute of conviction, in both contexts, giving some guiding principles for reviewing statutes in the first instance.

With respect to the non-traditional "circumstance-specific" approach, its application will generally be exclusive to one subpart of the state-legislated statute; another subpart of the same state-legislated statute will then be subject to the traditional "categorical approach." As a thesis of this article, the authors recommend that practitioners demand analysis of the state-legislated statute from the standpoint that the- conviction does not satisfy elements subject to the traditional "categorical approach." Success depends on preventing the immigration judge (IJ) or other adjudicator from engaging in a fishing expedition under the non-traditional "circumstance-specific approach.[5]

From a great triptych of recent SCOTUS decisions, we arrive at some widely applicable principles. First, if the state statute is *missing* an element of the generic definition, then the offense is overbroad and fails to categorically match the generic definition. Accordingly, what California calls "burglary" lacks an element of "unlawful entry or remaining" at the location

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[3] In perhaps the best explanation of the technique, reiterating that the inquiry is one of strict "elemental" nature, Justice Kagan provides the following exposition:

> 'Elements' are the 'constituent parts' of a crime's legal definition—the things the 'prosecution must prove to sustain a conviction.' At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty. Facts, by contrast, are mere real-world things—extraneous to the crime's legal requirements. (We have sometimes called them 'brute facts' when distinguishing them from elements.) They are 'circumstance[s]' or 'event[s]' having no 'legal effect [or] consequence': In particular, they need neither be found by a jury nor admitted by a defendant. And ACCA, as we have always understood it, cares not a whit about them. A crime counts as 'burglary' under the Act ifits *elements* are the same as, or narrower than, those of the generic offense. But if the crime of conviction covers any more conduct than the generic offense, then it is not an ACCA 'burglary'—even if the defendant's actual conduct (*i.e.,* the facts of the crime) fits within the generic offense's boundaries.). (*Mathis v. United States*, 136 S.Ct. 2243, 2248 (2016).)

[4] *Kawashima v. Holder*, 565 U.S. 478, 483 (2012).

[5] This practice advisory recommends that practitioners do so to render IJ's helpless from relying on what might otherwise be a playbook for which IJ's reach. The playbook includes training materials, such as "Avoiding the Use or Mitigating the Effect of the Categorical Approach." (see "EOIR Releases Training Materials on Developments in Criminal Immigration and Bond Law" (June 4, 2018), AILA Doc. No. 18082202). IJ's might otherwise enter erroneous orders in reliance on a presentation by Roger A. Pauley of the BIA whose flawed training materials include what follows: "(1) correctly concluding that the issue is one where it is not necessary to apply the categorical approach at all; (2) finding the issue is governed by the so-called "circumstance-specific" approach; (3) apply the doctrine that requires an alien to show that, where the charge is based on conviction for an aggravated felony, there is a "realistic probability" that his offense comes within the scope of the charge; and (4) mitigating the effect of the categorical approach by applying it in a manner that permits a sensible result to be reached." The authors credit and applaud Matthew Hoppock for his FOIA request prompting EOIR disclosure of this 2018 Legal Training Program.

burglarized, so the California crime does not categorically match the generic definition of burglary.[6] Equivalently, a state-legislated statute lacking an *exception* present in the generic definition will render such a statute overbroad or "over-inclusive" relative to the generic definition and foreclose a categorical match. Illustratively, what a Georgia statute calls "felony drug delivery" is not the equivalent of any federal felony; the reason is that Georgia lacks a misdemeanor exception (to otherwise felonious conduct) for social sharing of cannabis without remuneration, as no such exception exists in. the generic definition.[7] Finally, if an element of a state offense is facially overbroad, it is not a categorical match with the generic definition. Accordingly, an Iowa burglary offense, in which jury unanimity is not required as to the location of the burglary fails to categorically match generic burglary; this outcome results from a generic definition necessarily relating to a structure in contrast to a state-legislated statute relating more broadly to a "structure, building, air or water vehicle or trailer."[8]

IDENTIFYING THE "GENERIC" DEFINITION

Are There Statutory References to Which We Can Turn?

