



2019 CASE UPDATE: THE DOMESTIC VIOLENCE DEPORTATION GROUND

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Overview: Domestic Violence Deportation Ground, INA § 237(a)(2)(E)

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The domestic violence deportation ground sets out four bases for deportability: conviction of a crime of domestic violence; conviction of a crime of stalking; conviction of a crime of child abuse, neglect, or abandonment; and being the subject of a civil or criminal court finding of a violation of certain portions of a domestic violence protection order.

This advisory will provide a brief overview of all of these parts of the deportation ground and their effect, and then review recent decisions and their effect on California offenses and within the Ninth Circuit. It will reference other advisories that go into more detail on several topics.

Remember that offenses that involve domestic violence or children also may have other immigration consequences. They may be crimes involving moral turpitude or aggravated felonies, or have negative discretionary factors in applications for relief. See Part I. In addition, coming within the domestic violence or other crimes-based deportation grounds can make a noncitizen ineligible to apply for some forms of cancellation of removal for non-permanent residents (“non-LPR cancellation”) or for DACA.

This advisory first appeared in June 2018, to discuss recent federal court and Board of Immigration Appeals decisions that significantly affected each of the four bases of the domestic violence deportation ground. This

update in November 2019 incorporates holdings in several additional new cases that affect our analysis of this ground.¹

I. Overview

A. Four Bases of the Domestic Violence Deportation Ground

The domestic violence deportation ground (“DV ground”) appears at INA § 237(a)(2)(E), 8 USC § 1227(a)(2)(E). It sets out four distinct ways that a noncitizen can become deportable (as well as ineligible for certain forms of relief):

- Conviction of a “crime of domestic violence,” § 237(a)(2)(E)(i);
- Conviction of a “crime of stalking,” § 237(a)(2)(E)(i);
- Conviction of a “crime of child abuse, child neglect, or child abandonment,” § 237(a)(2)(E)(i);
- Judicial finding in civil or criminal proceedings of a violation of certain portions of a domestic violence protective order (essentially, any violation of a DV stay-away order), § 237(a)(2)(E)(ii).

Effective date. The criminal conviction, or the conduct that was found to have violated the protective order, must have occurred 1) after admission (except when used as a bar to certain forms of relief; see Subpart B, below), and 2) on or after September 30, 1996,²

Example: Joe was admitted to the United States in 1994. In 1995 he was convicted of California Pen C § 273.5, domestic battery with traumatic injury. Because the conviction occurred before September 30, 1996, it does not trigger the DV ground, either as a basis for deportability or as a bar to eligibility for non-LPR cancellation of removal. If he had been convicted of the same offense in 1997, it would have triggered these penalties.

B. Penalties, Defenses, Exceptions, and Waivers

When does this ground apply? What waivers or exceptions are available?

- **Deportable.** Like any deportation ground, the DV ground can cause a permanent resident, refugee, or other person who has been admitted to the United States to be placed in removal proceedings and charged with being deportable. If the person is not eligible for and granted relief, they can be removed (deported).

¹ The advisory adds discussion of *Stokeling v. United States*, 139 S.Ct. 544 (2019); *Diaz-Quirazco v. Barr*, 931 F.3d 830 (9th Cir. 2019); cases culminating in *Martinez-Cedillo v. Barr*, 923 F.3d 1162 (9th Cir. 2019) (*withdrawn*); *United States v. Perez*, 932 F.3d 782 (9th Cir. 2019); *Menendez v. Whitaker*, 908 F.3d 467 (9th Cir. 2018), and *Matter of Thomas/Matter of Thompson*, 27 I&N Dec. 674 (AG 2019).

² See IIRIRA § 350 for the effective date provision. The effective date applies to the DV deportation ground for purposes of deportability, as a bar to relief, and in every other context.

