

Being Careful What You Wish For: Divisible Statutes - Identifying a Non-Deportable Solution to a Non-Citizen's Criminal Problem

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I. INTRODUCTION

When a non-citizen is arrested, it may be possible for her to underestimate the full consequences of a criminal charge. The primary concern of the non-citizen is when she may be released from custody in order to resume family obligations or return to work before compromising her standing with an employer. With an immediate need for release from custody, a quick plea to an offense may be an attractive option. The non-citizen may not be aware of the immigration consequences of taking an imprudent plea, the ramifications of which could far outweigh the inconvenience of additional time in jail following an arrest.

Many criminal convictions lead to the institution of removal proceedings against the non-citizen with the end result being that she loses her right to remain in the United States. Depending on the offense and the duration of the non-citizen's residence in the United States, a waiver may be available to "pardon" the deportable offense and restore status in the United States. However, in many cases, the nature of the criminal offense renders the non-citizen deportable as an "aggravated felon," from which little relief is available. Alternatively, the non-citizen may not have lived in the United States long enough to qualify for a waiver. Legislation has increased the number of crimes classified as aggravated felonies, and investment in national databases has led to greater apprehension of non-citizens with criminal convictions.¹ Consequently, the number of non-citizens ordered deported

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1. Immigration and Nationality Act § 236(d), 8 U.S.C. § 1226(d) (2000). INA § 236(d) (2006). Identification of criminal aliens:

- (1) The Attorney General shall devise and implement a system—
 - (A) to make available, daily (on a 24-hour basis), to Federal, State, and local authorities the investigative resources of the Service to determine whether individuals arrested by such authorities for aggravated felonies are aliens;

...

from the United States based on convictions for aggravated felonies has also risen, from 10,303 in 1992 to at least 23,065 in 2006.²

This article addresses recent case examples involving convictions that, on their face, seemed to provide an adequate basis of deportability. Convictions under the criminal statutes addressed herein generally appear to encompass deportable offenses, but have been held to be insufficient to assure deportability. Therefore, these examples can serve as templates for analysis of other statutes.

II. PRELIMINARY ISSUE: BASIS OF REMOVAL AND CONTEMPORARY FORMS OF RELIEF

The so-called “divisibility” analysis is significant since it can be determinative of whether a ground of deportability or inadmissibility may be sustained. Thus, successfully arguing divisibility may lead to terminating removal proceedings against a non-citizen. Since certain categories of crimes are waivable, it is possible to argue that a non-citizen is not barred from forms of relief such as a waiver under former section 212(c) of the Immigration and Nationality Act (INA), Cancellation of Removal, or a waiver of inadmissibility under § 212(h) of the INA.³ This is significant both as a legal strategy and as a therapeutic or holistic methodology, since the non-citizen must establish *prima facie* eligibility for a waiver before she is permitted to present any testimony or evidence of her equities in the United States. Her alternative is deportation without ever having the opportunity to present the human elements of her case.

In its contemporary and most common form, former § 212(c) of the INA is available for aliens who have been legal permanent residents

(C) which uses computer resources to maintain a current record of aliens who have been convicted of an aggravated felony . . .

(2) The record under paragraph (1)(C) shall be made available—

(A) to inspectors at ports of entry and to border patrol agents at sector headquarters for purposes of immediate identification of any alien who was previously ordered removed and is seeking to reenter the United States, and

. . . .

(3) Upon the request of the governor or chief executive officer of any State, the Service shall provide assistance to State courts in the identification of aliens unlawfully present in the United States pending criminal prosecution.

2. TRAC Immigration Report, *New Data on the Processing of Aggravated Felons*, <http://trac.syr.edu/immigration/reports/175> (last visited January 25, 2007).

3. See 8 C.F.R. § 1212.3(f), INA § 212(c) (1996) (repealed 1996); INA § 212(h), 8 U.S.C. § 1182(h) (2000); INA § 240A, 8 U.S.C. § 1229 (2000).

for seven years, and who pled guilty to an offense prior to April 24, 1996.⁴ Section 212(c) relief is barred if the plea was for an aggravated felony and the alien served more than five years in jail for the crime.⁵ Relief is also barred if the alien is charged with a ground of deportability under § 237 of the INA, which does not have a corresponding ground of inadmissibility under § 212.⁶ Also, a subsequent conviction may make the alien ineligible for this waiver.⁷ If an alien is granted § 212(c) relief, she maintains her lawful permanent resident status.

Cancellation of Removal for permanent residents under § 240A(a) of the INA requires that the alien have resided in the United States for seven years, including at least five years as a permanent resident, but aggravated felonies serve as a bar to this form of relief.⁸ Cancellation of Removal for non-permanent residents under § 240A(b) requires ten years presence in the United States, “good moral character,” and a showing that denial and removal would result in “exceptional and extremely unusual hardship” to a citizen or resident spouse, child, or parent.⁹ Criminal grounds of deportability provide a statutory bar to the showing of “good moral character,” including convictions for aggravated felonies, controlled substances offenses, firearms offenses and crimes of domestic violence.¹⁰

Two forms of waivers of inadmissibility exist under § 212(h) of the INA. As a defense from removal, non-residents with an immigrant visa available to them may apply for residency and waive criminal grounds of inadmissibility including most crimes involving moral turpitude, convictions of multiple crimes, prostitution, and a single conviction of possession of less than thirty grams of marijuana.¹¹ In its second form, permanent residents of seven years may re-acquire their residency and waive the same offenses, unless their conviction could be categorized as an aggravated felony.¹² In both forms of § 212(h) the applicant must also meet a threshold requirement of showing that

4. See 8 C.F.R. § 1212.3(f) (2007); INA § 212(c) (1996) (repealed 1996).

5. 8 C.F.R. § 1212.3(f), 69 Fed. Reg. 57826-35 (Sept. 28, 2004); see generally *INS v. St. Cyr*, 533 U.S. 289 (2001).

6. See INA § 237, 8 U.S.C. § 1227 (2000); see also INA § 212, 8 U.S.C. § 1182.

7. See 8 C.F.R. § 1212.3(f), INA § 212(c) (repealed 1996).

8. INA § 240A(a), 8 U.S.C. § 1229b(a) (2000).

9. INA § 240A(b), 8 U.S.C. § 1229b(b) (2000).

10. INA § 240A(b)(1)(C), 8 U.S.C. § 1229b(b)(1)(C) (2000).

11. See INA § 212(h), 8 U.S.C. § 1182.

12. Equal protection arguments to the latter have failed, despite permanent residents having more restrictions than non-residents. See *Moore v. Ashcroft*, 251 F.3d 919 (11th Cir. 2001).

denial and deportation would cause extreme hardship to a spouse, child, or parent.¹³ In each of the forms of relief, once the *prima facie* case and any required standard of hardship is met, the alien must also show that she warrants a favorable exercise of discretion.¹⁴

In order to provide the framework for an equitable application of discretionary relief, the Board [of Immigration Appeals] has enunciated factors relevant to the issue of whether . . . relief should be granted as a matter of discretion. Among the factors deemed adverse to a respondent's application have been the nature and underlying circumstances of the exclusion ground at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record, and if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country . . .¹⁵

Favorable considerations have been found to include such factors as family ties within the United States, residents of long duration in this country (particularly when the inception of residence occurred while the respondent was of young age), evidence of hardship to the respondent and family if deportation occurs, service in this country's Armed Forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of a genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character (e.g., affidavits from family, friends, and responsible community representatives).¹⁶

As outlined above, the Immigration Court does not consider any discretionary factors or examine a respondent's individual equities without first determining *prima facie* eligibility for a form of relief from removal. Legal argument on eligibility may determine whether the respondent is entitled to apply for relief and a subsequent balancing of her equities in the United States. Discretionary issues may receive *de novo* review by the Board of Immigration Appeals (BIA). The federal courts of appeals defer to the conclusions of the BIA, unless "manifestly contrary to the law and an abuse of discretion."¹⁷

13. See INA § 212(h), 8 U.S.C. § 1182.

14. See INA § 212(h)(2), 8 U.S.C. § 1182.

15. *In re Marin*, 16 I. & N. Dec. 581, 584 (B.I.A. 1978) (citing *In re Carrasco*, Interim Decision 2579 (B.I.A. 1977), *aff'd* on other grounds, *Carrasco-Favela v. INS*, 563 F.2d 1220 (5 Cir.1977); *In re Edwards*, 10 I. & N. Dec. 506 (B.I.A. 1963, 1964); *In re M—*, 3 I. & N. Dec. 804 (B.I.A. 1949); *In re V—*, 1 I. & N. Dec. 293 (B.I.A. 1942); *In re G—*, 1 I. & N. Dec. 8 (B.I.A. 1940; A.G.1940)).