What exactly is the generic definition? In many instances, this generic definition is enumerated by statutory reference within the INA. For example, to be a "drug trafficking crime" aggravated felony, a state offense must share the elements of a federal *felony* offense listed at 18 USC §§924(c). The plain language of 18 USC §924(c) becomes the "generic" definition as a strict point of comparison. Any state-legislated statute proscribing simple possession is not a categorical match by comparison to a §924(c) offense, *even if the state punishes that offense as a felony*, because the federal government treats all first possession offenses as misdemeanors.[9] Similarly, even if a foreign national has two convictions under any state-legislated statute proscribing simple possession, the second conviction does not count as a categorical match to the federal felony of recidivist possession if the state offense was not *charged* as a recidivist offense with an element establishing existence of a prior conviction.[10] Finally, practitioners should argue that a conviction record omitting drug identity does not relate to a federal controlled substance *at all*; the strength of this latter argument improves in the context of a state-legislated statutory scheme potentially encompassing both drugs exclusive of and inclusive of federal schedules at 21 USC §802 or incorporated therein by reference.[11]

Identifying Historic Meanings of Statutory Terms as Alternative to Federal Statutes

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[6] *Descamps v. United States*, 570 U.S. 254 (2013).
[7] *Moncrieffe v. Holder*, 569 U.S. 184 (2013).
[8] *See generally Mathis, supra.*
[9] *Lopez v. Gonzales*, 549 U.S. 47 (2006).
[10] *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010).
[11] *Mellouli v. Lynch*, 135 S.Ct. 1980 (2015). Drugs proscribed by Kansas, but not federal law, follow: Salvia divinorum or salvinorum A (Kan. Stat.Ann. §65-4105(d)(30) (2010)); Datura stramonium, commonly known as gypsum weed or jimson weed (Kan. Stat. Ann. §65-4105(d)(31) (2010)); 1–Pentyl–3–(1–naphthoyl)indole (Kan. Stat. Ann. §65-4105(d)(33) (2010)); 1–Butyl–3–(1–naphthoyl)indole (Kan. Stat. Ann. §65-4105(d)(34) (2010)); 1–(3–[trifluoromethylphenyl]) piperazine ("TFMPP") (Kan. Stat. Ann. §65-4105(d)(36) (2010)); Butyl nitrite (Kan. Stat. Ann. §65-4111(g) (2010)); Propylhexedrine (Kan. Stat. Ann. §65-4113(d)(1) (2010)); Pseudoephedrine (Kan. Stat. Ann. §65-4113(f) (2010)); and Ephedrine (Kan. Stat. Ann. §65-4113(e) (2010)).

In other instances, the INA lacks an express statutory reference to rely upon. In this context, the courts and the Board of Immigration Appeals have reiterated that the generic definition derives from prevailing norms contemporaneous with its use by Congress in relevant legislation. Courts measure the generic definition from how the majority of states defined the offense.[12] This method for determining the generic definition applies with respect to aggravated felonies under immigration law including, *inter alia*, murder and [13] rape,[14] (INA §101(a)(43)(A)); and "theft"[15] and "burglary"[16] offenses and receipt of stolen property[17] (INA 101(a)(43)(G)).

Attacking Fluctuations in the Definition of a Crime Involving Turpitude

An elements-based approach applies equally in the context of crimes involving moral turpitude (CIMTs). On a congressional record devoid of a generic CIMT definition for purposes of the INA, over a course of decades the Board of Immigration Appeals (BIA or Board) addressed a wide array of offenses for whether each is a CIMT. For example, in 1973, the BIA deemed theft not to be a CIMT without an element of intent to permanently deprive the owner of possession.[18] Forty-three years later, the BIA re-evaluated contemporary norms in furtherance of expanding the definition of a CIMT to encompass temporary deprivations eroding value of property.[19]

Many more state criminal schemes will accordingly fall within the ambit of a broader CIMT definition in the "theft" context. An inadequately-static CIMT definition runs at odds with reasonable reliance of foreign nationals who seek to mitigate immigration consequences by entering a change of plea to guilty or no contest upon waiver of jury trial.[20] Practitioners should raise objections against an elements-based comparison of the categorical approach for its flaws associated with introduction of a CIMT definition that is not static.[21]

