



IMMIGRATION CONSEQUENCES OF TEXAS ASSAULT

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Table of Contents

I. The Texas Assault Statute at Tex. Penal Code § 22.01	2
A. Domestic Violence-Related Assault	2
B. Characterization of Offenses and Potential Sentences	3
II. Immigration Consequences of a Texas Assault Conviction	4
A. Crime Involving Moral Turpitude	4
B. Aggravated Felony	5
C. Crime of Domestic Violence	8
III. Examples	9
A. Amal – Lawful Permanent Resident (LPR)	9
B. Trinidad - Undocumented	9
C. Angel – DACA Recipient	10
IV. Mitigating the Risks in Criminal Proceedings	10
A. Alternative Offenses	10
B. Sentencing	11
V. Conclusion	11
VI. Appendix – Immigration Consequences for Texas Assault by Statutory Subsection	12

Convictions can trigger a variety of immigration consequences for noncitizens, from losing immigration status to becoming ineligible for forms of immigration relief or even bond. This advisory¹ analyzes the consequences of a conviction for assault under Texas Penal Code § 22.01. Assault is a common charge in Texas, accounting for 16% of misdemeanor cases filed statewide in 2021.² This advisory is geared towards legal practitioners representing or advising noncitizen clients with prior or pending Texas assault charges.³

I. The Texas Assault Statute at Tex. Penal Code § 22.01

There are three ways to violate the basic Texas assault statute, each corresponding to a separate subsection of the statute:

- (1) by causing bodily injury (“assault-bodily-injury”), Tex. Penal Code § 22.01(a)(1);
- (2) by threatening bodily injury (“assault-by-threat”), Tex. Penal Code § 22.01(a)(2);
- (3) by causing offensive or provocative contact (“assault-by-contact”), Tex. Penal Code § 22.01(a)(3).

Of these subsections, assault-bodily-injury tends to be the most commonly charged subsection. For each, the *mens rea*—the mental state—includes intentional or knowing conduct. Though, importantly, assault-bodily-injury can also be committed recklessly.

A. Domestic Violence-Related Assault

Texas does not have a separate misdemeanor domestic violence-related assault statute. The assault-bodily-injury and assault-by-threat subsections explicitly reference that “a person’s spouse” may be a victim, but the relationship between the defendant and victim is not an element of the misdemeanor offense. Even so, state law requires the judge to enter an affirmative finding

¹ This advisory is not legal advice and is not a substitute for individualized case consultation and research. The law referenced in this advisory may change after publication. Many thanks to Jordan Pollock and Kathrine Russell for their review and comment.

² *Annual Statistical Report for the Texas Judiciary, Fiscal Year 2021*, Office of Court Administration, available at <https://www.txcourts.gov/media/1454127/fy-21-annual-statistical-report-final.pdf> at 16.

³ This advisory assumes that the reader already understands how criminal convictions can affect noncitizens and will not cover: the definition of a conviction for immigration purposes; grounds of inadmissibility and deportability and to whom each applies; use of the categorical approach in analyzing criminal offenses; the requirements for different forms of relief from removal; or immigration consequences of other Texas assault statutes. For more information on these topics, see ILRC, *What Qualifies as a Conviction for Immigration Purposes?*, (April 5, 2019) <https://www.ilrc.org/what-qualifies-conviction-immigration-purposes>; Inadmissibility & Deportability (ILRC 2019); ILRC, *How to Use the Categorical Approach Now*, (Oct. 5, 2021) <https://www.ilrc.org/how-use-categorical-approach-now-2021>; ILRC, *Immigration Relief Toolkit for Criminal Defenders*, 2018, (Aug. 27, 2018) https://www.ilrc.org/sites/default/files/resources/relief_toolkit-20180827.pdf. See also *Removal Defense: Defending Immigrants in Immigration Court* (ILRC 2020).

of “family violence” when the court determines that family violence was involved.⁴ Family violence is involved when the defendant and victim are: individuals related by blood or marriage, including ex-spouses and unmarried parents of the same child; individuals who live together even if unrelated; or individuals who have or have had a “continuing relationship of a romantic or intimate nature.”⁵ The State typically charges these cases as assault-bodily-injury with the charging and conviction documents reflecting “Assault Family Violence.” An “Assault Family Violence” charge can be a felony offense in certain circumstances, in which case the family relationship becomes an element of the offense, as described further below.