16. *In re Marin*, 16 I. & N. Dec. at 584-85.

17. INA § 242(b)(4)(D), 8 U.S.C. § 1252(b)(4)(D) (2000).

III. BURDEN OF PROOF AND LEGAL STANDARD FOR DIVISIBILITY OF CRIMINAL STATUTES

After the commencement of the removal proceedings only the Immigration Judge may terminate proceedings upon request by either party.¹⁸ A respondent may request termination on grounds such as: (1) the charging document, known as the Notice to Appear, is defective; (2) there is an incongruity between the charge and the allegations; or (3) the Department of Homeland Security has not met its burden of proof.¹⁹ If the respondent is legally admitted to the United States, the Department of Homeland Security (formerly Immigration and Naturalization Service) must prove the alien's deportability by clear, unequivocal, and convincing evidence.²⁰

A respondent arriving at a port of entry is considered an "arriving alien" and bears the burden of proving her admissibility. Even a returning permanent resident is considered an arriving alien if, since her initial admission as a resident, she has been convicted of a crime that would render her inadmissible.²¹ Whether detected at a port of entry or through other contact with law enforcement, the criminal alien is issued the Notice to Appear and given a court date to answer to the charges regarding the grounds of removal (deportability or inadmissibility).²²

A common procedure is that at a preliminary hearing before the immigration court the non-citizen respondent may deny the factual allegations, thus forcing the Department of Homeland Security to acquire and file with the court certified copies of any criminal records necessary to substantiate the factual grounds of removal.²³ Alternatively, the respondent may concede to the factual accuracy of the charges against her, namely that she is a non-citizen who has been convicted of a crime.

Once the factual issues are resolved, the respondent may contest whether the facts support a legal ground for deportability. In this case, the court must rule on whether the respondent's violation of a criminal statute necessarily satisfies a defined category of inadmissibility or deportability as defined in the Immigration and Nationality Act.

18. See *In re G-N-C-*, 22 I. & N. Dec. 281 (B.I.A. 1998).

19. *Woodby v. INS*, 385 U.S. 276 (1966).

20. See 8 C.F.R. § 1240.8(a). See also UNITED STATES DEP'T OF JUSTICE, IMMIGRATION JUDGE BENCHBOOK, vol. 2, at 605 (4th ed).

21. INA § 101(a)(13)(C)(v), 8 U.S.C. § 1101(a)(13)(C)(v) (2000).

22. INA § 239(a)(1), 8 U.S.C. § 1229(a)(1) (2000).

23. INA § 240(c)(3)(B), 8 U.S.C. § 1229a(c)(3)(B) (2000).

The Board of Immigration Appeals has held that where a statute is divisible, e.g., when it describes some conduct that will support finding an immigration violation and some that will not, a look beyond the statute to the record of conviction “and to other documents admissible as evidence in proving a criminal conviction” is required in order to determine whether the offense in which the respondent was convicted was an aggravated felony.²⁴ The record of conviction is comprised of a narrow, specific set of documents and can include the charging document, plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented.²⁵

In analyzing grounds of removal, courts apply the “categorical” and “modified categorical” approaches.²⁶ The categorical approach looks only to the structure of the statute of conviction and establishes whether a respondent convicted under that statute must be subject to an immigration consequence.²⁷ If the statute of conviction criminalizes conduct that both is and is not considered an enumerated offense, the court employs a modified categorical approach by conducting “a limited examination of documents in the record of conviction to determine if there is sufficient evidence to conclude that a defendant was convicted of the elements of the generically defined crime even though his or her statute of conviction was facially overinclusive.”²⁸

Immigration Courts are constrained by the principle of “not looking behind a record of conviction.”²⁹ By limiting examination to the record of conviction, the courts prevent the parties from presenting any and all possible evidence bearing on the conduct leading to the conviction.³⁰ This preserves judicial economy and assists in a streamlined adjudication consistent with the settled proposition that an Immigration Judge cannot adjudicate guilt or innocence.³¹ Thus a respondent in Immigration Court cannot contest that he was not actually guilty of a crime to which he pled guilty. Similarly, the respondent receives the benefit of any plea bargain in which he pleads to a non-

24. *In re Sweetser*, 22 I. & N. Dec. 709, 714 (B.I.A. 1999).

25. *See* *Shepard v. United States*, 544 U.S. 13, 26 (2005); *see also* *Notash v. Gonzales*, 427 F.3d 693, 697 (9th Cir. 2005).

26. *See* *United States v. Pallares-Galan*, 359 F.3d 1088, 1099 (9th Cir. 2004); *see also* *Chang v. INS*, 307 F.3d 1185, 1189-92 (9th Cir. 2002).

27. *Chang*, 307 F.3d at 1189-92.

28. *Id.* at 1189.

29. *In re Pedro Aricio Pichardo-Sufren*, 21 I. & N. Dec. 330 (B.I.A. 1996); *see* *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038-39 (1984).

30. *See* sources cited *supra* note 29.

31. *See* sources cited *supra* note 29.

deportable offense, regardless of the underlying facts of his conduct.³² The following discussion addresses how a carefully calculated plea agreement may ensure that the criminal resolution minimizes future immigration consequences.

A. *Historical Focus: Pichardo and Sweetser*

The analysis of the legal ground for removal mandates a focus on an alien's conviction rather than his actual conduct. This standard is borne out in *In re Pichardo*, a Board of Immigration Appeals decision from 1996.³³ In *Pichardo*, the respondent had multiple convictions, including a 1993 conviction for possession of cocaine and a 1988 conviction for possession of a weapon in violation of New York Penal Law section 265.02.³⁴ Based on the cocaine conviction, Pichardo was deportable as an aggravated felon, but since his conviction predated April 24, 1996, he was eligible for a waiver under former § 212(c) of the INA.³⁵

The weapons violation also led the Immigration and Naturalization Service (INS) to allege that Pichardo was also deportable under former § 241(a)(2)(C) of the INA as an alien convicted of a firearms offense.³⁶ This allegation was more problematic for him since it was not waivable under former INA § 212(c).³⁷ As discussed above, the INA § 212(c) waiver is only available if the ground of deportability has

32. See sources cited *supra* note 29.

33. *In re Pichardo*, 21 I. & N. Dec. 330 (B.I.A. 1996).

34. *Id.* at 331-32.

35. *But see* *Lopez v. Gonzalez*, No. 05-547, (S. Ct. Dec. 5, 2006) (finding that possession without intent to distribute may not satisfy the aggravated felony ground found at INA §101(a)(43)(B), thus rendering many drug convictions non-aggravated felonies and making respondents, even with post-April 24, 1996, convictions eligible for some forms of relief from removal, including Cancellation of Removal). This is a marked charge from prior controlling precedent in most circuits which held that the only waivable controlled substance violation was for one conviction of simple possession of marijuana.