Former U.S. Attorney General Mukasey threatened abandonment of an elements-based approach by favoring inquiry into facts,[22] and admissibility of extrinsic evidence including testimony on subjective state of mind or knowledge and/or other non-record evidence.[23]

Mukasey deemed an elements-based test inappropriate outside criminal sentencing. He presented a position against its application in the realm of immigration, even seeking to foreclose a

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[12] *Esquivel-Quintana v. Sessions*, 137 S.Ct. 1562 (2017).
[13] *Matter of M-W-*, 25 I&N Dec. 748 (BIA 2012).
[14] *See e.g. Perez-Gonzalez v. Holder*, 667 F.3d 622, 625-26 (5th Cir. 2012) (finding an offense not "rape" where Montana statute proscribed non-generic conduct such as digital penetration).
[15] *See Matter of V-Z-S-,* 22 I&N Dec. 1338 (BIA 2000) (requiring an element of "taking").
[16] *Taylor v. U.S.* 495 U.S. 575, 598-99 (1990).
[17] *Matter of Bahta,* 21 USC §1381 (BIA 2000).
[18] *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973).
[19] *Matter of Diaz-Lizarraga*, 26 I&N Dec. 847 (BIA 2016); *Matter of Obeya*, 26 I&N Dec. 856 (BIA 2016).
[20] *INS v. St. Cyr*, 553 U.S. 289, 294 (2001); *Santobello v. New York*, 404 U.S. 257 (1971).
[21] *See e.g. Obeya v. Sessions*, 884 F.3d 442, 445 (2d Cir. 2018) (rejecting retroactive application of decisions changing CIMT elements, noting: "Agencies may create new rules through adjudication, but the retroactive application of the resulting rules 'must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.' *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947).").
[22] *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008).
[23] *Id.* at 708–09.

categorical application to the generic definition of an aggravated felony.[24] Seven years later, after U.S. Courts of Appeals had roundly rejected *Silva-Trevino* and its non-elemental approach, Attorney General Holder vacated the decision, in April 2015.[25]

In contrast, Mukasey's "realistic probability" standard continues to call for analysis of *facts* (not elements) about historical prosecutions as to relevant statutes under which foreign nationals have suffered conviction. Unless facts establish historical prosecution of non-CIMT misconduct under such a statute, conviction thereof may well be regarded as a theoretical possibility rendering the statute a categorical CIMT. While the burden persists under the "realistic probability" test, a countervailing factor relates to burdens of proof and production on relief.

The latter issues have arisen on a pending case, *Pereida v. Barr*, before SCOTUS in which the Justices recently convened oral argument to address dissimilarities between application of the traditional "categorical approach" under the INA and under the ACCA. An overarching issue is whether a foreign national must produce evidence from a limited universe of court documents to foreclose an Immigration Court from pretermitting relief. Even the conservative flank expressed at oral argument an interest in unburdening foreign nationals to more closely resemble criminal defendants who suffer neither burdens of proof nor production.

Relying on The Traditional Categorical Approach for Termination Even If, Under* Kawashima / Shular*, A Circumstance-Specific Or "Conduct"-Based Approach Applies to Another Element

In certain very limited exceptions, as described at the outset of this practice pointer, a variation on the traditional categorical approach exists. Application of this variation, known as the circumstance-specific or "conduct"-based approach, is limited to scenarios where a court has held that a statute refers to *conduct*, rather than a type of *crime*. A recent example of this variation arose in early 2020 on a case by the name of *Shular v. United States*.[26] In *Shular*, SCOTUS decided that a Florida conviction could trigger a sentencing enhancement under the ACCA. In affirming, SCOTUS adhered to the Eleventh Circuit's decision that the term "'serious drug offense' '***involving*** manufacturing or distributing a controlled substance'" is not a "generic" offense.[27] SCOTUS held that the term "involving" softened the literalism of the subsequent phrases to mere types of qualifying "*conduct*," rather than any specific generic *offense*. The Court thus negated any need to canvass national norms to determine prevailing norms in drug distribution offenses.[28] Restated, if the type of conduct in a predicate conviction – as a matter of fact - "involved" drug manufacturing/distribution, a defendant could not escape the sentence enhancement by showing any nuanced distinction between their state-legislated statute of conviction and the elements of a generically-defined standard offense.[29]