- **Non-LPR Cancellation.** Coming within this ground can serve as a bar to eligibility for cancellation of removal for non-permanent residents under INA § 240A(b). This type of cancellation is a defense to removal, and if the person wins, they will be granted lawful permanent resident status. This bar to cancellation applies somewhat differently, depending upon whether the person is applying for “ten-year” cancellation under § 240A(b)(1) or VAWA cancellation under § 240A(b)(2).³
- **LPR cancellation.** Being deportable under the DV ground *alone* does not “stop the clock” on accruing the seven years of residence that is required for cancellation of removal for permanent residents, INA § 240A(a), (d). Because it is a deportation ground, the DV ground is not “referred to” in INA § 212(a)(2), which is a requirement for stopping the clock.⁴ But if the conviction also falls within a ground of inadmissibility, e.g., under the crime involving moral turpitude inadmissibility ground, it might stop the seven-year clock on that basis. See online advisory on LPR cancellation.⁵
- **Waiver for certain victims.** Sometimes victims of domestic violence also are “cross-charged” with a DV offense after a violent incident, and they may plead guilty. A discretionary waiver can help people who have become deportable under the DV ground, but who can show that they were primarily the victim in the relationship, and make other showings. See INA § 237(a)(7). This waiver also can be used to prevent a deportable DV disposition from acting as a bar to eligibility for ten-year or VAWA cancellation of removal for non-permanent residents. See INA § 240A(b)(5). One can apply to waive a conviction of a domestic violence or a stalking offense, or a judicial finding of having violated a DV protective order.
- **DACA.** A conviction of a crime of domestic violence is a bar to DACA (Deferred Action for Childhood Arrivals), as a “significant misdemeanor.” Note that officers making DACA adjudications do not use the categorical approach, or a specific generic definition, to decide whether a conviction is a “crime of domestic violence.” Many applicants have been denied DACA because they were charged with a domestic violence offense, even if that charge was dismissed and they pleaded guilty to a non-DV offense. See resources on DACA and crimes.⁶
- **Mandatory detention.** Being deportable under the DV ground alone does not subject the person to mandatory detention. See INA § 236(c), 8 USC § 1226(c), and online practice advisory.⁷

³ Ten-year cancellation of removal is barred if the person was “convicted of an offense under” the crimes deportability and inadmissibility grounds. See INA § 240A(b)(1)(C), 8 USC § 1229b(b)(1)(C). The Ninth Circuit held that the bar applies to any noncitizen *convicted of an offense described in the deportation ground*, and that it applies to people who entered without inspection (and who therefore are not actually subject to the deportation grounds), as well as those who have been admitted. *Gonzalez-Gonzalez v. Ashcroft*, 390 F.3d 649 (9th Cir. 2004). In contrast, VAWA cancellation is barred if the person actually is inadmissible or deportable under the crimes grounds, or convicted of an aggravated felony. INA § 240A(b)(2)(a)(iv), 8 USC § 1229b(b)(2)(a)(iv). Here the person must have been admitted in order to be deportable under the DV ground. See *Gonzalez-Gonzalez* at n. 3. See also waiver for persons who are primarily the victim in the relationship, discussed in text.

⁴ See *Matter of Campos-Torres*, 22 I&N Dec. 1289 (BIA 2000) (interpreting INA § 240A(d), 8 USC § 1229b(d)).

⁵ See ILRC, *Practice Advisory: Cancellation of Removal for Permanent Residents* (November 2019) at www.ilrc.org/crimes.

⁶ See materials at www.ilrc.org/daca.

⁷ See ILRC, *Practice Advisory: How to Avoid Mandatory Detention* (May 2018), available at <https://www.ilrc.org/how-avoid-mandatory-ice-detention>.

For further discussion of defense strategies to show eligibility for different forms of relief despite a criminal record, see *Removal Defense* (ILRC 2019 edition forthcoming), available at www.ilrc.org/publications and see the free resource *N.17 Relief Toolkit* at www.ilrc.org/chart.

Other consequences. Advocates should consider whether the conviction, judicial finding, or conduct has any other potential immigration consequences.

- **Other removal grounds.** An offense that involves domestic violence or child abuse might also constitute an inadmissible or deportable crime involving moral turpitude, or make the person inadmissible based on two or more convictions with an aggregate sentence of five years or more. It might be an aggravated felony, either as a “crime of violence” where a sentence of one year or more was imposed, or sexual abuse of a minor, or rape. See INA § 101(a)(43)(A), (F). For California offenses, check the California *Chart*; sign up at www.ilrc.org/chart.
- **Other bars to relief.** Any criminal conviction is a negative factor for purposes of relief, but some convictions are absolute bars to relief, or trigger stricter standards for granting relief. Depending on the facts, the conviction might qualify as a “particularly serious crime” (asylum and withholding), a “violent or dangerous” offense (asylum, adjustment, § 212(h)), or a “significant misdemeanor” (DACA). Check the ILRC *Relief Toolkit*⁸ for a concise discussion of eligibility for, and crimes bars to, the various forms of immigration relief.

II. Crime of Domestic Violence: *Dimaya*, *Stokeling*, and *Matter of H. Estrada*

To be deportable under INA § 237(a)(2)(E)(i) based on a conviction of a “crime of domestic violence”:

- a) the person must be convicted of a **crime of violence as defined at 18 USC § 16(a)**, where
- b) sufficient evidence proves that the victim and perpetrator **shared a qualifying domestic relationship**, as that is defined under the DV ground.

The conviction must have occurred after admission and on or after September 30, 1996. All of these factors must be met for it to be a deportable crime of domestic violence under this prong.