36. Recodified at INA § 237(a)(2)(C) (2006).

37. A strategy for addressing this phenomenon was approved in *In re Gabryelsky*, 20 I. & N. 750 (B.I.A. 1993), and followed in *In re Azurin*, 23 I. & N. Dec. 695 (B.I.A. 2005). Eligible respondents can "stack waivers" by simultaneously applying for § 212(c) and adjustment of status, possibly also with a § 212(h) waiver in order to waive a crime not waivable under § 212(c). Perhaps paradoxically, since the firearms offense was not a ground of inadmissibility (and therefore not waivable under § 212(c)), it was not a direct bar to adjustment of status, although perhaps it was a "crime involving moral turpitude" requiring a § 212(h) waiver and a showing of the required "extreme hardship" to a qualifying relative.

a corresponding ground of inadmissibility.³⁸ The “certain firearms offenses” language of former INA § 241(a)(2)(C) is unique and has no similar counterpart in the inadmissibility grounds at INA § 212.³⁹ By comparison, controlled substances offenses have parallel sections in both pertinent sections of the INA.⁴⁰ Thus, Pichardo could only apply for INA § 212(c) relief if he could successfully argue that his crime was not a firearms offense.

Pichardo conceded the existence of the convictions but denied that his conviction was for a firearms offense for immigration purposes.⁴¹ He therefore contested that he was removable under INA § 241(a)(2)(C).⁴² During the proceedings before the Immigration Judge, Pichardo testified that the offense he committed involved the use of a firearm, but denied that his *conviction* was for a firearms offense.⁴³ The INS introduced a Certificate of Disposition from the Supreme Court, County of Bronx, New York, documenting that Pichardo was convicted of criminal possession of a weapon in the third degree.⁴⁴ The Immigration Judge used this Certificate of Disposition and Pichardo’s extrinsic testimonial evidence to find him deportable.⁴⁵

By its very terms, former INA § 241(a)(2)(C) renders deportable only aliens who have been convicted of firearms violations. Thus an alien who may have *committed* a firearms violation but was never *convicted* of such a violation does not fall within the purview of former INA § 241(a)(2)(C).⁴⁶

Pichardo’s record of conviction was limited to a single Certificate of Disposition, although other documents would have been admissible had they been submitted, including any charging document, plea agreement, transcript of plea colloquy, or any explicit factual finding by the trial judge.⁴⁷ The Certificate referenced the New York statute, but “nowhere in the record file [was] there any evidence of the particular subdivision of section 265.02 of the New York Penal Law which the respondent was convicted of violating.”⁴⁸

38. See INA § 212(c), 8 U.S.C. § 1182.

39. See discussion *supra* note 37; INA § 212, 8 U.S.C. § 1182.

40. See INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182; INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227.

41. *Pichardo*, 21 I. & N. Dec. 330 at 334.

42. *Id.* at 330, 334.

43. *Id.* at 331.

44. *Id.*

45. *Id.*

46. *Id.* at 333.

47. *Id.* at 334.

48. *Id.* at 333.

Pichardo prevailed in arguing that section 265.02 is a “divisible” statute encompassing both crimes that do and crimes that *do not* involve firearms.⁴⁹ It contains five subdivisions, the first of which could, but may not, necessarily, involve a firearms-related possession violation.⁵⁰ For example, subsection 265.02(1) criminalizes the possession of any weapon referenced in section 265.01, if the possessor has a prior criminal record. Section 265.01 contains an extensive list of weapons and weapons-related offenses, comprised primarily of non-firearms offenses.⁵¹ Under the statute, Pichardo *could* possibly have

49. *Id.* at 333, 334.

50. At the time the respondent was convicted, § 265.02 provided as follows:

A person is guilty of criminal possession of a weapon in the third degree when:

- (1) He commits the crime of criminal possession of a weapon in the fourth degree as defined in subdivision one, two, three or five of section 265.01, and has been previously convicted of any crime; or
- (2) He possesses any explosive or incendiary bomb, bombshell, firearm silencer, machine-gun or any other firearm or weapon simulating a machine-gun and which is adaptable for such use; or
- (3) He knowingly has in his possession a machine-gun, firearm, rifle or shotgun which has been defaced for the purpose of concealment or prevention of the detection of a crime or misrepresenting the identity of such machine-gun, firearm, rifle or shotgun; or
- (4) He possesses any loaded firearm. Such possession shall not, except as provided in subdivision one, constitute a violation of this section if such possession takes place in such person’s home or place of business;
- (5)(i) He possesses twenty or more firearms; or (ii) he possesses a firearm and has been previously convicted of a felony or a class A misdemeanor defined in this chapter within the five years immediately preceding the commission of the offense and such possession did not take place in the person’s home or place of business.

N.Y. PENAL LAW § 265.02 (McKinney 1988).

51. Section 265.01 provides in pertinent part that a person is guilty of criminal possession of a weapon in the fourth degree when :

- (1) He possesses any firearm, electronic dart gun, gravity knife, switchblade knife, pilum ballistic knife, cane sword, billy, blackjack, bludgeon, metal knuckles, chuka stick, sand bag, sandclub, wrist-brace type slingshot or slungshot, shirken or “Kung Fu star”; or
- (2) He possesses any dagger, dangerous knife, dirk, razor, stiletto, imitation pistol, or any other dangerous or deadly instrument or weapon with intent to use the same unlawfully against another; or
- (3) He knowingly has in his possession a rifle, shotgun or firearm in or upon a building or grounds, used for educational purposes, of any school, college or university, except the forestry lands, wherever located, owned and maintained by the State University of New York college of environmental science and forestry, . . . without the written authorization of such educational institution; or

been convicted of possession of the following non-firearms: “electronic dart gun, gravity knife, switchblade knife, pilum ballistic knife, cane sword, billy, blackjack, bludgeon, metal knuckles, chuka stick, sand bag, sandclub, wrist-brace type slingshot or slungshot, shirken, ‘Kung Fu star’ . . . dagger, dangerous knife, dirk, razor, stiletto, imitation pistol, or any other dangerous or deadly instrument or weapon.”⁵² A non-citizen possessing *any* dangerous weapon would satisfy the statute.

As such, the record did not compel a finding that Pichardo was convicted of a section involving firearms. Since the charge of deportability was contested by him, and because the court could not look beyond the record of conviction or use the extrinsic testimony of Pichardo to sustain the charge, the INS failed its burden of proving deportability for a firearms violation. Therefore, Pichardo was not barred from applying for a waiver under former § 212(c).

Divisibility analysis was further developed in the 1999 case *In re Sweetser* addressing the divisibility of Colorado Revised Statutes sections 18-6-401(1) and (7)(a)(II), in the posture of a motion to terminate removal proceedings.⁵³ Sweetser was convicted of criminally negligent child abuse in relation to the accidental drowning of his infant stepson in a few inches of bathwater.⁵⁴ Although the coroner ruled the death accidental, Sweetser was charged, convicted and sentenced to four years imprisonment.⁵⁵ The Immigration and Naturalization Service (INS) initially sought the deportation of Sweetser, a British citizen and permanent U.S. resident of twenty-nine years, by alleging that he had committed two crimes involving moral turpitude.⁵⁶ The immigration judge found that the offense lacked the intent requirement for a crime involving moral turpitude, but instead found Sweetser to be deportable as an aggravated felon for having been convicted of a crime of violence (as defined in section 16 of title 18, United States Code) for which the term of imprisonment was at least one year.⁵⁷

. . .
(5) He possesses any dangerous or deadly weapon and is not a citizen of the United States[.]

N.Y. PENAL LAW § 265.01 (McKinney 1998).

52. *Id.*

53. *In re Sweetser*, 22 I. & N. Dec. 709 (B.I.A. 1999).

54. *Id.* at 710.

55. *Id.*

56. *Id.* at 710-11. Sweetser had a prior conviction for shoplifting.

57. INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F); *see also Sweetser*, 22 I. & N. at 710-11.

The United States Code defines “crime of violence” as

- (a) an offense that has as an element the use, attempted use, or threatened use of force against the person or property of another, or
- (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.⁵⁸

INA § 101(a)(43)(F) requires that a “crime of violence” be a felony, since it must be punished by at least one year of imprisonment.⁵⁹ 18 U.S.C. § 16(a) requires physical force to be an element of the crime. Under 18 U.S.C. § 16(b), the Board of Immigration Appeals “applies the ‘generic’ or ‘categorical approach’ . . . [requiring] ‘that the nature of the crime . . . is such that its commission would ordinarily present a risk that physical force would be used against the person or property of another irrespective of whether the risk develops or harm actually occurs.’”⁶⁰

Under Colorado Revised Statute sections 18-6-401(1) and (7)(a)(II), a person is guilty of child abuse:

If he causes an injury to a child’s life or health or permits a child to be unreasonably placed in a situation which poses a threat of injury to the child’s life or health. Such an offense is a class 3 felony when “a person acts with criminal negligence and the child abuse results in death to the child.”⁶¹

Thus, a person could be convicted under the Colorado statute for either causing an injury via physical force or by passively creating a dangerous situation. As such, the statute is divisible for immigration purposes since it criminalizes both violent and non-violent behavior, with the non-violent behaviors being non-deportable offenses under INA § 101(a)(43)(F).⁶²

The analysis does not stop with the identification of a divisible statute. The INS had the burden of proving that the full record of conviction supported a finding that Sweetser actually was deportable for a crime that did, in fact, involve violence. Since the Colorado statute encompassed a “wide range of behaviors that may or may not result in immigration consequences under the Act, the categorical approach

58. 18 U.S.C. § 16(a-b) (2006).

59. INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F).

60. *Sweetser*, 22 I. & N. Dec. at 712-13 (quoting *In re Alcontar*, 20 I. & N. Dec. 801, 812 (B.I.A. 1994)).

61. *Id.* at 713 (quoting COLO. REV. STAT. §§ 18-6-401(1), 7(a)(II)).

62. INA § 101(a)(43)(F), 8 U.S.C. § 1101(a)(43)(F).

allows a court to go beyond the mere fact of conviction.”⁶³ The Immigration Court is obligated to resolve whether Sweetser’s conduct falls within the broad state statute by relying only on facts clearly resolved in the criminal conviction documents.

The record in Sweetser’s case established that his conviction was based on his negligent omission of proper care and therefore did not support a finding that violence was an essential element of the offense.⁶⁴ The INS failed its burden of proof, and removal proceedings were terminated.⁶⁵

B. *Current case examples: Jaggernauth (theft); Valansi (fraud/ embezzlement); and Fernandez-Ruiz (domestic violence)*

Restrictions in available relief from removal have motivated respondents to continue to challenge statutes as insufficient causes for deportation. Whereas prior to 1996, a permanent resident charged as an aggravated felon could concede removability and progress to a balancing of their equities under former INA § 212(c), a contemporary respondent is barred from virtually all relief if considered an aggravated felon.⁶⁶

In 2003, Marlene Jaggernauth was issued a final order of removal by the Board of Immigration Appeals.⁶⁷ Jaggernauth, a native and citizen of Trinidad and Tobago, had lived in the United States as a permanent resident since 1977, when she immigrated at the age of twelve.⁶⁸ During twenty-six years of residence, Jaggernauth was involved in two incidences of criminal activity including grand theft in 1997 and grand theft and resisting a merchant in 2001.⁶⁹ For her second theft offense, Jaggernauth received a sentence of one year.⁷⁰ The Department of Homeland Security (DHS) issued a Notice to Appear alleging that she was deportable as an aggravated felon under INA § 237(a)(2)(A)(iii) based on the second theft offense. DHS alleged that the crime satisfied the aggravated felony definition at INA § 101(a)(43)(G) as a theft offense or burglary offense for which the term of imprisonment was at least one year.⁷¹ The DHS further

63. *Sweetser*, 22 I. & N. Dec. at 715.

64. *Id.* at 710-11.

65. *Id.*

66. 8 C.F.R. § 1212.3(f); INA § 212(c) (repealed 1996).

67. *Jaggernauth v. U.S. Atty. Gen.*, 432 F.3d 1346, 1347 (11th Cir. 2005).

68. *Id.*

69. *Id.* at 1348-49.

70. *Id.*

71. *Id.* at 1349.

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alleged Jaggernaut's deportability as an alien convicted of two crimes involving moral turpitude under INA § 237(a)(2)(A)(ii).⁷²

The aggravated felony charge was central in Jaggernaut's case since it rendered her ineligible for Cancellation of Removal or a waiver under INA § 212(h). She was unable to present any of her personal equities and was ordered deported in a brief hearing which required only seven pages of transcript.

Jaggernaut conceded the factual allegations of her convictions in a manner consistent with *pro se* respondents:

Judge to Ms. Jaggernaut:

Q. You were convicted April 24, 1997 for grand theft?

A. Yes, sir.

Q. In Saint Lucie County?

A. Yes, sir.

Q. You were convicted May 29th, 01, in Indian River, for grand theft second degree and resisting a merchant?

A. Yes, sir.

...

Q. And the - Exhibit No. 2 will be the whole conviction record for grand theft showing the probation violation, as well as the - and you were also - you also have a record here, grand theft third degree. In the Department of Homeland Security file, this conviction record, which shows that you were sentenced to (indiscernible) probation for 36 months, right?

A. Correct, sir.

Q. Did you also violate probation on the second one?

A. No, sir. I completed - I got three years probation, it was done in 14 months, sir.

Q. Let me look at the conviction record.

...

Q. All right, ma'am, you have no objection to this. Exhibit no. 3 will be that conviction record, correct?

A. Correct.

Q. You got a one year sentence with suspended sentence, okay.

A. Yes, sir.

Q. . . . So we admitted all we have (indiscernible), okay. I'm going to have to sustain both charges, as you know. On the law, you seem to be very well versed on doing it on your own . . . What I'm going to have to do, ma'am, is I'm going to have to order you removed from the United States.⁷³

72. *Id.*

73. Transcript of Record at 10-11, *In re* Jaggernaut (on file with author).

Jaggernaut's appeal to the Board of Immigration Appeals and the U.S. Court of Appeals for the Eleventh Circuit turned on the issue of the definition of a theft offense under INA § 101(a)(43)(G).⁷⁴ Jaggernaut's case could not have proceeded on appeal had she conceded the "charges" of removability, but in her case the judge, upon concession of the factual charges, sustained the legal charges of deportability himself. The judge assumed that grand theft would constitute a "theft offense" aggravated felony since Jaggernaut was sentenced to one year imprisonment, despite receiving a suspended sentence.⁷⁵

The Eleventh Circuit held Florida Statute section 812.014(1) does not exclusively constitute theft offenses, and that the record of conviction did not prove that Marlene Jaggernaut had necessarily committed a theft offense.⁷⁶ Under Florida Statute section 812.014(1):

[a] person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently: (a) [d]eprive the other person of a right to the property or a benefit from the property [or] (b) appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.⁷⁷

Jaggernaut could therefore have appropriated, or used, the merchandise, rather than intending to temporarily or permanently steal it, and still be convicted under the Florida theft statute.⁷⁸ The distinction is significant because under BIA precedent "theft", for immigration pur-

74. *Jaggernaut*, 432 F.3d at 1352-53.

75. INA § 101(a)(48)(A) (The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—

(i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and

(ii) the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed.

(B) Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law *regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part.* (emphasis added)).

76. *Jaggernaut*, 432 F.3d at 1354-55.

77. *Id.* at 1353-54 (quoting Fla. Stat. § 812.014(1) (2001)).