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[24] *Id*. at 701–02.
[25] *Matter of Silva-Trevino,* 26 I&N Dec. 550 (AG 2015).
[26] 140 S.Ct. 779 (2020).
[27] *See generally Shular*, approving *United States v. Smith*, 775 F.3d 1262, 1267 (11th Cir. 2014)
[28] *See Shular*, at 786 ("Using 'involving' rather than 'is' does not clarify that the terms are names of offenses; quite the opposite.").
[29] The issue in *Shular* was Florida's unique burden shifting scheme, in which defendants are presumed culpable *mens rea* regarding the illicitness of the substance involved in the offense. Shular had hoped that if the federal

The *Shular* court illustrated its conclusion by relying upon an immigration case, *Kawashima v. Holder*,[30] which explained that the immigration aggravated felony of an offense "***involving*** fraud or deceit,"[31]—is also *not* a test involving a comparison with a generic crime, but a flexible determination of whether the underlying offense generally meets the described type of conduct.[32] Why is this? Because of the statutory term "involving."

On one hand, Mr. Shular suffered the enhancement subjecting him to an extra decade in jail because the ACCA used the word "involving;" similarly disturbing is what Mrs. and Mr. Kawashima suffered in being found deportable as aggravated felons for the same. On the other hand, and quite fortunately, this impact from the term "involving" is a proverbial "exception that proves the rule." The term "involving" does not elsewhere appear in an immigration statute.

Loss of More Than $10,000 Under INA §101(A)(43)(M) May Be Subject to a Circumstance-Specific or Conduct-Based Approach, So Motions to Terminate Should First Present Categorical Approach on Separate Elements of Materiality and Misrepresentation

Kawashima describes the aggravated felony of deceit under INA §101(a)(43)(M)(ii). Distinguishing deceit in INA §101(a)(43)(M)(i) from the aggravated felony of fraud in INA §101(a)(43)(M)(i) is essential. This distinction should lead to scrutiny of fraud as to elements of materiality and misrepresentation on a traditional categorical approach. Practitioners should argue that cited cases in accompanying materials are authoritative.[33]

MOVING TO TERMINATE AND DISMISS ALLEGATION UNDER INA §101(A)(43)(M)(I)

Introduction to the Elements of an Allegation

A charge under 8 USC §1101(a)(43)(M)(i) has two components. Failure to produce proof as to either one dooms the allegation.

First, it involves fraud or deceit; breaking down fraud into materiality and misrepresentation is essential. Second, loss to the victim or victim must exceed $10,000.

ACCA standard was for a "generic" crime, he could distinguish his offense for its lack of a full *mens rea* element and escape a sentence enhancement.

[30] 565 U.S. 478 (2012).

[31] INA §101(a)(43)(M).

[32] *See Shular*, at 786.

[33] While 8 CFR §3.1(g) refers to published BIA cases as precedential decisions, unpublished BIA cases have precedential value. (*Davila Bardales v. INS*, 27 F.3d 1, 5-6 (1st Cir. 1994) ("Put bluntly, we see no earthly reason why the mere fact of non-publication should permit an agency to take a view of the law in one case that is flatly contrary to the view it set out in earlier (yet contemporary) cases without explaining why it is doing so.").)