A. Conviction of a “Crime of Violence”: *Dimaya*, *Stokeling*, and 18 USC § 16(a)

An offense never is a deportable crime of domestic violence unless it is a “crime of violence” (“COV”), as defined by 18 USC § 16(a) (“an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another”). See INA § 237(a)(2)(E)(i). For example, California spousal battery, Pen C § 243(e), is an offense relating to domestic violence, but it is not a deportable “crime of domestic violence,” because the minimum conduct required for § 243(e) is an offensive touching, and that does not meet the definition of a COV at 18 USC § 16(a).⁹

⁸ See ILRC, *N.17 Defenders’ Relief Toolkit* at www.ilrc.org/chart. For more extensive discussion see manuals such as *Removal Defense* (ILRC 2019 edition forthcoming), available at www.ilrc.org/publications.

⁹ See, e.g., *Matter of Sanudo*, 23 I&N Dec. 968 (BIA 2006). While *Sanudo* held that Pen C § 243(e) was “divisible” between violent and offensive conduct, subsequent Supreme Court precedent has established that it is not divisible. See ILRC, *How to Use the Categorical Approach Now* (2019 version forthcoming), available at www.ilrc.org/crimes.

For the most up-to-date discussion of which California offenses are COVs, advocates can consult resources such as the California *Chart* and *Blog*. Advocates can sign up at www.ilrc.org/chart. But at this writing:

- **COVs.** Commonly charged offenses that are held COVs include Pen C §§ 245 (serious assault), 273.5 (serious domestic battery), and 422 (criminal threat). In an arguably incorrect case, the Ninth Circuit held that § 243(d) (battery with injury) is a COV. *U.S. v. Perez*, 932 F.3d 782 (9th Cir. 2019).
- **Not COVs.** Commonly charged offenses that are not COVs, and therefore may be good alternatives to avoid a deportable crime of DV, include Pen C §§ 32, 136.1(b)(1), 236/237 (misdemeanor), 243(a), 243(e), 459/460(a) or (b), 591, 594, possession of any weapon, and arguably offenses such as §§ 207(a), 236/237 (felony), and 243.4. Note that some carry other immigration consequences, e.g., as crimes involving moral turpitude, that also must be considered; see the California *Chart*.

Discussion. The “crime of violence” definition at 18 USC § 16 has two subsections: § 16(a) (the “elements” clause) and § 16(b) (the “residual clause”). In 2018, the Supreme Court struck down § 16(b) for being unconstitutionally vague. *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), upholding *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015). Now, 18 USC § 16(a) is the only applicable definition for a “crime of violence.” This means that fewer offenses will be deportable crimes of domestic violence, because fewer offenses will be “crimes of violence.”

This section will provide a brief summary of *Dimaya* and discuss how this change affects some California offenses. For a more detailed analysis of *Dimaya* and its consequences, and sample pleadings for reopening immigration proceedings based on the decision, see the California *Chart* and online practice advisories.¹⁰ This section also discusses the Supreme Court’s 2019 *Stokeling* decision, which defines a COV.

***Dimaya* and 18 USC § 16.** For immigration purposes, a crime of violence is defined at 18 USC § 16. In *Dimaya*, the U.S. Supreme Court held that part of this definition – 18 USC § 16(b) – is void for vagueness and can no longer be used. Section 16(b) had stated that a felony offense is a COV if “by its nature” it involves a “substantial risk” that force could be used. Under *Dimaya*, all precedent finding a conviction to be a COV under § 16(b) or similar federal definitions is reversed. With § 16(b) gone, some felony offenses that used to be COVs no longer are: they came within the § 16(b) definition, but they do not come within the narrower § 16(a) definition.

The current definition of a crime for violence for immigration purposes is:

18 USC § 16. The term “crime of violence” means –

(a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another.

A full discussion of the meaning of “force” under 18 USC § 16(a) is beyond the scope of this advisory. Advocates can check offenses on the California *Chart* or other resources. Generally, “force” here means violent,

¹⁰ See NIPNLG and IDP, *Sessions v. Dimaya: Supreme Court strikes down 18 USC § 16(b) as void for vagueness* (2018), available at <http://nipnlg.org/practice.html>

aggressive force. Courts have interpreted § 16(a) to exclude offenses that can be violated by an offensive touching, e.g., Pen C § 243(e); negligent conduct, e.g., DUI or DUI with injury, absent a special intent requirement; and recklessness (although ICE might assert that recklessness should be included¹¹).