B. Characterization of Offenses and Potential Sentences

Assault-bodily-injury under § 22.01(a)(1) is a Class A misdemeanor,⁶ but the State can charge it as a second-degree or third-degree felony depending on characteristics of the victim (including the relationship with the defendant), the defendant’s prior criminal history, and the victim’s occupation.

Though a misdemeanor assault charge does not include the relationship between defendant and victim as an element, when punishable as a felony, it does. For example, assault-bodily-injury becomes a third-degree felony when committed against, generally, a family or household member *and* the defendant (1) has a prior domestic-violence related conviction, or (2) commits the offense by impeding breath (commonly referred to as assault strangulation).⁷ And when both of those are true, it becomes a second-degree felony.⁸ In those cases, the family or household relationship between defendant and victim is an element of the offense.⁹

⁴ Tex. Code of Crim. Pro. Art. 42.013.

⁵ Tex. Family Code § 71.0021(b), 71.003, or 71.005.

⁶ Tex. Penal Code §§ 12.21-23; 12.33-35. The potential sentence ranges for Texas offenses referenced in this advisory are:

Second-degree felony: 2-20 years;

Third-degree felony: 2-10 years;

Class A misdemeanor: 1 year or less;

Class B misdemeanor: 180 days or less;

Class C misdemeanor: fine-only.

⁷ Tex. Penal Code § 22.01(b)(2).

⁸ Tex. Penal Code § 22.01(b-3).

⁹ See *Apprendi v. New Jersey*, 530 US 466, 490 (2000) (establishing rule to differentiate between a sentencing enhancement and an offense element); *Matter of German-Santos*, 28 I&N Dec. 552, 554 (BIA 2022) (applying *Apprendi* to determine when a statute defines a separate criminal offense under federal immigration law).

Other victim characteristics can also lead to increased potential punishment. Assault-bodily-injury becomes a second- or third-degree felony when the defendant commits the offense against a public servant, peace officer, judge, or certain other government and public actors.¹⁰

Similarly, assault-by-threat and assault-by-contact under § 22.01(a)(2)-(3) are Class C misdemeanors. Nevertheless, they become Class A or B misdemeanor offenses when the victim has certain characteristics, like being elderly or disabled.¹¹

II. Immigration Consequences of a Texas Assault Conviction

A. Crime Involving Moral Turpitude

A “crime involving moral turpitude” (CIMT) can trigger both inadmissibility under INA § 212(a)(2)(A) and deportability under INA § 237(a)(2)(A)(i)-(ii).¹²

1. Assault-bodily-injury - § 22.01(a)(1)

Assault-bodily-injury under § 22.01(a)(1) is not a “crime involving moral turpitude.” In *Gomez-Perez v. Lynch*, the Fifth Circuit held that the assault-bodily-injury subsection is not divisible. That is because the mental states in the statute—intentional, knowing, or reckless—are means to commit a single offense rather than elements of distinct offenses. This means the jury need not agree on the mental state to convict. Looking only at the minimum conduct necessary to violate the statute—the test applicable to CIMTs in the Fifth Circuit¹³—a “reckless” assault-bodily-injury, without more, does not rise to morally turpitudinous levels, so the statute is categorically overbroad.¹⁴

What if the assault-bodily-injury was a family violence offense? Since the Fifth Circuit decided that the statute is overbroad in *Gomez-Perez*, the Board of Immigration Appeals (BIA) has issued unpublished decisions holding that assault-bodily-injury under § 22.01(a)(1) is not a

¹⁰ Tex. Penal Code § 22.01(b)(1), (b)(3), (b-1), (b-2).

¹¹ Tex. Penal Code § 22.01(c).

¹² References in this section are to either convictions for immigration purposes or legally sufficient admissions. For more, see ILRC, *All Those Rules About Crimes Involving Moral Turpitude*, (June 22, 2021) <https://www.ilrc.org/all-those-rules-about-crimes-involving-moral-turpitude>.

¹³ *Mercado v. Lynch*, 823 F.3d 276 (5th Cir. 2016).

¹⁴ *Gomez-Perez v. Lynch*, 829 F.3d 323 (5th Cir. 2016); *Matter of Fualaau*, 21 I&N Dec. 475 (BIA 1996).