In determining whether an offense involves fraud or deceit, the traditional categorical approach applies.[34] As to loss, the circumstance-specific or conduct-based approach applies.[35]

The Categorical Approach and Fraud Or Deceit

Applicability of the circumstance-specific or conduct-based approach to loss should not detract from application of the non-fact-based traditional categorical approach to the elements of fraud or deceit.[36] In other words, a statute that allows for conviction of conduct that may constitute fraud or deceit, however defined, may nevertheless fail to be a categorical match for (M)(i) if the statue reaches conduct that does not fall within either of those components.[37] Moreover, in applying the categorical approach, it is important to determine the necessary elements for conviction as opposed to the means by which the offense can be committed since this analysis may or may not bring the offense within (M)(i) by permitting application of the modified categorical approach if the statute of conviction is determined to be divisible.[38]

Defining Fraud or Deceit

While SCOTUS in *Kawashima* defined "deceit" under (M)(i), there has been no such definition of fraud. Nevertheless certain basic principles can be applied in seeking termination. First, resist the likely effort by the U.S. Department of Homeland Security (DHS) to urge that falsity alone satisfies (M)(i) because *Kawashima* provides strong arguments to the contrary. In sustaining removability under the deceit prong of M(i), *Kawashima* took care to set out the necessary elements of the two tax offenses at issue, both of which required materiality: "Mr. Kawashima does not dispute that the *elements* of a violation of §7206(1) include, *inter alia*, that the document in question was false *as to a material matter*, that the defendant did not believe the document to be true and correct *as to every material matter*, and that he acted wilfully with the specific intent to violate the law."[39] Likewise with respect to Mrs. Kawashima, the Supreme Court emphasized that she "does not dispute that the elements of an offense of a violation of §7206(2) include *inter alia* that the document was false *as to a material matter* and that the defendant acted willfully."[40]

Given these elements, the Supreme Court concluded as to Mr. Kawashima that "his conviction under §7206(1) establishes that he knowingly and willfully submitted a tax return that was false as to a *material* matter. He therefore committed a felony that involved 'deceit."[41] Likewise with Mrs. Kawashima, the Supreme Court held that her "conviction establishes that, by knowingly

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[34] See *Kawashima v. Holder*, 565 U.S. 478, 483 (2012) ("To determine whether the Kawashimas' offenses "involv[e] fraud or deceit" within the meaning of Clause (i), we employ a categorical approach by looking to the statute defining the crime of conviction, rather than to the specific facts underlying the crime").

[35] See *Nijhawan v. Holder*, 557 U.S. 29 (2009).

[36] See, *e.g.*, *Wang v. Attorney General*, 898 F.3d 341 (3d Cir. 2018).

[37] See, *e.g.*, *Matter of Ahn*, A038-665-355 (BIA Oct. 16, 2018)(while defendant's conduct in violating 26 USC §7212 may have involved fraud or deceit, there was no categorical match because conduct not amounting to fraud or deceit, such as bribery, would also sustain a conviction under the criminal statute).

[38] See *Mathis v. U.S.*, 136 S.Ct. 2243 (2016), which distinguishes between elements for conviction and means.

[39] *Kawashima v. Holder*, *supra*, 565 U.S at 482–86 (emphasis added).

[40] *Id*. (emphasis added.); *Nijhawan v. Holder*, *supra*, 565 U.S. at 482–86.

[41] *Kawashima v. Holder*, *supra*, 565 U.S. at 482–86. (emphasis added).

and willfully assisting her husband's filing of a *materially* false tax return, [she] also committed a felony that involved 'deceit.'"[42]

Such all-inclusive analysis of the elements for conviction and express reliance on materiality would have been unnecessary if *Kawashima* did not require materiality and relied instead upon the false statement alone.[43] Furthermore, motions to terminate and dismiss should resist any attempt by DHS to argue that materiality is a necessary element for conviction under the state-legislated criminal statute of conviction unless jury instructions set forth materiality as an element under the statute or as an element deriving from terms under such state's common law.[44] Indeed, *Wang* noted that materiality should not be imputed absent a common law term due to the Government concession in *Maslenjak v. United States*, 137 S.Ct. 1918, 1920–21.[45]

Similar arguments can be made against invocation of the fraud prong. At the outset of review, practitioners should look at the intent requirement for the state-legislated criminal statute of conviction. If the state does not require jury unanimity on intent to defraud as an element for conviction, then the conviction falls outside the fraud prong.[46] Further support for this line of cases can be drawn from most federal fraud statutes requiring at least misrepresentation and materiality, such that the absence of these elements in a state-legislated statute can be the basis for a motion to terminate.[47]

Further support derives from how the Board had historically defined fraud.[48] Because all five of these elements are rarely required for conviction under a federal criminal statute, moving for termination and dismissal for failure of a state-legislated statute to meet all five for satisfaction of the fraud prong would probably be an uphill climb.