Impact of *Dimaya* on California offenses. Any felony that was held a COV only under 18 USC § 16(b), and that does not meet the definition at § 16(a), is no longer a COV. There are holdings or arguments that the following California felonies (and misdemeanors) are not a COV under 18 USC § 16(a):

- California Pen C § 207(a) (kidnapping, see also *Stokeling* discussion, below);
- § 236/237 (false imprisonment, see also *Stokeling* discussion, below);
- § 243.4 (sexual battery, see also *Stokeling* discussion, below);
- § 460(a) (residential burglary);
- § 646.9 (stalking, see discussion at Part III, below); and
- § 33215 (possession of a sawed-off shotgun).

This is a beginning list; advocates may identify more offenses that no longer are crimes of violence, as we continue to apply *Dimaya*. For further discussion, see endnotes to these offenses in the California *Chart* (sign up at www.ilrc.org/chart).

Dimaya should apply retroactively, so that some prior convictions no longer can be held a deportable crime of domestic violence and/or a crime of violence aggravated felony. If you have a current or past client penalized under these provisions, review the case to see if *Dimaya* might change the analysis. A person previously found deportable and/or ineligible for relief because of a conviction found to be a crime of DV or a COV under 18 USC § 16(b) may have a basis to file a motion to reopen or reconsider in light of *Dimaya*. Also, a person previously advised not to apply for an immigration benefit like adjustment of status or naturalization because of such a conviction might now be safely eligible to apply for such a benefit. In these cases, investigate whether the person could re-apply for some relief or move to reopen a prior decision – even if the person already has been removed. See discussion and sample pleadings for dealing with older convictions in online practice advisory.¹²

Stokeling and Crimes of Violence. Following *Dimaya*, the Supreme Court addressed a definition of COV that is identical to 18 USC § 16(a), in *Stokeling v. United States*, 139 S.Ct. 544 (2019). *Stokeling* held that *if overcoming the will of the victim is an element of the offense*—as it was in the Florida robbery offense at issue—then, due to the nature of that confrontation, even a minimal use of force amounts to a COV. Significantly, the Court stated that the *Stokeling* rule does *not* apply to offenses such as classic battery that can be committed by a minimal touching. *Id.* at 553. Overcoming the will of the victim is not a requirement for committing simple battery.

¹¹ See discussion of *Voisine v. United States*, 136 S.Ct. 386 (2016) in NIPNLG/IDP, *Practice Alert: Voisine v. United States* (2016), available at <http://nipnlg.org/practice.html>

¹² See the NIPNLG/IDP practice advisory on *Dimaya*, fn. 6, above.

See further discussion of *Stokeling*'s effect on individual offenses in the California *Chart* and the *Stokeling* practice advisory.¹³ Note that California offenses that could be construed as having overcoming the will of the victim with force as an element could include robbery (Pen C § 211), sexual battery (Pen C § 243.4), some kidnapping (Pen C § 207(a)) and false imprisonment (Pen C § 236/237). But it is not clear that all are COVs. Arguably, § 207(a) is not a COV under *Stokeling* because it can be committed by threat of arresting the victim, which involves no threat of force (not even a threat to use minimal force).¹⁴ Felony §§ 236/237 can be committed by “violence, menace, fraud, or deceit.” Perhaps this offense committed by “violence” alone would be a COV. However, felony §§ 236/237 as a whole should be held indivisible¹⁵ between violence and the other, non-violent options of fraud, deceit, and menace (which includes threat of arrest).¹⁶ Because §§ 236/237 should be found indivisible, even a plea to violence should not be a COV—but criminal defenders still should try to plead to one of the other means, to prevent mistaken COV charges.

Aggravated Felony if a Year or More Sentence is Imposed; *Thomas/Thompson* and Pen C § 18.5(b). This advisory focuses on COVs in the context of the domestic violence deportation ground, INA § 237(a)(E)(i). It's important to remember, however, that a conviction of a COV as defined at 18 USC § 16(a) also is an “aggravated felony” for immigration purposes, *if* a sentence of one year or more has been imposed (with or without a domestic relationship). INA § 101(a)(43)(F), 8 USC § 1101(a)(43)(F). The same definition of COV applies here, so that some convictions that were aggravated felonies as COVs now no longer are, because under *Dimaya* they no longer meet the definition of a COV.

One can prevent a COV from being an aggravated felony by going to criminal court and asking the judge to reduce the sentence imposed to something less than a year. Recently, Attorney General Barr sharply limited when immigration authorities will give effect to a state court's reduction of an imposed sentence. In *Matter of Thomas/Matter of Thompson*, 27 I&N Dec. 674 (AG October 25, 2019), the AG set out a new rule, which is that a court must reduce an imposed sentence *due to a ground of legal invalidity*, for the reduction to have immigration effect. This reversed the rule that was in place for decades, which was that a state court's reduction of a sentence has immigration effect regardless of the court's basis for reducing it. In California, this ruling can harm people whose imposed sentences were reduced to 364 days under Pen C § 18.5(b). These people should consider returning to criminal court to try to obtain an additional form of post-conviction relief, such as Pen C § 1473.7, to vacate the conviction itself and re-plead to a disposition that is not an aggravated felony. See practice advisory on *Matter of Thomas/Matter of Thompson*,¹⁷ and for information on post-

¹³ See ILRC, *Stokeling v. United States* (January 2019) at www.ilrc.org/crimes. *Stokeling* addressed the definition of a crime of violence under the elements clause of the ACCA, a federal sentence enhancement statute that is nearly identical to 18 USC § 16(a).