78. *Id.* Florida courts, have consistently interpreted the section in the disjunctive, to articulate two distinct levels of intent. See *T.L.M. v. State*, 755 So. 2d 749, 751 (Fla. Dist. Ct. App. 2000) (stating that "Section 812.014 requires a finding of specific criminal intent to either (a) 'deprive' the other person of a right to the property or a benefit therefrom or (b) 'appropriate' the property to his own use or to the use of any person not entitled thereto").

poses, requires intent to deprive the owner of the rights and benefits of ownership even if such a deprivation is less than total or permanent, and a “glorified borrowing” is not a theft.⁷⁹

Having identified that the statute is divisible, it was necessary to determine whether Jaggernauth’s record of conviction could clarify which level of intent she possessed when committing her offense. This required analyzing the information, plea judgment and sentence. In Jaggernauth’s case, each document incorporated the entire Florida Statute section 812.014, without clarifying whether she was charged and convicted under subpart (a) or (b).⁸⁰ Thus the record of conviction did not prove that she was convicted under subpart (a), which was the only section that would have necessarily required “the criminal intent to deprive the owner of the rights and privileges of ownership” necessary to be an aggravated felony theft offense.⁸¹ Whether inadvertent or purposeful, Jaggernauth had successfully pled to a divisible statute with sufficient vagueness to prevent sustaining a ground of deportability.

By the time Jaggernauth won her argument before the Eleventh Circuit, she had been physically deported.⁸² Nonetheless, her case was remanded to the Board of Immigration Appeals to consider whether she remained deportable under INA § 237(a)(2)(A)(ii). This required a further analysis of whether Fla. Stat. section 812.014(1) was necessarily a crime involving moral turpitude. Additionally, Jaggernauth was deemed eligible to apply for Cancellation of Removal since her aggravated felony conviction, which barred her application, was invalidated.⁸³

Valansi v. Ashcroft addresses a divisible statute situation where the alien clearly entered her plea to an offense in a strategic manner in order to preserve the argument that her conviction was not for an “aggravated felony,” and was consequently not a deportable offense.⁸⁴ Valansi immigrated to the United States in 1974 when she was only one month old and became a permanent resident of the United States in 1990.⁸⁵ Over a period of months in 1997, she embezzled more than

79. See *In re V-Z-S-*, 22 I & N Dec. 1338, 1346 (B.I.A. 2000) (stating that a “glorified borrowing” of property is not a theft offense).

80. *Jaggernauth*, 432 F.3d at 1349.

81. *V-Z-S-*, 22 I. & N. at 1346; INA § 101(a)(43)(G).

82. *Jaggernauth*, 432 F.3d at 1350.

83. At the time of publication, Jaggernauth was scheduled for a master calendar scheduling hearing before the Immigration Court to hear applications for relief.

84. *Valansi v. Ashcroft*, 278 F.3d 203 (3rd Cir. 2002).

85. *Id.* at 205.

\$400,000 from a bank where she was an employee.⁸⁶ She entered a guilty plea in 1998.⁸⁷

Valansi was placed in removal proceedings and was charged as an aggravated felon. Both the immigration court and the Board of Immigration Appeals sustained the aggravated felony charge and deemed Valansi ineligible for relief from removal.⁸⁸ Her guilty plea was after the sunset of INA § 212(c). Like Jaggernauth, she was deemed statutorily ineligible to apply for Cancellation of Removal under INA § 240A(a) based on the aggravated felony charge. Unlike Jaggernauth, Valansi could terminate removal proceedings if she could prevail on the argument that her conviction for embezzlement under 18 U.S.C. § 656 was a non-deportable violation of a divisible statute.⁸⁹

Valansi was charged as deportable under the fraud provision of the aggravated felony definition at INA § 101(a)(43)(M), which makes deportable an alien conviction of an “offense that involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000.”⁹⁰ Valansi was not even arguably deportable under the theft offense definition at INA § 101(a)(43)(G), since an imprisonment term of at least one year was not imposed, as it was in *Jaggernauth*.⁹¹

The Board of Immigration Appeals based its decision on a parsing of the meaning of fraud and relied on the general meaning of embezzlement to support its holding that embezzlement, by its very nature, necessarily did involve fraud.⁹² The argument of the BIA and Department of Justice was:

[since] it has [been] acknowledged that, because the term “fraud” is not defined in the INA, “it should be used in the commonly accepted legal sense, that is, as consisting of false representations of a material fact made with knowledge of [their] falsity and with intent to deceive the other party. The representation must be believed and acted upon by the party deceived to his disadvantage.”⁹³

86. *Id.*

87. *Id.* at 205-06.

88. *Id.* at 206-07.

89. Jaggernauth had a second offense, rendering her deportable under INA § 237(a)(2)(A)(ii) as an alien convicted of two or more crimes involving moral turpitude. *Jaggernauth*, 432 F.3d at 1348-49. Valansi was not deportable under INA § 237(a)(2)(A)(i) since even if her crime involved moral turpitude, it did not take place within five years of admission. *Valansi*, 278 F.3d at 207.

90. *Valansi*, 278 F.3d (quoting INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i) (2000)).

91. See INA § 101(a)(43)(G), 8 U.S.C. § 1101(a)(43)(G); see also *Jaggernauth*, 432 F.3d 1346.

92. *Valansi*, 278 F.3d at 209-10.

93. *Id.* at 209 (citations omitted).

As discussed in *Valansi*, 18 U.S.C. § 656 on its face is not divisible and does not clearly enunciate a requirement of fraud.⁹⁴ However, precedent in the Third Circuit has preserved a five-factor analysis for satisfying the embezzlement offense, essentially preserving an earlier definition of 18 U.S.C. § 656.⁹⁵ As such, the elements necessary to be established for Valansi's conviction were: "(1) the defendant was an employee, (2) of a federally connected bank, (3) who took cash or other assets, (4) in the custody or care of the bank, (5) with the intent to injure or defraud the bank."⁹⁶

It is the fifth element that is the basis of Valansi's successful case theory. The fraud ground for an aggravated felony requires "fraud or deceit," but under the interpretation of 18 U.S.C. § 656, it is possible to be found guilty when only intending to "injure," not to defraud or deceive.⁹⁷

94. *Id.* at 209-11; *see also* 18 U.S.C. § 656 (2000). Theft, embezzlement, or misapplication by bank officer or employee:

Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, depository institution holding company, national bank, insured bank, branch or agency of a foreign bank, or organization operating under section 25 or section 25(a) of the Federal Reserve Act, or a receiver of a national bank, insured bank, branch, agency, or organization or any agent or employee of the receiver, or a Federal Reserve Agent, or an agent or employee of a Federal Reserve Agent or of the Board of Governors of the Federal Reserve System, embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank, branch, agency, or organization or holding company or any moneys, funds, assets or securities intrusted to the custody or care of such bank, branch, agency, or organization or holding company or to the custody or care of any such agent, officer, director, employee or receiver, shall be fined not more than \$ 1,000,000 or imprisoned not more than 30 years, or both; but if the amount embezzled, abstracted, purloined or misapplied does not exceed \$1,000, he shall be fined under this title or imprisoned not more than one year, or both.

95. *See Valansi*, 278 F.3d at 209-10.

96. *Id.* at 210. (stating that "[t]he predecessor of 18 U.S.C. § 656 explicitly enunciated the last element, the intention to injure or defraud the bank, but the 1948 revision omitted this language. Nevertheless, *Golden v. United States*, 318 F.2d 357 (1st Cir. 1963), and *Seals v. United States*, 221 F.2d 243 (8th Cir. 1955), held that this revision did not change the meaning or substance of the existing law. In *Schmidt* we cited *Golden* and *Seals* for the proposition that an intent to injure or defraud, 'while no longer explicitly required by the statute, is still considered an essential element of the crime. [*United States v. Schmidt*, 471 F.2d 385, at 386 (3d Cir. 1972)]").