Two older SCOTUS decisions are actually akin to *Kawashima* in construing the term "involving fraud." In both *Bridges v. U.S.*, 346 U.S. 209, 220 (1953) and *U.S. v. Scharton*, 285 U.S. 518 (1932), the Supreme Court construed the meaning of "involving fraud;" that precise term appeared in relevant statutes of limitation. In *Bridges*, the defendant had been charged with an offense whose legal elements were (1) knowingly making a false statement and (2) that is material in a naturalization application.[49] If the offense was one involving fraud, then the

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[42] *Id*.

[43] See also *Matter of Wang*, A088152814 (BIA 2019) (unpublished) (on remand from *Wang v. Attorney General*, 898 F.3d 341 (3d Cir. 2018), in which the panel held a false statement alone to meet neither the deceit prong nor the fraud prong of (M)(i).

[44] See, *e.g*., *US v. Wells*, 519 U.S. 482 (1997) (rejecting implied materiality).

[45] *Wang v. Attorney General*, *supra*, 898 F.3d at 348 n.13.

[46] See, *e.g*., *Bobb v. Attorney General*, 458 F.3d 213 (3d Cir. 2006) (where intent to defraud is necessary element conviction falls within the fraud prong); *Valansi v. Ashcroft*, 278 F.3d 203 (3d Cir. 2002) (intent to injure takes statute outside fraud prong).

[47] *Neder v. United States*, 527 U.S. 1, 23 (1999); See also *US v. Alvarez*, 567 U.S. 709, 734 (2012) (Breyer, J., concurring) ("[f]raud statutes. . .typically require proof of misrepresentation that is material, upon which the victim relied, and which caused actual injury.").

[48] *Matter of GG*, 7 I&N Dec. 161 (BIA 1955) (fraud requires (i) false representation, (ii) of a material fact, (iii) made with knowledge of its falsity and with intent to deceive the other party, who (iv) believes the representation, and who (v) who acts to his detriment in reliance upon the representation); See, e.g., *Taniguchi v. Kan Pacific Saipan, Ltd.*, 566 U.S. 560, 571 (2012)(same words in a statute should be given the same meaning).

[49] *Bridges v. US*, *supra*, 346 U.S. at 220.

prosecution of the defendant in *Bridges* would have been timely under the Wartime Suspension of Limitations for offenses involving fraud. Yet the Supreme Court expressly held that this was not an offense involving fraud concluding: "In that offense as in the comparable offense of perjury, fraud is not an essential ingredient. The offense is complete without proof of fraud, although fraud often accompanies it."[50] Likewise in *U.S. v. Scharton*, 285 U.S. 518 (1932), as cited with approval in *Kawashima*, a similar limitations statute for offenses involving fraud was held inapplicable to a prosecution for tax evasion, where intent to defraud was not a necessary element of the offense. *Bridges* and *Scharton* figured in a Congressional calculus enacting INA §101(a)(43)(M).

If the Preceding Strategy Fails, Then Practitioners Should Move to Terminate and Dismiss Based on Loss to The Victim and Should Ask from Bifurcation from Any Government Motion to Pretermit as Well as Bifurcation from Any Individual Hearing or Merits Hearing

Under *Nijhawan*, loss is determined by the circumstance-specific / conduct-based approach. This approach is not limited to the conviction record. Indeed in *Matter of Babaiskov*, 24 I&N Dec. 306, 321 (BIA 2007), the Board has gone so far as to hold that the Immigration Court may consider any otherwise-admissible evidence as subject to admission on the issue of loss. A defendant of foreign nationality will have two opportunities to contest loss, as follow: first, at sentencing before the state criminal court; and subsequently in removal proceedings where DHS has the burden to establish loss by clear and convincing evidence. Furthermore, the loss must be tethered to the actual count of conviction.[51]