¹⁴ Felony kidnapping, Pen C § 207(a), was held a COV under § 16(b) but not § 16(a). *Delgado-Hernandez v. Holder*, 697 F.3d 1125 (9th Cir. 2012). Arguably this also is not a COV under *Stokeling*, *supra*, because even if overcoming the will of the victim is an element, the threat can be threat of arrest, which involves no use of force. *People v. Majors* (2004) 33 Cal.4th 321.

¹⁵ The four options are means rather than elements, because a jury is not required to decide unanimously between them. See CALCRIM 1240 and *People v. Henderson* (1977) 19 Cal. 3d 86, 95.

¹⁶ Felony Pen C §§ 236/237 can be committed by menace, including threat of arrest. *People v. Moore* (1961) 196 Cal.App.2d 91, 99. Arguably that is not a COV under *Stokeling* because it involves no violence.

¹⁷ See ILRC, *AG Overturns Sentence Modification Rule: Matter of Thomas & Matter of Thompson* (October 2019) at https://www.ilrc.org/sites/default/files/resources/matter_of_thomas_sentence_pcr.pdf

conviction relief generally for immigrants, especially under California law, see resources at www.ilrc.org/immigrants-post-conviction-relief.

A. Qualifying Domestic Relationship: *Tokatly* versus *Matter of H. Estrada*

To qualify as a deportable crime of domestic violence, the conviction must be of a crime of violence (COV) under 18 USC § 16(a), and it also must involve a qualifying domestic relationship. This includes any relationship protected under state DV laws. Section 237(a)(2)(E)(i) defines the offense as a COV:

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.

What standards govern how ICE must prove the qualifying relationship? The relationship is always proved if it is an *element* of the offense. For example, Pen C § 273.5, domestic battery with traumatic injury, has a domestic relationship as an element of the offense; by definition, all relationships listed in § 273.5 are protected under state DV laws, so that element is proved. Of course, besides involving a qualifying relationship, the offense must be a COV. For example, Pen C § 243(e) meets the relationship requirement because that is an element of the offense. It is not a deportable crime of DV, however, because it is not a COV based on the fact that it can involve a mere offensive touching. See Part A, above.

What if the offense is a COV, but it does not have a relationship as an element? Here the Ninth Circuit and BIA disagree. In older cases, the Ninth Circuit held that under the categorical approach, the record of conviction must contain facts that conclusively prove the relationship. For example, if the conviction was for Pen C § 422 (criminal threat, a COV), and during the plea colloquy the defendant had admitted that the victim was his ex-spouse, that would be evidence from the reviewable record proving a qualifying domestic relationship. But the court held that if the record is vague as to the relationship, the conviction is not a deportable crime of domestic violence. See *Tokatly v. Ashcroft*, 371 F.3d 613 (9th Cir. 2004); *Cisneros-Perez v. Gonzales*, 451 F.3d 1053 (9th Cir. 2006).

In contrast, the Board of Immigration Appeals (BIA) and some other federal circuit courts of appeals hold that the categorical approach does not apply at all to proving the relationship. Instead, the fact-based “circumstance specific” test applies to the relationship, and that permits ICE to use any relevant and probative evidence, including evidence from outside the conviction record, to prove it. *Matter of H. Estrada*, 26 I&N Dec 749 (BIA 2016). Under that rule, in the above example of the conviction for Pen C § 422, if the record did not discuss the victim and defendant's relationship, ICE still could prove it in removal proceedings by introducing evidence such as the victim's and defendant's divorce ruling, or testimony from the victim or other witnesses. If the evidence was sufficiently credible, the person would be found deportable.

Because the law is unsettled, criminal defense counsel must conservatively assume that the BIA's rule will be used. Counsel should try to arrange a plea either to (a) an offense that is not a COV under 18 USC § 16(a) (in which case it is not a deportable crime of DV even if there is a domestic relationship), or (b) an offense that is

a COV, but that is committed either against property or against a *specific person* with whom the defendant does not share a protected relationship (e.g., the ex-girlfriend's new boyfriend, the police officer, the neighbor). Remember that regardless of any relationship, a single conviction of a COV will become an aggravated felony if a sentence of one year or more is imposed. See Part A, above.

