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28 September 2014

TO:

FROM: Sean R. Hanover, Esq.

RE: JAMES EKEKE, Case 14-48 (District of Deleware)

Pursuant to the Order entered by Judge Stark on 18 September 2014, authorizing the services of an immigration expert, I submit the following report regarding the immigration consequences of Mr. Ekeke's charges, proposed alternative sentencing guidelines, and a possible alternative plea agreement.

I am available to answer any questions you may have regarding this report. You may reach me at 703-402-2723 or SeanHanover@hanoverlawpc.com.

Respectfully,

Sean R. Hanover, Esq.

Principal Attorney

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IMMIGRATION CONSEQUENCES

AND

CRIMINAL MITIGATION STRATEGY

J A M E S   E K E K E

Report prepared: 28 September 2014

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NOTICE: This report contains strategy information for the defense. Care should be used in disclosing aspects of this information to the prosecution.

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A. CRIMINAL CONVICTIONS IN IMMIGRATION COURT

I. Judgements

1. Determining whether a criminal action constitutes a threat to immigration status begins by understanding *when* the Court will inquire into a criminal matter.
2. To constitute an actionable event in Immigration Court, a criminal event must have two components (see INA § 101(a)(48)):
    a. A judgment was made. A judge enters a finding, a jury returns a verdict, or your client pleads to the case (including Alford and no contest pleas). This *does not* include a deferred agreement with the prosecutor that does not result in the entry of an order by the Court (other than disposing of the case). Note – even admissions by Mr. Ekeke as to the facts in a government proffer, or affirmation of the veracity of a police report could be used by an Immigration Court, in certain instances, to find a judgment was made (see below under *modified categorical approach*).
    b. A restraint on liberty occurs. This includes jail time, but also fines. Immigration Courts are mixed on whether probation only, with no actual jail time, constitutes a restraint on liberty. Generally, if the Court orders the client to some program or task, even community service, there is a very high likelihood that constitutes a restraint.
3. Without a judgment *and* a restraint on liberty, the nature of the criminal conduct is irrelevant and further inquiry is not required.

CAUTION: If the opportunity to take a deferred sentencing agreement or alternative plea is available, be sure (a) to have your client admit to nothing that constitutes a crime involving moral turpitude (CIMT), and (b) ensure that the judge does not enter a finding as to guilt or innocence of your client. The judge may affirm the agreement reached between the client and the prosecutor, without making a finding of guilt or innocence. Finally, if the judge makes a finding, ensure that there is no restraint attendant with the finding.

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B. IMMIGRATION CODE AND CRIMINAL CONDUCT

II. Crimes Involving Moral Turpitude

1. A crime involving moral turpitude (CIMT) is defined by the Board of Immigration Appeals as referring:

> [G]enerally to conduct that is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general. See, e.g., Matter of Solon, 24 I&N Dec. 239, 240 (BIA 2007); Matter of Torres-Varela, 23 I&N Dec. 78, 83 (BIA 2001). Moral turpitude is conduct that is per se morally reprehensible and intrinsically wrong or malum in se. See Matter of Fualaau, 21 I&N Dec. at 477; Matter of Franklin, 20 I&N Dec. 867 (BIA 1994), aff'd, 72 F.3d 571 (8th Cir. 1995); Matter of Serna, 20 I&N Dec. 579, 582 (BIA 1992). Where knowing or intentional conduct is an element of a morally reprehensible offense, we have found moral turpitude to be present. See, e.g., Matter of Danesh, 19 I&N Dec. 669, 673 (BIA 1988). [*excerpt from* Matter of Ruiz-Lopez at 553]

2. Distilled, CIMTs usually cover fraud, deceit, crimes with a loss of over $10,000, and most forms of abuse. There are no specific "triggers" for CIMTs. Each crime must be viewed independently in light of the BIA and relevant circuit holding (see Section D(I) below). A CIMT is usually terminal to all forms of relief except withholding of removal and Convention Against Torture.

3. If the client has only one CIMT, and it is minor, it may often be excused under th "petty exception" rule. See 8 USC 1182(a)(2)(A)(ii)(II). The exceptions to CIMTs do not apply to Mr. Ekeke.

3. Two or more CIMTs results in removal. See 8 USC 1227(a)(2)(A)(ii).

4. In addition, the requirements for good moral character are found under INA § 101(f). However, GMC is not a often a factor in removal defense, and only comes into play when considering naturalization of discretion. Generally, a CIMT (other than petty) and/or an aggravated felony (see below) prevent a finding of GMC. As it is highly unlikely Mr. Ekeke will be considering citizenship in the near future, further analysis of GMC is not provided in this report.