97. *Id.* at 211. ("[T]he *mens rea* element under § 656 may also be established by proof of an 'intent to injure.' The plain meaning of the term 'injure' is 'to do an injustice to,' 'to harm, impair or tarnish the standing of,' or 'to inflict material damage or loss on.' Webster's Third New International Dictionary at 1164. Acting with the

With divisibility established, there is still a possibility of deportability under the embezzlement statute. In order to resolve the issue, the court must address the full record of conviction in order to determine whether Valansi was convicted under the deportable or non-deportable section of the statute.⁹⁸

Much to the consternation of the dissenting judge, Valansi had very informed criminal defense counsel. This ensured that Valansi pled to a charge with the necessary vagueness to avoid satisfying the aggravated felony definition.⁹⁹ Her counsel then instructed the trial court that her plea was for intentionally depriving a bank of its property, with the intent to injure the bank.¹⁰⁰ The property, in the form of unprocessed checks, was worthless to Valansi, but she appropriated the property nonetheless.¹⁰¹ The indictment appeared to represent a charge of “injure and defraud,” but her guilty plea was explicitly only to the “injure” element, which was sufficient to sustain the conviction.¹⁰²

intent to injure does not require ‘false representations of a material fact made with knowledge of [their] falsity and with intent to deceive the other party,’ *Matter of GG*, 7 I. & N. Dec. at 164, or ‘a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment.’ Black’s Law Dictionary 670 (7th ed. 1999). Nor does it require deception, which is defined as causing another to believe what is false. Thus, a conviction under § 656 establishing only that the defendant acted with an intent to injure his or her employer is not an offense that ‘involves fraud or deceit’ under 8 U.S.C. § 1101(a)(43)(M)(i)”.

98. *Id.* at 211, n. 7. (“We agree that the Government may establish that the accused acted with ‘intent to injure or defraud’ by offering proof that he or she ‘knowingly participated in a deceptive or fraudulent transaction.’ However, we also believe that element could be satisfied by proof that the defendant acted with merely an intent to injure his or her employer. Under the latter circumstance, a conviction under 18 U.S.C. § 656 does not, in our view, necessarily involve fraud. That depends on how the conviction under § 656 unfolds.”).

99. *Valansi*, 278 F.3d at 218 (Scirica, J., dissenting).

100. *Id.* at 221-22.

101. *Id.* at 220.

102. *Id.* at 214-15. (“A federal grand jury returned an indictment [against Valansi] charging that, ‘with intent to injure and defraud the Bank, [she] knowingly and willfully embezzle[d] and purloine[d] . . . moneys, funds, credits, and assets belong to the Bank and intrusted [sic] to her custody and care,’ in violation of 18 U.S.C. § 656. We therefore decline to limit our inquiry to the charge as stated in the indictment. . . . We instead examine the entire context of Valansi’s conviction, including not only the offense as charged in the indictment, but also as explained to her and confirmed by the District Court during the plea colloquy. . . . When the District Court asked the Government to read the elements of Valansi’s crime into the record during the plea colloquy, the Government included as a necessary element that Valansi ‘acted with the intent to injure or defraud the bank.’ The District Court then asked a series of questions with the goal of confirming that Valansi’s conduct conformed to the

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The record of Valansi's guilty plea reveals the following discussion regarding her intent:

THE COURT: What everybody is telling me is . . . [t]he taking meant an intent to deprive.

MR. PASCARELLA: That's correct.

THE COURT: That's what Miss Valansi is admitting to?

MR. PASCARELLA: That's correct.

BY THE COURT:

Q Is that correct, Ms. Valansi?

A Yes.

Q You are saying it is, yes, I took it – I took them, I intended to deprive the bank of them, but I'm not going to say that I also never intended to return them. Is that fair to say?

A Correct.

Q Is there anything else that you wish to add in terms of my understanding of what you're admitting to on the issue of checks?

A No, ma'am.¹⁰³

The Third Circuit could not “conclude, after scrutinizing the entire plea colloquy and record, that Valansi knowingly pled guilty to embezzlement with the specific intent to defraud.”¹⁰⁴ The court candidly wrote that the role of informed criminal and immigration counsel was central to its interpretation of Valansi's plea.¹⁰⁵ Since the statute was divisible, and Valansi had counsel, the court could not believe that Valansi actually would have pled to the deportable side of the statute.¹⁰⁶ The court stated that “Valansi, advised by experienced immigration counsel, wanted strongly to avoid subjecting herself to deportation as a result of her plea. Not conceding this alternative element of embezzlement allowed her both a way to plead affirmatively to the crime and to offer an argument to elude deportation.”¹⁰⁷ Although the dissent characterized this as merely “a clever bit of lawyering that was not picked up on by the government or the District Judge,” Valansi was entitled to the benefit of her well-crafted plea and was consequently not deportable.¹⁰⁸

elements charged. Valansi's responses demonstrate the intent to injure her employer by depriving it of its property. But never do they demonstrate clearly that Valansi's specific intent was to defraud the bank.”)

103. *Valansi*, 278 F.3d at 216.

104. *Id.* at 217.

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.* at 218.

From the examples discussed above, a practitioner may draw certain conclusions. Knowing from *Pichardo* that extrinsic evidence, including the alien's own admission in testimony, is not admissible to sustain a ground of removability, the criminal attorney may build a record that is for a lesser, or vague offense.¹⁰⁹ However, the lesser offense is not necessarily an improvement for immigration purposes. *Pichardo's* plea was to the more severe, but divisible, New York statute section 265.02.¹¹⁰ Since section 265.02 referenced the lesser section 265.01, *Pichardo* could plea to either, so long as the record of conviction did not show that he was specifically charged with a firearm offense.¹¹¹

Valansi strategically looked at the elements of her criminal charges, and identified and pled guilty to the one charge that had a divisible statute containing the one non-deportable option, given that she was caught with over \$400,000 in embezzled bank property.¹¹² Unlike *Pichardo*, *Valansi* could expect a detailed record of conviction to be forwarded to the Immigration Court, and the initial charge was specifically for both the deportable and non-deportable sides of the statute. By carefully entering a plea to the non-deportable offense, she could protect her immigration status. She then could suffer any punitive consequences, knowing that deportation would not be a collateral consequence of her specific criminal conviction.

Jaggernauth was charged with language that tracked the Florida theft statute.¹¹³ She pled guilty to the offense, and the record of conviction consistently made clear the statute she had violated.¹¹⁴ Appearing *pro se* before the immigration court she admitted that the convictions occurred. Finally, with counsel on appeal, she was able to argue that the clear record of conviction could have been for an offense that did not satisfy the BIA's definition of a theft offense.¹¹⁵ In other cases, it may be possible to continue making guilty pleas to the Florida theft statute either generally, as *Jaggernauth* did, or specifically to the "appropriating" language deemed non-deportable.

109. See generally *In re Pichardo*, 21 I. & N. Dec. 330, 336 (B.I.A. 1996).

110. *Id.* at 332-33.

111. *Id.*

112. *Valansi*, 278 F.3d at 205.

113. *Jaggernauth v. U.S. Atty. Gen.*, 432 F.3d 1346, 1348-49 (11th Cir. 2005).

114. *Id.*

115. *Id.*

C. Trends in Analyzing “Crimes of Violence”

While Sweetser clearly was not convicted of a violent crime,¹¹⁶ it is important to consider the possible consequences for any plea. His conduct was neither intentional nor active, as it was a breach of his duty of care.¹¹⁷ Recent cases have followed involving accidental deaths and apparent acts of violence. Most instructive may be *Leocal v. Ashcroft*, which involved the Florida statute for driving under the influence and thereby causing severe bodily injury.¹¹⁸ In *Leocal*, the Supreme Court held that a “crime of violence” requires a “higher *mens rea* than merely accidental or negligent conduct.”¹¹⁹ As a consequence of *Leocal*, circuits and the BIA must now consider whether other violent crimes in which a victim is injured are necessarily “crimes of violence.”

For example, the Ninth Circuit recently held in *Fernandez-Ruiz v. Gonzales* that an Arizona conviction for domestic violence is not necessarily a “crime of domestic violence” for immigration purposes under INA § 237(a)(2)(E).¹²⁰ The court analyzed the Arizona Revised Statute section 13-1203(A)(1) which states that [a] person commits assault by: [i]ntentionally, knowingly or *recklessly* causing any physical injury to another person.”¹²¹ The court held that under the categorical approach, “without regard to the particular facts of Fernandez-Ruiz’s

116. *In re Sweetser*, 22 I. & N. Dec. 709 (B.I.A. 1999).