Immigration advocates in removal proceedings in the Ninth Circuit can continue to assert *Tokatly*, which is governing law, but they must try hard to create an additional defense strategy. ICE may appeal decisions relying on *Tokatly*, and someday the Ninth Circuit may well decide to abandon *Tokatly* and adopt the BIA's rule. Advocates also can argue that no offense should be a deportable crime of DV unless the relationship is an element of the offense, although that will be aggressively contested. For further discussion see ILRC, *Deportable Crimes of Domestic Violence, Matter of H. Estrada* (2016), at www.ilrc.org/crimes.

III. Conviction of Stalking: *Matter of Sanchez-Lopez* (2018)

A conviction for a "crime of stalking" is a deportability ground within INA § 237(a)(2)(E)(i). The stalking can be against anyone; it is not limited to domestic relationships. The conviction must be after admission and after September 30, 1996.

The categorical approach applies to the determination of whether a conviction is a "crime of stalking." The BIA's adopted generic definition of a "crime of stalking" is: "(1) conduct that was engaged in on more than a single occasion, (2) which was directed at a specific individual, (3) with the intent to cause that individual or a member of his or her immediate family to be placed in fear of bodily injury or death." *Matter of Sanchez-Lopez*, 27 I&N Dec. 256, 258 (BIA 2018). There is a fourth element regarding the consequences of the stalking conduct, which the BIA has not taken a position on.

Reversing its own prior precedent, the BIA held that Pen C § 646.9, California stalking, is *not* a deportable crime of stalking. It held that § 646.9 is overbroad and indivisible because it prohibits intent to cause fear for one's "safety," while the generic definition of stalking requires intent to cause fear of "death or bodily injury." Therefore, no conviction of § 646.9 is a deportable "crime of stalking." *Matter of Sanchez-Lopez*, 27 I&N Dec. 256 (BIA 2018), overruling *Matter of Sanchez-Lopez*, 26 I&N Dec. 72 (BIA 2012).

The 2018 *Sanchez-Lopez* decision should apply retroactively, so that prior § 646.9 convictions no longer can be held deportable crimes of stalking. If you have a current or past client who was penalized under these provisions, review the case and investigate whether the person could re-apply for some relief or move to reopen a prior decision – even if the person already has been removed. See discussion and sample pleadings for dealing with older convictions in online practice advisory.¹⁸

Other immigration consequences of Pen C § 646.9. Section 646.9 still can become an aggravated felony or a deportable crime of domestic violence, *if* it is held to be a crime of violence (COV) under 18 USC § 16(a). It should not be, however. The Ninth Circuit held that at least harassing under § 646.9 is not a COV. *Malta-Espinoza v. Gonzales*, 478 F.3d 1080 (9th Cir. 2007). At the time, the court held that § 646.9 was divisible, but under subsequent Supreme Court precedent on the categorical approach it should not be; therefore no § 646.9 conviction should be a COV. The BIA declined to follow *Malta-Espinoza* outside the Ninth Circuit's

¹⁸ See the NIPNLG/IDP practice advisory on *Dimaya* cited above, which addresses reopening based on changed law.

jurisdiction. *Matter of U. Singh*, 25 I&N Dec. 670, 676-677 (BIA 2012). But the BIA found § 646.9 to be a COV only under 18 USC § 16(b), which was struck down by *Dimaya*.

Criminal defense counsel should conservatively assume that stalking under Pen C § 646.9 is a crime involving moral turpitude (CIMT), because the BIA so held, albeit in dicta.¹⁹ Immigration advocates may contest this, although they must seek additional defense strategies as well.

IV. Conviction of a Crime of Child Abuse, Neglect, or Abandonment

The DV deportation ground provides that a conviction of a “crime of child abuse, child neglect, or child abandonment” (hereafter, “crime of child abuse”) causes deportability. INA § 237(a)(2)(E)(i). The conviction must have occurred after admission to the United States and on or after September 30, 1996. The BIA has created vague definitions of these terms, which makes it hard to predict which convictions might trigger a charge of deportability. The BIA stated that its definitions apply equally to the three categories (abuse, neglect, and abandonment).²⁰

Child endangerment statutes and Pen C § 273a. The good news is that the BIA stated that a less serious California child endangerment statute, Pen C § 273a(b), is *not* a crime of child abuse. *Matter of Mendoza-Osorio*, 26 I&N Dec. 703, 710 (BIA 2016).