CIMT even when family violence is involved. The BIA has reasoned that the finding of a domestic relationship in a misdemeanor assault family violence offense is made by the judge and not the jury: it is not an element of the offense.¹⁵

Assault-bodily-injury offenses with higher level punishments. Although assault-bodily-injury itself is not a CIMT, certain factors that define distinct offenses and increase the potential punishment for the offense can change whether the offense involves moral turpitude. For analyses of assault-bodily-injury offenses with increased punishments, see the appendix below with further discussion in the endnotes.

2. Assault-by-threat - § 22.01(a)(2)

Assault-by-threat under § 22.01(a)(2) is likely a CIMT because a conviction requires a knowing or intentional mental state.¹⁶ As a practical matter, however, this offense is not commonly charged except as a predicate for an aggravated assault § 22.02 (i.e., involving a deadly weapon), which is a CIMT due to the aggravating factor (the deadly weapon).¹⁷

¹⁵ *J-R-M-*, AXXX XXX 954 (BIA June 16, 2017); available for purchase at <http://www.irac.net/unpublished/index>. And practitioners generally report immigration judges are following this reasoning, finding assault-bodily-injury involving family violence is not a CIMT. *But see Calderon-Dominguez v. Mukasey*, 261 F. App'x. 671, 673 (5th Cir. 2008) (before *Gomez-Perez*, applying modified categorical approach to find that intentional assault of spouse was CIMT). *See Matter of German-Santos*, 28 I&N Dec. 552, 554 (BIA 2022) (discussing when state law's categorization as a "sentence enhancement" creates a distinct offense for federal immigration law).

¹⁶ *Matter of Ajami*, 22 I&N Dec. 952 (BIA 1999) ("[T]hreatening behavior can be an element of a crime involving moral turpitude ... intentional transmission of threats is evidence of a vicious motive or a corrupt mind."); *Matter of Salad*, 27 I&N Dec. 733 (BIA 2020) ("the communication of an intent to injure another by use of violence involves sufficiently reprehensible conduct to constitute a crime involving moral turpitude"); *see also Matter of Pedro Abdiel Alatorre Barrera*, 2014 WL 4966493, at *2 (BIA Sept. 10, 2014) (finding conviction for terroristic threats under Tex. Penal Code § 22.07 categorically a CIMT).

¹⁷ Tex. Penal Code § 22.02(a)(2). *See Matter of Cesar Trevino Rodriguez*, 2016 WL 8188590, at *4 (BIA Nov. 16, 2016) (concluding in post-*Gomez-Perez* and post-*Mathis* case "that one who commits an assault under any section of Tex. Penal Code § 22.01 while using or exhibiting a dangerous weapon in violation of Tex. Penal Code § 22.02(a)(2) is guilty of a crime involving moral turpitude, regardless of whether he or she recklessly causes bodily injury to another, specifically intends to threaten another with imminent bodily injury, or specifically intends to cause offensive or provocative contact with another" and that "the minimum reading of Tex. Penal Code § 22.02(a)(2) reaches only offenses involving moral turpitude, [so] it categorically qualifies as a crime involving moral turpitude.")

3. Assault-by-contact - § 22.01(a)(3)

Under *Matter of Solon*, assault-by-contact under § 22.01(a)(3) should not be a CIMT because it involves only “de minimus” or offensive touching, which the BIA has found is not morally reprehensible.¹⁸

B. Aggravated Felony

A conviction for an “aggravated felony” makes a person deportable and ineligible for most forms of relief. While there are many types of aggravated felonies defined at INA § 101(a)(43), the relevant one for this advisory is at INA § 101(a)(43)(F), defining “crime of violence” as an offense that has “as an element the use, attempted use, or threatened use of force.” 18 U.S.C. § 16(a). If an offense is a “crime of violence” and the sentence imposed is a term of imprisonment of one year or more, it will constitute an aggravated felony.

1. Misdemeanor assault-bodily-injury - § 22.01(a)(1)

In *Borden v. United States*, the Supreme Court held that a crime with a reckless mental state is insufficient to be a “violent felony” under the Armed Career Offender Act (ACCA).¹⁹ The Fifth Circuit then applied *Borden* to hold that § 22.01(a)(1) is not an aggravated felony because the ACCA “violent felony” and the aggravated felony crime of violence definitions are virtually identical.²⁰ As a result, a conviction for violating § 22.01(a)(1) can never be a crime of violence aggravated felony.