III. Aggravated Felonies

1. Aggravated felonies are defined under INA § 101(a)(43). There are numerous types of aggravated felonies enumerated in the code (these specifically listed crimes, such as murder, peonage, crimes involving fraud with a lost above $10,000, etc. are known as "triggers"). However, for practical purposes, the general definition of any crime involving violence and a sentence of 1 year or more constitutes an aggravated felony (INA § 101(a)(43)(E)(iii)(f)). This general definition is *not* considered a trigger, and each criminal act/code must be reviewed to determine if it meets the definition of a (1) trigger, or (2) general definition of an aggravated felony. See Section D(I) below.
2. There are two specific definitions – INA § 101(a)(43)(D), relating to money laundering, and INA § 101(a)(43)(M)(ii), relating to tax evasion with a loss of more than $10,000 to the United States . Both of these may apply to Mr. Ekeke; neither are commonly charged in the initial Notice to Appear (summons for Immigration Court). However, it is possible the government will seek one or both. An alien may not be bonded out of jail while awaiting his immigration hearing if he has a conviction/judgment for an aggravated felony.

C. REMOVAL VS. INADMISSABILITY

I. Definitions

1. Inadmissibility refers to the alien's ability to enter the country. This includes everything from simple visitor visas to adjustment of status. In the case of Mr. Ekeke, this is particularly relevant. An Legal Permanent Resident (LPR) who is stripped of his permanent residency must re-apply to adjust his/her status back to that of an LPR. A conviction that prevents admissibility *forever bars* Mr. Ekeke from returning to the United State. There are limited exceptions to the permanent bar (known as a 212(h) waiver), but these are not often given, and usually not

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within the first 10 years of conviction. See INA § 212(a) for a list of criminal conduct that makes an individual inadmissible.

2. As a general rule, non-petty CIMTs and crime involving drugs, firearms, or domestic violence make the client *inadmissible*.
3. Removal refers to the process of appearing before an immigration judge, or in certain circumstances (*expedited removal*) an ICE officer, to determine if the client's criminal conduct while within the United States in sufficient to have her removed. Conduct leading to removal is specified in INA § 237.
   Offenses triggering removal dictate the type of relief available to the client in Immigration Court. Inadmissibility considerations govern adjustment and re-entry into the United States after removal.

CAUTION: An immigration judge can find a client removable, but such offenses *not* prevent admission to the United States. Certain aggravated felonies are removable events but are *not* a bar to re-admission (for example, burglary where there was no evidence of a taking). In those instances, if Mr. Ekeke had a United States citizen or LPR spouse who could sponsor him, he may be able to admit removability, reserve a hearing on inadmissibility, and adjust in front of the immigration judge once inadmissibility was determined to not be an issue. Keep this in mind as you negotiate a potential plea.

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D. SUPREME COURT HOLDING ON DIVISIBLE CRIMINAL MATTERS IN IMMIGRATION COURT

I. Background

1. Determining whether criminal conduct rises to the level of "aggravated felony" or "CIMT", as defined in paragraphs B(II) and B(III) above, is accomplished as follows:
    a. Does the criminal code specify a trigger enumerated in the Code? (INA § 101(a)(43), INA § 212(a), or INA § 237(a))?
    b. If there is no trigger, do the elements of the criminal conduct constitute an aggravated felony or CIMT by definition[1]?
    c. If either (a) or (b) are operative, then a determination must be made as to whether the criminal statute is divisible. That is – whether there are categories of conduct outlined in the statute, some of which may be CIMT/Aggravated Felonies, and some of which are not. This is known as the categorical/modified-categorical approach. We will use this test methodology to review Mr. Ekeke's criminal charges.

II. Categorical Approach

1. The categorical approach was defined by the Supreme Court in Shepard v. United States, 544 U.S. 13 (2005), and Taylor v. United States, 495 U.S. 575 (1990), and has been applied to immigration proceedings. Kawashima v. Holder, 132 S. Ct. 1172, 1173 (2012).
2. The categorical approach is used when the statute in question contains no disjunctive; that is, there is only one set of elements for the criminal conduct. Where there is a list of elements, *each* must be present in order for a conviction to occur.
3. When the criminal elements fall into the category of CIMT/aggravated felony, the client is deportable (or inadmissible).