117. *Id.* at 710-11.

118. *Leocal v. Ashcroft*, 543 U.S. 1 (2004).

119. *Id.* at 2.

120. *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1125 (9th Cir. 2006); *see also* INA § 237(a)(2)(E), 8 U.S.C. § 1227.

INA § 237(a)(2)(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children.

(i) Domestic violence, stalking, and child abuse. Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term “crime of domestic violence” means any crime of violence (as defined in section 16 of Title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual’s acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

121. ARIZ. REV. STAT. ANN. § 13-1203(a)(1) (2006) (emphasis added).

offense,” it must ask whether the “full range of conduct” proscribed by the statutes under which Fernandez-Ruiz was convicted meets the definition of a crime of domestic violence.¹²² The Ninth Circuit reasoned that under *Leocal*, the 18 U.S.C. § 16(a) requirement that “force be used ‘against’ someone or something suggested that crimes of violence require ‘a higher degree of intent than negligent or merely accidental conduct.’”¹²³ Thus, Fernandez-Ruiz’s conduct, which could have been merely reckless under the statute, is not categorically a crime of domestic violence under INA § 237(a)(2)(E). Under the modified categorical approach, the court found that nothing in the record of conviction could demonstrate that Fernandez-Ruiz had committed his offense knowingly or intentionally¹²⁴ and therefore did not find him deportable under the domestic violence provision of INA § 237(a)(2)(E).¹²⁵ In response, the dissent began its criticism of the majority’s decision with the succinct opening salvo of “[m]en do not beat their wives by accident.”¹²⁶

D. Case Example - Conspiracy, Fraud, or Theft?

Given the myriad state and federal criminal statutes, immigration defense counsel will likely be challenging divisible statutes for the foreseeable future. A recent non-precedent decision illustrates some of the possibilities involved in a federal embezzlement conspiracy, and how proper coordination between criminal and immigration counsel can result in placing a non-citizen in the strongest position for contesting removability.¹²⁷

122. *Fernandez-Ruiz*, 466 F.3d at 1125.

123. *Id.* at 1127 (quoting *Leocal*, 543 U.S. at 9) (emphasis in *Leocal*).

124. *Id.* at 1132.

125. *Id.* at 1135.

126. *Id.* at 1136 (Wardlaw, J., dissenting) (“Blind to this truth, the majority ignores the realities of domestic violence and disregards congressional intent to hold that an Arizona domestic violence conviction is not a “crime of domestic violence” for purposes of a federal immigration law. The majority’s hypertechnical analysis stretches the categorical approach [of *Taylor*] to absurdity and misreads [*Leocal*] as barring all crimes involving the reckless use of force from qualifying as “crimes of violence” under 18 U.S.C. § 16.) (internal citations omitted).

127. The following discussion relates to a case represented by the author. The author’s representation occurred during the time the respondent was considering entering a plea in the criminal prosecution and later subsequent to the initiation of removal proceedings. The divisibility argument was made before the immigration court. The judge found divisibility and terminated proceedings. There are no references to an appellate record or transcript of proceedings because the case was not appealed. The respondent’s name has been changed to protect confidentiality.

Respondent, Mr. R-, a native and citizen of Guyana, was granted lawful permanent residency in the United States in 1971. Mr. R- and several others were charged in 2004 for criminal activity involving a conspiracy to embezzle approximately \$17,000 in federal funds designated for a Section 8 housing project. Mr. R- was charged on four separate counts in a federal indictment.

After consulting immigration counsel, Mr. R- negotiated and entered into a plea agreement, admitting to only one count of the indictment, titled “Conspiracy to Steal Government Funds.” However, this lengthy count of the indictment described in detail conduct possibly including embezzlement, theft and fraud.

The crime in Mr. R-’s plea agreement was referenced as “conspiracy to steal money of the United States and conspiracy to steal federal funds . . . in violation of Title 18, United States Code, Section 371.” The judgment was subsequently entered in Mr. R-’s case, describing the nature of the convicted offense as “Conspiracy to embezzle public money and to embezzle program funds.” As a consequence of the plea agreement, Mr. R- was sentenced to three years probation. In 2006, the Department of Homeland Security (DHS) issued Mr. R- a Notice to Appear and took him into custody.

This case presents an inconsistent record of conviction. Unlike the cases of *Jaggernauth* and *Pichardo*, where the record of conviction consistently tracked and restated the criminal statute, Mr. R-’s record of conviction contained different terminology in the indictment, plea and judgment.¹²⁸ Although DHS bears the burden of proof to demonstrate deportability, defense counsel must be prepared to argue all of the possible interpretations of the record.

Before an immigration judge, Mr. R- successfully argued that he was not subject to removal since he was not convicted of a crime that constituted either “theft” or “fraud” aggravated felonies under the INA.¹²⁹ Mr. R- needed to prevail on this argument in order to be released from immigration custody and to terminate his proceedings.¹³⁰ He would have been barred from all discretionary relief if he was found to be an “aggravated felon,” since the conviction was eight years after the revocation of INA § 212(c). Previously, this section pro-

128. See *Jaggernauth*, 432 F.3d 1346; see also *Pichardo*, 21 I. & N. Dec. 330.

129. INA §§ 101(a)(43)(G), (M), 8 U.S.C. § 1101. Mr. R- was sentenced only to probation. Thus, he did not have the requisite one year of imprisonment to satisfy INA § 101(a)(43)(G).

130. As an aggravated felon, Mr. R- was subject to the mandatory detention provisions of INA § 236(c).

vided the only form of relief that could waive aggravated felonies committed by lawful permanent residents.¹³¹

Mr. R- was convicted under the first portion of the first paragraph of 18 U.S.C. § 371, which states:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.¹³²

The federal conspiracy statute was favorable to Mr. R- since it was divisible on its face and even divisible in its title, offering the possibilities of conviction for either conspiring “to commit any offense against the United States”, *or* “to defraud the United States”¹³³ Although the second part of the first paragraph of the statute could encompass a crime involving fraud and thereby trigger the fraud provision under the Act’s definition of aggravated felony, 18 U.S.C. § 371 is a divisible statute and reflects as much even in its title of “Conspiracy to commit offense *or* to defraud United States.”¹³⁴ When Mr. R- pleaded guilty and was adjudicated guilty of this charge, he specifically pleaded guilty only to “conspiracy to steal government funds.” In doing so, he strategically admitted an offense that could only relate to the first part of the statute’s language, which was a generic “offense against the United States.”

Mr. R-’s conviction was for the offense of conspiracy, which necessarily implies or encompasses additional criminal goals or activity. Furthermore, conspiracy is specifically incorporated into the aggravated felony definition at INA § 101(a)(43)(U), which makes an aggravated felony “an attempt or conspiracy to commit an offense described” in INA §§ 101(a)(43)(A)-(T).¹³⁵

The judgment in Mr. R-’s criminal case indicates that he was adjudicated guilty for the crime of “conspiracy to embezzle public money and to embezzle program funds.” Although the “embezzle” language may imply a fraud component, a closer examination of the statutory

131. See INA § 212(c), 8 U.S.C. § 1182(c).

132. 18 U.S.C. § 371 (2000).

133. *Id.*

134. *Id.* (emphasis added).

135. INA § 101(a)(43)(U), 8 U.S.C. § 1101(a)(43)(U).

construction of the crime as well as a review of the record of conviction as a whole demonstrated otherwise. The indictment in the case, in detailing the acts of the conspirators referred to two statutes, 18 U.S.C. § 641 and 18 U.S.C. § 666(a)(1)(A), each discussed below.

The full language of 18 U.S.C. § 641 (emphasis added) is as follows:

Whoever embezzles, steals, purloins, *or* knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; *or*

Whoever receives, conceals, or retains the same with *intent to convert* it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted -

Shall be fined under this title or imprisoned not more than ten years, or both; but if the value of such property . . . does not exceed the sum of \$1,000, he shall be fined under this title or imprisoned not more than one year, or both.