Regarding Pen C § 273a(a), criminal defense counsel must assume conservatively that both felony and misdemeanor 273a(a) are deportable child abuse convictions. In response to a § 273a(a) charge, defenders can offer a plea to § 273a(b) and, if needed, to an additional, immigration-neutral misdemeanor or felony such as vandalism. Immigration advocates who are considering affirmative applications, such as for naturalization, also should assume that any 273a(a) conviction makes the person deportable.

However, the § 273a(a) issue is not resolved in the Ninth Circuit. Advocates in removal proceedings can argue that it is not deportable child abuse. Among other reasons, child “endangerment” is a distinct offense and term of art that arguably is not included in the terms “child abuse, child neglect, or child abandonment.” In *Martinez-Cedillo v. Sessions*, a three-judge panel held that § 273a(a) is a crime of child abuse, neglect, or abandonment, but the Ninth Circuit granted a petition for rehearing *en banc*. However, Mr. Martinez-Cedillo died soon after that, so the *en banc* appeal was dismissed as moot and the panel decision was vacated.²¹ This means that there is no precedent Ninth Circuit decision on § 273a(a), and that the court may be willing to consider this argument.

¹⁹ In *Matter of U. Singh*, cited in text, the BIA assumed without discussion that Pen C § 646.9 is a CIMT. See also *Matter of Ajami*, 22 I&N Dec. 949 (1999) (finding that Michigan *aggravated* stalking is a CIMT).

²⁰ See *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008); *Matter of Soram*, 25 I&N Dec. 378, 380-81 (BIA 2010); and *Matter of Mendez-Osorio*, 26 I&N Dec. 703, 710 (BIA 2016).

²¹ See *Martinez-Cedillo v. Barr*, 918 F.3d 601 (9th Cir. 2019), granting a petition for rehearing *en banc* and designating *Martinez-Cedillo v. Sessions*, 869 F.3d 979 (9th Cir. 2018) as non-precedential. Then see *Martinez-Cedillo v. Barr*, 923 F.3d 1162 (9th Cir. May 16, 2019) dismissing the appeal as moot, and vacating the panel decision, due to the death of the petitioner.

The Ninth Circuit held that § 273a(a) and (b) are categorically *not* crimes of violence, because they are overbroad and indivisible. Furthermore, neither should be held a crime involving moral turpitude.²²

DUI with child in the car. Conviction of a DUI with an enhancement for having a minor in the car (Veh C § 23572) is being held a deportable child abuse offense. Defenders should try to bargain for a DUI (or better, a wet reckless or some other offense) plus a § 273a(b), instead of the enhancement.

Age-neutral offenses. An age-neutral offense is one that does not have age of the victim as an element. An example of an offense that does have age as an element is Pen C § 261.5(d), which requires the victim to be of a specific, minor age.

Under the categorical approach, an age-neutral offense *never* can be held a deportable crime of child abuse, even if the record of conviction shows that the victim was under age 18. However, due to an older BIA decision that did not correctly apply the categorical approach, immigration advocates should be prepared to explain this rule and criminal defenders should keep information about minor age out of the record in order to avoid any erroneous immigration charges. The BIA agrees that the categorical approach governs whether an offense is a deportable crime of child abuse.²³ In 2008 the BIA held that a simple battery statute, which had no element relating to age, was not categorically (always) a crime of child abuse, but that it was divisible. If the record of conviction had conclusively proved that the victim in the case was under age 18, the conviction would have been deportable child abuse. See *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008). This aspect of *Velazquez-Herrera* was overruled by subsequent U.S. Supreme Court rulings, which the BIA has adopted. These decisions make clear that a statute is divisible only if it sets out multiple offenses phrased in the alternative, and at least one of the offenses is made up of elements that match the generic definition at issue.²⁴ Because an age-neutral statute has no element, or even statutory language, requiring minor age, it is not divisible and is never a deportable crime of child abuse, regardless of information in the record.

V. Violation of a Protective Order: Ninth Circuit Defers to *Matter of Obshatko*

Noncitizens are deportable if a civil or criminal court judge makes a finding that they violated a portion of a domestic violence (DV) protective order that “involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection order was issued.” INA 237(a)(2)(E)(ii). The conduct that constituted the violation (as opposed to the court finding of violation) must have occurred after admission and on or after September 30, 1996. The BIA has taken the position that this inquiry is not governed by the categorical approach, and the Ninth Circuit has deferred to that position. See *Diaz-Quirazco v. Barr*, 931 F.3d 830 (9th Cir. 2019).

²² See *Ramirez v. Lynch*, 810 F.3d 1127, 1133-38 (9th Cir 2016), holding that § 273a(a) is categorically not a crime of violence because it is an indivisible statute that can be committed by negligence. The same analysis applies to moral turpitude. Section 273a can be violated by wholly passive conduct, or good faith but unreasonable belief that the conduct is in the child’s best interest. See endnotes to California *Chart*.