2. Felony assault-bodily-injury - § 22.01(b)

Section 22.01(b) of the Texas Penal Code defines several distinct offenses where the defendant commits a § 22.01(a)(1) assault against a victim with certain specific characteristics. No conviction of a § 22.01(b) offense can be a crime of violence aggravated felony because the

¹⁸ *Matter of Solon*, 24 I&N Dec. 239, 241 (BIA 2007) (“de minimis conduct or harm, such as offensive or provocative physical contact or insults, [] is not ordinarily considered to be inherently vile, depraved, or morally reprehensible”); see also *Matter of (IDENTIFYING INFORMATION REDACTED BY AGENCY) APPLICATION: Application for Waiver of Grounds of Inadmissibility under section 212(h) of the Immigration and Nationality Act*, 8 U.S.C. § 1182(h), 2014 WL 3951048, at *5 (AAO Feb. 25, 2014) (finding conviction for assault-by-contact under Tex. Penal Code § 22.01(a)(3) is not a crime involving moral turpitude).

¹⁹ See *Borden v. United States*, 141 S. Ct. 1817 (2021).

²⁰ *United States v. Fuentes-Rodriguez*, 22 F.4th 504, 505 (5th Cir. 2022).

minimum conduct for every § 22.01(b) offense includes a reckless mental state, which lacks sufficient intentionality to satisfy the definition of crime of violence.²¹

3. Assault-by-threat - § 22.01(a)(2)

Recklessness is not a listed mental state under § 22.01(a)(2), which means that *Borden* does not apply to assault-by-threat. However, an assault-by-threat conviction under § 22.01(a)(2) cannot be an aggravated felony because the maximum sentence is 180 days, which is less than the definitional threshold that requires imprisonment of one year or more.

4. Assault-by-contact - § 22.01(a)(3)

The minimum conduct to violate § 22.01(a)(3) is a reckless assault by offensive touching. A conviction of assault-by-contact under § 22.01(a)(3) cannot fit the crime of violence definition because a mere offensive touching lacks sufficient use of force to be a “violent felony” under the Supreme Court’s decision in *Johnson v. U.S.*²² The BIA applies the Supreme Court’s *Johnson* decision to analyze whether an offense is a crime of violence under the immigration laws.²³ As a result, a conviction for assault by contact is not a crime of violence aggravated felony.

What counts as a one-year sentence? In Texas, deferred adjudication²⁴ is a common disposition. While deferred adjudication is a conviction for immigration purposes, no “term of imprisonment” arises because it does not impose or contemplate imposing jail time. This means a one-year term of deferred adjudication probation (known as “community supervision”) for assault-bodily-injury will not be an aggravated felony. But jail time *is* contemplated in another

²¹ *Borden v. United States*, 141 S. Ct. 1817 (2021); *United States v. Fuentes-Rodriguez*, 22 F.4th 504, 505 (5th Cir. 2022). Note that assault on a peace officer or judge should not be—and no cases were found showing that it would be—an “obstruction of justice” aggravated felony under INA § 101(a)(43)(S) because it lacks a specific intent to “interfere ... in an investigation or proceeding that is ongoing, pending, or reasonably foreseeable by the defendant.” See *Matter of Valenzuela Gallardo*, 27 I&N Dec. 460 (BIA 2018) (redefining obstruction of justice aggravated felony).

²² See *Johnson v. United States*, 576 U.S. 591 (2015) (“physical force” for ACCA’s “use, attempted use, or threatened use of physical force” clause does not include “offensive touching” assault (common-law battery)); *United States v. Castleman*, 572 U.S. 157 (2014) (stating that “whether or not the causation of bodily injury necessarily entails violent force [] mere offensive touching does not” in holding that mere offensive touching is sufficient for a “misdemeanor crime of violence” under separate definition at 18 U.S.C. § 922(g)(9)); *Matter of Julio E. Velasquez*, 25 I&N Dec. 278 (BIA 2010) (Virginia assault and battery not a crime of violence because it includes offensive touching); *United States v. Landeros-Gonzales*, 262 F.3d 424, 426 (5th Cir. 2001); *Gonzalez-Garcia v. Gonzales*, 166 F. App’x 740, 744 (5th Cir. 2006), subsequently withdrawn from bound volume and unpublished (“offensive or provocative contact” does not necessarily involve the use of physical force). See also ILRC, *Some Felonies Should No Longer Be “Crimes of Violence” under Johnson v. United States*, (Aug. 6, 2015) <https://www.ilrc.org/some-felonies-should-no-longer-be-%E2%80%9Ccrimes-violence%E2%80%9D-immigration-purposes-under-johnson-v-united>.