This proposition means that the best case for termination on loss will be in those instances where the client has been convicted of a single substantive offense with a loss not more than $10,000 as to that specific count, as in *Alaka* itself. Likewise termination might be possible under the circumstances of the case if the client never actually had control of the funds allegedly obtained by fraud.[52] Similarly, termination might be possible if what the defendant received was considered gain and not loss.[53] Likewise, loss can be challenged when based upon a restitution order that encompasses not only loss from fraud crimes but also from crimes not involving fraud or deceit, without determining the amount attributable to the fraud offenses.[54]

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[50] *Bridges v. U.S.*, *supra*, 346 U.S. at 202.

[51] See *Nijhawan*, 557 U.S. at 442, citing with approval *Alaka v. Attorney General*, 456 F.3d 88,107–08 (3d Cir. 2006), overruled in part on other grounds, *Bastardo-Vale v. Attorney General*, 934 F.3d 255 (3d Cir. 2019) (loss amount must be tethered to offense of conviction; amount cannot be based on counts on which the defendant gained on acquittal or on dismissed counts or on *general conduct*).

[52] *Singh v, Attorney General*, 677 F.3d 503, 512 (3d Cir. 2012) (Respondent had concealed funds from his bankruptcy filing but those funds had been entrusted, unbeknownst to the Respondent, to a person cooperating with the government).

[53] See, *e.g.*, *Matter of Koval*, A088414342 (York Immigration Court, Feb. 21, 2012) (money defendant received from insider trading does not equate to loss under (M)(i)).) (See, *e.g.*, *Matter of Koval*, A088414342 (York Immigration Court, Feb. 21, 2012) (money defendant received from insider trading does not equate to loss under (M)(i)).

[54] See, *e.g.*, *Rampersaud v. Barr*, 972 F.3d 55 (2d Cir. Aug. 19, 2020).

At the same time, arguments that there was no loss because a lender forgave the amount obtained by fraud prior to the defendant's prosecution have been rejected.[55] Likewise, arguments that the defendant's conduct did not cause the loss have suffered rejection. An example is *Wang* itself, in which the Petitioner argued that his false entries about commodity trades did not cause a loss to his commodity trading employer since the loss occurred when the positions were liquidated.

MOVING TO TERMINATE AND DISMISS ALLEGATION UNDER INA §101(A)(43)(T)

The aggravated felony definition includes "an offense relating to a failure to appear before a court pursuant to a court order to answer to or dispose of a charge of a felony for which a sentence of 2 years' imprisonment or more may be imposed." The categorical approach applies in determining whether the state-legislated statute contains an element of "failure to appear," and whether another element of "before a court" is exclusive of other venues.[56] A state's bail jumping statute allowing for conviction based on failure to appear at places other than "before a court" is a firm basis on which to move for termination and dismissal.[57]

Practitioners should move to terminate and dismiss exclusive to the elements of "failure to appear" and "before a court" under a traditional categorical approach in furtherance of foreclosing scrutiny of other elements on a circumstance-specific / conduct-based approach. In particular, the element of "pursuant to a court order" renders a fishing expedition particularly likely on a circumstance-specific / conduct-based approach.[58]

MOVING TO TERMINATE AND DISMISS ALLEGATION UNDER INA §237(A)(2)(E)(I).

Practitioners should move to terminate and dismiss on grounds exclusive of the "domestic nature" of a relationship, to which a circumstance-specific / conduct-based approach applies for purposes of the deportability ground at INA §237(a)(2)(E)(i).[59] This strategy is the only viable tactic even where the state has separate statutes that proscribe simple assault, and domestic assault, distinctly.

Focusing on the categorical arguments that show why the state statute does not constitute a crime of violence is key on a motion to terminate and dismiss. Practitioners should fight the admission of police reports and other evidence that falls outside the record of conviction (ROC) as well as remind the IJ why police reports and other evidence outside the ROC are unreliable. Preserving arguments for appeal is also essential to foreclose the BIA from determining on a weak ROC that findings as to the domestic nature of the relationship could reasonably be drawn.