²³ See, e.g., *Velazquez-Herrera*, 24 I&N Dec. at 503; *Matter of Soram*, above; *Matter of Mendez-Osorio*, above; and *Fregozo v. Holder*, 576 F.3d 1030, 1035 (9th Cir. 2009).

²⁴ See discussion of *Mathis v. United States*, 136 S. Ct. 2243 (2016) in *Matter of Chairez*, 27 I&N Dec. 21 (BIA 2017) and preceding *Chairez* decisions, and see ILRC, *How to Use the Categorical Approach Now*, at fn. 5, above.

This is a dangerous removal ground because it may be found to include a finding of *any* violation of a DV “stay-away” order, no matter how innocuous the conduct. The BIA and the Ninth Circuit state that the test is whether the person was found to have violated the part of the order that is *meant to protect against* threats, harassment, etc., even if the person did not actually do those things. The Ninth Circuit held that a permanent resident was deportable because a court had found that he violated a DV stay-away order by walking his child halfway up the driveway after visitation, rather than dropping the child at the curb. Although the man did not engage in harassment or threats, the Ninth Circuit held that because he was found to have violated the section of the DV order designed to protect against these, he was deportable.²⁵

How does ICE prove that there is a qualifying judicial ruling that makes this finding? Say that it is established that a civil or criminal court judge found that the person violated some kind of order. Did this finding relate to a DV protective order, and if so was it for the part of the order protecting against repeated harassment, threat, or injury? The BIA held that because INA § 237(a)(2)(E)(ii) does not use the statutory term “conviction,” therefore the categorical approach does not apply at all – even if in fact a conviction is the basis for deportability. Instead, for this ground the immigration judge

should consider the probative and reliable evidence regarding what a State court has determined about the alien’s violation. In so doing, an Immigration Judge should decide (1) whether a State court “determine[d]” that the alien “has engaged in conduct that violates the portion of a protection order that involve[d] protection against credible threats of violence, repeated harassment, or bodily injury” and (2) whether the order was “issued for the purpose of preventing violent or threatening acts of domestic violence.”

***Matter of Obshatko*, 27 I&N Dec. 173, 176-77 (BIA 2017).**

The Ninth Circuit earlier had held that the categorical approach did apply in this inquiry. See *Alanis-Alvarado v. Holder*, 558 F.3d 833, 836-38 (9th Cir. 2009). However, in 2019 the Ninth Circuit decided to defer to the Board and reversed *Alanis-Alvarado*. See *Diaz-Quirazco v. Barr*, 931 F.3d 830 (9th Cir. 2019).²⁶ Advocates may make a retroactivity argument that guilty pleas or agreements from before November 17, 2017 (the date that *Matter of Obshatko* was published) should not be subject to the *Obshatko* rule, because defendants may have relied on the rule in *Alanis-Alvarado*, which was in force between its publication date of September 3, 2008 and *Obshatko*’s publication on November 17, 2017. See discussion of the federal court rules against retroactive application of new agency standards established through adjudication in, e.g., *Miguel-Miguel v. Gonzales*, 500 F.3d 941 (9th Cir. 2007). Advocates also can investigate arguments that this should apply to guilty pleas or civil agreements received even before *Alanis-Alvarado* was decided.

²⁵ See *Szalai v. Holder*, 572 F.3d 975 (9th Cir. 2009), cited approvingly in *Matter of Strydom*, 25 I&N Dec. 507 (BIA 2011); see also *Alanis-Alvarado v. Holder*, 558 F.3d 833, 835, 839-40 (9th Cir. 2009).

²⁶ The court deferred to the BIA under *Chevron/Brand X* principles. See ILRC, *Overview of Chevron, Mead, and Brand X Principles* (2011) at www.ilrc.org/crimes. In *Diaz-Quirazco* the court decided to defer to *Matter of Medina-Jimenez*, 27 I&N Dec. 399 (BIA 2018) and *Matter of Obshatko*, *supra*, and withdraw from its holding on the categorical approach in *Alanis-Alvarado v. Holder*, 558 F.3d 833, 835, 839-40 (9th Cir. 2009).

Finally, remember that the issue is *what findings the court made*, not what conduct took place. Evidence that the person actually did violate this kind of order does not prove deportability. ICE must prove that a court specifically found the person to have violated the applicable provisions of a qualifying DV order.

Criminal defenders should act conservatively and try to never admit to violating any DV stay-away order, but instead should plead either 1) to violating a specific provision of the order that does not trigger deportation, for example relating to visits, custody, child support, or possibly anger management classes, or else 2) to a new offense not relating to violation of an order. (While it may not be necessary, the very safest course is to plead to a new offense involving a different victim, whom the order was not intended to protect.)



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