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[1] CIMT: Intentional conduct that is inherently base, vile, or depraved, and contrary to the accepted rules of morality and the duties owed between persons or to society in general. Look for abuse or "taking" or "fraud" elements.
Aggravated Felony: A crime of violence with a potential jail sentence of 1 year or longer. Note however, that a crime involving violence with a mandatory detention of greater than one year is automatically an aggravated felony.

III. Modified Categorical Approach

1. The categorical approach may be “modified” if the statute of conviction defines more than one crime (includes a disjunctive such as “or” in the list of criminal elements), at least one of which comes within the removal ground and one of which does not. In these cases, the Immigration Judge may consult the “record of conviction” -- a defined set of court documents including:
   d. Charging document;
   e. Plea agreement;
   f. Plea colloquy (transcript);
   g. Verdict or judgment of conviction.

   These documents may be used to determine whether the defendant was necessarily convicted of an offense falling within the removal ground[2]. Gonzales v. Duenas-Alvarez, 549 U.S. 183, 187 (2007); Rivas v. Holder, 2014 U.S. App. LEXIS 15663 (2nd Cir., 2014); Daibo v. AG of the United States, 265 Fed. Appx. 56 (3rd Cir., 2008).
2. NOTE! The list of documents that may be consulted when utilizing the modified categorical approach *is limited*. Immigration Courts are not criminal courts, and an immigration judge may not hold a second criminal trial or inquiry. Alsol v. Mukasey, 548 F.3d 207, 217 (2nd Cir., 2008).

CAUTION: If appropriate, try to direct the client into pleaing to criminal conduct that is *divisible*. Be sure to use liberal language in the plea agreement that clearly shows the conduct falls on the side of non-CIMT or non-aggravated felony actions. *Pre-planning for this is critical*.

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[2] See Zota, Sejal, *Matter of Davey & the Categorical Approach*, Immigration Project of the National Lawyer's Guild, January 2013, page 1. Reference Link: http://www.nationalimmigrationproject.org/legalresources/practice_advisories/pa_MatterOfDavey&TheCategoricalApproach-16Jan2013.pdf

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E. MR. EKEKE'S CRIMINAL CHARGES

I. False Claims Conspiracy (18 USC 286)

1. Whoever enters into any agreement, combination, or conspiracy to defraud the United States, or any department or agency thereof, by obtaining or aiding to obtain the payment or allowance of any false, fictitious or fraudulent claim, shall be fined under this title or imprisoned not more than ten years, or both. (18 USC 286)
2. Is the charge disjunctive? Yes, however, all elements come within removal grounds. Therefore this falls under the categorical approach, and further review is not required.
3. Is a CIMT triggered by this crime? Yes. The term "defraud" and the knowing intent required to "enter into any agreement" combine to make this a CIMT.
4. Is this an aggravated felony? Yes. At $4 million, this exceeds a loss of $10,000 both by fraud and deceit (INA § 101(a)(43)(M)(i)), and to the government directly (INA § 101(a)(43)(M)(ii)).
5. Strategy to challenge this crime in Immigration Court: Prove that Mr. Ekeke did not *knowingly* enter into any agreement. If the element of *scienter* can be removed, then the crime cannot be a CIMT. Paragraph 12 in the indictment is problematic for this purpose; however, this is the only method for avoiding a CIMT in this instance. A CIMT would make Mr. Ekeke inadmissible, so this should be avoided, even if the aggravated felony designation associated with this charge cannot be avoided.

II. Access Device Fraud (18 USC 1029)

1. This crime involves the use of number, account information, or physical instruments to perpetrate a fraud across state lines. Each section of the criminal code (10 sections under 18 USC 1029) includes the phrase, "knowingly and with intent to defraud".
2. Is this charge disjunctive? No. Each section has the required wording for a CIMT.
3. Is a CIMT triggered by this crime? Yes. "knowingy" and "with intent to defraud" are classic elements of CIMTs.

4. Is this an aggravated felony? On its face, no. However, depending on the sentence, it may be. There is no violence here, and there is no minimum sentence of 1 year or more. However, the fraud provisions of INA § 101(a)(43)(M)(i) and (ii) will be triggered if *this charge* is shown to result in a loss of $10,000 or more.
5. Strategy to challenge this crime in Immigration Court: Ensure that no amount is specified in the final conviction. That will prevent this from constituting an aggravated felony. There is no way to avoid a CIMT on this count.