The word “value” means face, par, or market value, or cost price, either wholesale or retail, whichever is greater.¹³⁶

The disjunctive language between paragraphs indicates divisibility of the statute. The disjunctive language within each paragraph further distinguishes deportable and non-deportable conduct.

Based on the first paragraph of this statute, Mr. R- may not have been convicted of embezzling, but could have instead been convicted of stealing, purloining, or knowingly converting. In addition, as indicated by the second paragraph of 18 U.S.C. § 641, he may not have been guilty of any of the aforementioned acts at all, but rather guilty of receiving, concealing, or retaining with an “intent to convert.”¹³⁷ As discussed above, *Valansi* established the distinction between embezzling with the intent to defraud and embezzling with intent to injure, which possibly includes converting the property to a use other than the basis of the original legal possession.¹³⁸ Therefore, even if the judgment in this case accurately reflected that Mr. R- was guilty of “conspiracy to embezzle,” he could not categorically be deemed convicted of a fraud crime since his actions may have involved an intent to convert, but not an intent to defraud.

136. 18 U.S.C. § 641 (2000) (emphasis added).

137. *Id.*

138. See sources cited *supra* notes 84-95 and accompanying text.

Similarly, 18 U.S.C. § 666(a)(1)(A) does not clearly state whether fraud was an element of the crime for which Mr. R- was convicted:

- (a) Whoever, if the circumstance described in subsection (b) of this section exists—
 - (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—
 - (A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that—
 - (i) is valued at \$5,000 or more, and
 - (ii) is owned by, or is under the care, custody, or control of such organization, government, or agency[.]¹³⁹

Again, under the language of the statute, Mr. R- could have also stolen or knowingly converted property, but not necessarily embezzled or obtained it by fraud. The language of the instant statute does not provide certainty as to whether he was convicted of a crime involving fraud, but demonstrates, consistent with the indictment and plea agreement, that his conviction involved a conspiracy to steal and not a conspiracy to commit fraud.

Consequently, Mr. R- successfully argued that he was adjudicated guilty for only that portion of 18 U.S.C. § 371 involving “conspiracy to commit offense,” as distinguished from “conspiracy to commit fraud.” Mr. R- contended that his conviction, as referenced by the various admissible documents which comprise the record of conviction, consisted of “conspiracy to steal government funds,” “conspiracy to steal money of the United States,” and “conspiracy to steal federal funds.”¹⁴⁰ Accordingly, the immigration judge found that Mr. R- was not subject to removal under any provision of the INA since the statute under which he was convicted was divisible and the admissible evidence indicated that there was no element of fraud in Mr. R-’s conviction.

Further, Mr. R- was not subject to removal under the theft provision of the aggravated felony definition found at INA § 101(a)(43)(G). As in *Jaggernauth*, this section renders a respondent convicted of certain theft offenses removable pursuant to INA § 237(a)(2)(A)(iii).¹⁴¹ However, in order to be subject to this provision of the Act, an imprisonment term of at least one year must have been imposed for that theft

139. 18 U.S.C. § 666 (2000) (emphasis added).

140. See 18 U.S.C. § 371 (2000).

141. INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii).

or burglary offense.¹⁴² Mr. R- had negotiated a plea agreement and was sentenced to three years probation and no term of imprisonment. Accordingly, DHS was prohibited from bringing charges seeking his removal as an aggravated felon as defined in INA § 101(a)(43)(G). With no basis of deportability established, the immigration judge terminated proceedings and Mr. R- was released from custody.

IV. CONCLUSION

Those non-citizens convicted of a deportable offense and released from criminal custody after October 9, 1998, will likely be subject to mandatory detention.¹⁴³ They therefore will be contesting their removability from the discomfort and inconvenience of an immigration detention center or contracted prison facility. Immigration detention exerts pressure on respondents comparable to the pressure they felt upon their initial arrest and the stress of the criminal process. The detainee knows that if she loses her case before the immigration judge, detention will continue while she appeals to the Board of Immigration Appeals. Subsequently, she risks being deported during the pendency of any federal appeal. Even if the detainee wins in the federal forum, she faces procedural obstacles to re-entry into the United States and possible additional immigration charges.¹⁴⁴

Unfortunately for many non-citizens, the principle of “not looking behind the conviction” seals their fate, for they may fall into a category of inadmissibility or deportability that is not waivable under the INA. Immigration courts, for efficiency purposes, are bound by the record of conviction and must order removal when it is justified. As long as the conviction is final, the Immigration Court is bound by the judgment of the criminal court.¹⁴⁵

142. *Id.*

143. Memorandum from Michael A. Pearson, Executive Assoc. Comm'r for Field (July 12, 1999), reprinted in 76 No. 27 Interpreter Releases 1082, 1083 (July 19, 1999). October 9, 1998 was the expiration of the Transitional Period Custody Rule, under which the mandatory detention provision of INA § 236(c) was held in abeyance due to inadequate space to hold the required detainees.

144. As noted above, Jaggernauth was physically deported and was allowed to reenter to continue her removal proceedings following her victory in federal court. However, she remained subject to mandatory detention because of her multiple convictions for crimes involving moral turpitude under INA § 237(a)(2)(A)(iii). However, as a non-aggravated felon, she was then eligible for Cancellation of Removal under INA § 240A(a).

145. See generally *In re Punu*, 22 I. & N. Dec. 224 (B.I.A. 1998); *In re Thomas*, 21 I. & N. Dec. 20 (B.I.A. 1995) (stating that a judgment appealed to the first appellate level is not final).

Some respondents in immigration court have the option to pursue post-conviction relief and thus may be able to vacate their conviction and terminate proceedings.¹⁴⁶ It is essential for the criminal defense attorney and immigration attorney to collaborate in the timing of this attempt. For example, if the conviction is vacated and the client is re-charged and re-tried, it may be an option to plea to a divisible statute or to a clearly non-removable offense. Also, for older convictions, being re-charged and convicted may eliminate the availability of relief under INA § 212(c), as any plea and conviction will necessarily occur after April 24, 1996.

Many criminal non-citizens must face the immigration judge knowing that they cannot appeal or vacate their plea. Their only argument may be the inapplicability or over-breadth of the charges against them. The purpose of this paper is not to merely describe how to analyze the statute for divisibility and discuss cases where this technique has been successful for the non-citizen. The real goal is to use the case examples to illustrate strategic possibilities when criminal counsel, immigration counsel, and the respondent undertake long-term analysis and make informed decisions when deportation is a possible consequence of criminal activity.

The use of legal imagination is more effective when a difference may be made and the criminal attorney may negotiate the least damaging outcome. Ms. Valansi and Mr. R- took steps at the criminal trial level to minimize future consequences. Accepting a long period of probation may be advantageous compared to a shorter jail term. Moreover, the attorney may negotiate a plea for a non-deportable (or arguably non-deportable) offense in exchange for cooperation in another matter.

The possibilities are vast for crafting a potentially non-deportable solution, given the proper legal expertise and patience by the client. The goal is for the arrested non-citizen to accept a plea or litigate only after knowing the long-term consequences of her decision. Most would agree that suffering short-term in legal limbo at the initiation of

146. See *In re Adamiak*, 23 I. & N. Dec. 878 (B.I.A. 2006) (stating that a conviction vacated on due process grounds because of a court's failure to advise the defendant of the Immigration consequences of plea no longer constitutes a conviction for immigration purposes); *Alim v. Gonzales*, 446 F.3d 1239 (11th Cir. 2006) (stating that where a defendant is not advised of immigration consequences of a Florida plea, a court, in determining whether a vacated conviction remains a basis for removability, must look at records to determine if vacated on substantive grounds, as opposed to expunged via a rehabilitative statute).

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criminal proceedings and finding a livable solution is less disastrous than living a life deported, away from all that is loved in their adopted country.