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[55] *Giudice v. Attorney General*, 811 F.App'x 133(3d Cir. April 29, 2020) (loss was deemed to have occurred when the defendant first obtained the loan proceeds).
[56] *Matter of Garza-Olivares*, 26 I&N. Dec. 736, 739 (BIA 2016).
[57] See, *e.g.*, *U.S. v. Ramirez-Cortinas*, 360 F.Supp.3d 559, 570 W.D. Tex. 2019) rev'd on other grounds, 945 F.3d 286 (5th Cir. 2019).
[58] Compare *Barnaby v. Reno*, 142 F.Supp.2d 277, 280-81 (D. Conn. 2001) (an obligation to appear formed by a clerk's scheduling or a law enforcement officer's summons), with *Morales v. Sessions*, 4th Cir. 2018 (unpublished) (aggregating various court orders and forms to satisfy "pursuant to a court order" element).
[59] *Matter of H. Estrada*, 26 I&N Dec. 749 (BIA 2016).

Matter of H. Estrada may prompt better-informed defense practitioners to seek preemptive gains during the pendency of charges on domestic violence. Naming the victim as a distinct party with whom the Respondent does not have a domestic relationship is among few steps for improving the odds under the circumstance-specific / conduct- based approach.

Matter of H. Estrada may also lead to other approaches in the criminal defense arena with respect to domestic violence. For example, pleading guilty or no contest to an alternate charge and refusing to stipulate to the police report as the factual basis are essential steps.

MOVING TO TERMINATE AND DISMISS ALLEGATION UNDER INA §237(A)(2)(E)(II).

Moving to terminate and dismiss on an allegation of the deportability ground of removal at INA 237(a)(2)(E)(ii) requires a different tact than the other grounds that this practice pointer has addressed. A motion for termination and dismissal on such an allegation requires practitioners to attack evidence as being unreliable and insufficiently probative.

The practitioner should take heart in this fight based on an unpublished opinion in which the BIA upheld termination where DHS provided the IJ with only a criminal judgment but neither provided the IJ with the protection order that was violated nor provided the IJ with the criminal information or complaint; the BIA was without bases to find "what the 'State court has determined about the alien's violation' of a protection order.[60] The motion to terminate and dismiss also should preserve for appeal grounds for blunting the impact of *Obshatko*.[61]

Only "probative and reliable evidence" may be examined to establish a foreign national has at "any time after admission [been] enjoined under a protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued."[62]

No conviction is necessary for removal on the deportability ground at INA §237(a)(2)(E)(ii).[63] An entry of a civil finding of contempt qualifies under INA 237(a)(2)(E)(ii) as a removable offense.[64]

CONCLUSION

Motions to terminate and dismiss should insist on scrutiny of elements subject to the traditional categorical approach. Such motions should be argued as a bar to a circumstance-specific /

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[60] *In re Miguel Alberto Arizaga-Vallejo*, A078 230 633 (BIA Sept. 30, 2020, unpublished).

[61] See, *e.g.*, *Leon v. Attorney General* (unpublished 3d Cir. 2019) (noting in footnote 2 that the record was not preserved on the issue of analyzing the BIA's approach for "reasonable[ness]" under *Chevron*).

[62] *Matter of Obshatko*, 27 I. & N. Dec. 173, 176-177 (BIA 2017) (authorizing a departure from both the traditional categorical elements-based approach and the circumstance-specific / conduct-based approach.

[63] *Matter of Obshatko*, *supra*, 27 I&N Dec. at 177.

[64] See *Diaz-Quirazco v. Barr*, 931 F.3d 830 (9th Cir. 2019); *see also Garcia-Hernandez v. Boente*, 847 F.3d 869 (7th Cir. 2017) (reviewing available evidence and findings to conclude that the violation of the "stay away" order constituted a deportable offense).

conduct-based approach as to any other element. By doing so, practitioners foreclose any errors that might arise due to erroneous application of the latter on elements subject to the traditional categorical approach.