III. Wire Fraud (18 USC 1343)

1. Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. (18 USC 1343).
6. Is this charge disjunctive? Yes, however, all elements come within removal grounds. Therefore this falls under the categorical approach, and further review is not required.
2. Is a CIMT triggered by this crime? Yes. The elements of fraud and intent are both in the statute.
3. Is this an aggravated felony? Not likely. This crime covers the process of fraud (i.e. how the money was transferred), not an amount. There is no violence involved.
4. Strategy to challenge this crime in Immigration Court: Important to keep amounts out of any plea (including an amount related to 18 USC 1343 could trigger an aggravated felony on account of the >$10,000 regulation at INA § 101(a)(43)(M)(i) and (ii)).

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IV. Money Laundering (18 USC 1956)

1. There are various elements and sections to this crime. However, each require that the actor "knowingly" engages in financial transactions with the intent to promote illegal activity and "knowing" that the actions are taken to hide or conceal source or ownership of funds.
2. Is this charge disjunctive? Yes. However, each has a knowing component coupled with a deception element.
3. Is a CIMT triggered by this crime? Arguable, however, this is irrelevant. This money laundering is a trigger specifically enumerated in the immigration code. See INA § 212(a)(I)(i).
4. Money laundering is both a crime making Mr. Ekeke inadmissible, and also a removable offense under INA § 237(a)(2)(A)(i), (ii), and (iii) (defining CIMT and aggravated felony offenses as removable). Invariably it is considered an aggravated felony (the amount sent "over the wire" considered an instrumentality of the fraud and therefore triggers INA § 101(a)(43)(M)(ii), and (iii) and creates an aggravated felony (>$10,000)).
5. Strategy to challenge this crime in Immigration Court: Strategy is limited here. This charge should be avoided if at all possible, as it is a named trigger in immigration parlance. Keeping the amount below $10,000 would prevent this from being an aggravated felony, and therefore, arguably, not a removable offense. However, it would still constitute a CIMT, and when combined with any other CIMT would trigger removability[3].

[3] It should be noted that for *removability* purposes, INA 237(a)(2)(A)(i) (CIMT) requires that Mr. Ekeke have received his LPR status within 5 years of the offense. Where that is not the case, a CIMT, by itself, is not sufficient to trigger removal *unless* he is convicted of two or more CIMTs. In the case of two or more CIMTs, unless a petty exception applies, length of sentence and date of LPR status is irrelevant.

> Multiple criminal convictions.-Any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial, is deportable. INA 237(a)(2)(A)(ii)

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F. ALTERNATIVE CHARGES

1. The following charges can be substituted with a *higher likelihood* of immigration defense. It should be noted that none of these are optimal. A complete list of criminal actions under IRS code can be found here: http://www.irs.gov/irm/part9/irm_09-001-003.html. This includes the elements of each offense. STAY OUT OF TITLE 18 (18 USC XXX) as these are fraud and material misrepresentation statutes that will almost invariable end your client with a CIMT and an aggravated felony.

26 US 7206(2) – Filing an Incorrect or Fraudulent Return (on behalf of others), which reads:

> Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document [underline added]

In this instance, *false* and *fraudulent* are two different criteria, forcing a modified categorical approach. Be sure to have "false" used instead of "fraudulent" in any Court papers or plea. The distinction is critical in Immigration Court (and this will almost certainly be appealed to the Board of Immigration Appeals (BIA) or Circuit).

26 USC 7201 – Attempt to Evade or Defeat Tax

> Prohibits willfully attempting in any manner to evade or defeat any tax or the payment thereof.

In this instance, there is likely no fraud or CIMT in merely avoiding a tax. Note, however, to be cautious when taking this tactic to keep the plea colloquy, order, and other aspects of the record clear of “fraud” related terms (as discussed in this report; specifically Section D(III) above).

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G. POSSIBLE FORMS OF RELIEF FOR MR. EKEKE

I. Convention Against Torture

1. This is the only form of relief that is blind to any criminal charges or convictions. The United States may not send a person back to a country where she would be killed or tortured.
2. Elements: No person may be removed to a country where it is "more likely than not" that such person will be subject to torture. UN Convention Against Torture
3. Generally, the torture must be at the hands of the government, or orchestrated by an organization the government cannot or will not control.
4. "Torture" is defined, in part, as the intentional infliction of severe pain or suffering by, or at the instigation of, or with the consent or acquiescence of a public official.
   8 C.F.R. 1208.18(a)(1).
5. If the dangers in his home country support granting CAT, Mr. Ekeke would qualify for this relief.

II. Withholding of Removal

1. Withholding of removal is a form of asylum. There must be a nexus between Mr. Ekeke's membership in a protected class or group, and his fear that his life or liberty will be threatened on account of his membership in the protected group. To make this showing, the client must establish a "clear probability" of persecution, meaning that it is "more likely than not" that he will be subject to persecution on account of a protected ground if returned to the country from which he seeks withholding of removal. Cardoza-Fonseca, 480 U.S. 421.
2. Elements: (A) Protected group or class based on race, religion, nationality, membership in a particular social group, or political opinion. INA § 101(a)(42)(A). (B) More likely than not that the client will suffer persecution as a result of being a member of the protected group/class. (C) Not convicted of a particularly serious crime (defined as a conviction(s) with aggregate sentencing >=5 yrs).
3. It is unclear what his final conviction will be, but likely it will qualify as a serious crime, precluding this form of relief. If not, this would be a viable relief option presently, due to the Ebola virus in Nigeria and Western African in general (although

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not a particular group, both ICE and DHS have been granting withholding of removal and CAT for those countries due to those countries inability to stop the disease).

III. Cancellation of Removal

1. In Mr. Ekeke's situation, as an LPR, INA § 240A(b) applies. This form of cancellation can be done before the judge. If approved, deportation is canceled and Mr. Ekeke would keep his green-card.
2. Elements: (A) Must have been an LPR for at least five years, (B) must have resided continuously in the US for the last seven years, (C) no CIMT (stops the seven year clock under test B above on the date of the conviction), (D) no aggravated felony, (E) no crimes under INA § 212(a)(2) and 237(a)(2) and (4).
3. Unlikely that this relief will be available given the CIMT's involved with this case. Conversely, it is through cancellation cases that an immigration attorney reaches the question of modified-categorical approach, and whether certain crimes constitute a CIMT/aggravated felony for immigration purposes.

IV. S Visa

1. Used as an incentive for individuals involved in illegal activities to "turn" on their fellow conspirators, a S Visa is given when assistance is provided by the client in the prosecution of criminal investigation and charges (cooperation visa).
2. To be eligible, the LPR must first be stripped of his status (legal permanent residency), and then issued a S Visa permitting "re-entry" into the country. Once here on a S-Visa (re-entry is a fiction; this can be done in the Immigration Court/DHS context without leaving the US), the individual is granted a work permit. Generally, there is no adjustment out of S status, and the role is at the pleasure of the government (meaning it may be revoked at any time).
3. Elements: Must complete an I-854. Otherwise, this must be requested by the government and there is little Mr. Ekeke would need to do.

4. The challenge is convincing the government that Mr. Ekeke's cooperation is important enough to warrant S status. Frequently, it is necessary to delve further into the client's background to see if additional connections exist that might be useful for the government.

H. General Recommendations

I. Key Take Aways

2. There are two critical points in Mr. Ekeke's charges.
    a. CIMTs in all counts.
    b. Money Laundering is a named immigration trigger resulting in permanent inadmissibility and likely an aggravated felony (resulting in removability).
3. Defense to CIMTs:
    a. Never admit to "knowingly" doing anything. If you cannot include a statement indicating the client was unsure, unaware, or unintentional, leave that aspect of the case open so the immigration attorney can argue there was no finding of "intent" or "knowledge" on the record.
    b. Never admit to "depriving" or "defrauding" – change those terms to "taking" or using. To deprive or defraud or misrepresent are all key words for CIMT. A "taking" or "using" is ambiguous and gives the immigration attorney something to work with.
    c. If the term used in the plea agreement or order *contradicts* the statute, then arguably the Court did not find a CIMT. Circuits are mixed on the outcome of a conflicted statute/judicial determination. However, this gives the immigration attorney something to work with.
    d. **Remember that an aggravated felony is *not bondable* from Immigration Court**. That means that once ICE takes your client (subsequent to a criminal conviction), he will not be released for the pendency of his immigration

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proceedings. Aggravated felonies should be avoided if at all possible, and your client advised on this point.

e. Remember that any CIMT (except a petty offense) makes Mr. Ekeke *inadmissible* into the United States, preventing his seeking a waiver and adjustment before the Immigration Judge (a form of relief for aggravated felonies).

This report was prepared based on the indictment information provided. I remain available for additional consultation on subsequent plea negotiations or offers.

Respectfully,

Sean R. Hanover, Esq.

Principal Attorney

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