²³ *Matter of Dang*, 28 I&N Dec. 541 (BIA 2022).

²⁴ Tex. Code Crim. Pro. Art. 42A.101 et. seq.

common sentence called “straight probation,” which is a sentence to imprisonment that is probated.²⁵ So, for example, a “straight probation” sentence of one-year probated for three years *will* be an aggravated felony. Note that there is an unpublished case from the BIA finding that a sentence of 12 months is not a one-year sentence because Texas defines “month” as “30 days.”²⁶

C. Crime of Domestic Violence

A “crime of domestic violence” is a ground of deportability under INA § 237(a)(2)(E) and affects eligibility for some forms of relief. A crime of domestic violence is a “crime of violence” as defined in 18 U.S.C. § 16(a) committed by a person against their current or former spouse; a co-parent; a person they have lived with “as a spouse”; an individual “similarly situated to a spouse ... under the domestic or family violence laws of the jurisdiction where the offense occurs”; or an individual protected under the domestic or family violence laws of the United States, any state, tribal, or local government.²⁷ The scope of Texas’s family violence definition is broad, encompassing: individuals related by blood or marriage, including ex-spouses and unmarried parents of the same child; individuals who live together even if unrelated; or individuals who have or have had a “continuing relationship of a romantic or intimate nature.”²⁸

1. Assault-bodily-injury - §§ 22.01(a)(1), 22.01(b)

Regardless of the sentence, neither a conviction for assault-bodily-injury under § 22.01(a)(1) nor any of the offenses defined in § 22.01(b) satisfy the crime of domestic violence definition because they cannot be crimes of violence.²⁹ See discussion above.

2. Assault-by-threat - § 22.01(a)(2)

This offense requires a knowing or intentional mental state and otherwise satisfies the crime of violence definition, which includes the threatened use of force.³⁰ According to the Fifth Circuit, a conviction for this offense may be a deportable offense under the crime of domestic violence ground of deportability if the “evidence generally admissible for proof of facts in administrative proceedings” establishes the domestic relationship.³¹

²⁵ Tex. Code Crim. Pro. Art. 42A.053.

²⁶ See *Matter of Alejandro Castillo Munoz*, AXXX XXX 343 (BIA 19, 2018); available for purchase at <http://www.irac.net/unpublished/index>.

²⁷ INA § 237(a)(2)(E). Note that a waiver of this ground is available at INA § 237(a)(7) for certain victims of battery or extreme cruelty.

²⁸ Tex. Family Code § 71.0021(b), 71.003, or 71.005.

²⁹ *Matter of Dang*, 28 I&N Dec. 541 (BIA 2022).

³⁰ 18 U.S.C. § 16(a).

³¹ *Bianco v. Holder*, 624 F.3d 265, 272–73 (5th Cir. 2010).

3. Assault-by-contact - § 22.01(a)(3)

Assault-by-contact is not a crime of domestic violence, even if a domestic relationship is involved, because it is not a crime of violence. See *definition of crime of domestic violence above*.

III. Examples

A. Amal – Lawful Permanent Resident (LPR)

Amal has been an LPR since 2018. In 2022, she is arrested for the first time and charged with misdemeanor Assault Family Violence—assault-bodily-injury of a spouse under § 22.01(a)(1). What potential immigration consequences might Amal face?

Because Amal is an LPR, she is subject to the grounds of deportability at INA § 237, which include the aggravated felony ground at § 237(a)(2)(A)(iii), the moral turpitude ground at § 237(a)(2)(A)(I), and the crime of domestic violence ground at § 237(a)(2)(E). In 2021, the Supreme Court held that a crime with a reckless mental state is insufficient to be a violent felony under the Armed Career Offender Act (ACCA).³² The Fifth Circuit then applied that decision to hold that § 22.01(a)(1) is not an aggravated felony because the ACCA and the aggravated felony crime of violence definition are virtually identical.³³ The Fifth Circuit also has held that a § 22.01(a)(1) conviction is not a CIMT.³⁴ Amal will also not be deportable under the domestic violence deportation ground because that ground requires the offense to be a crime of violence, which does not include crimes with a reckless mental state. Therefore, even if Amal is convicted, she will not be deportable for the offense.

B. Trinidad – Undocumented

Trinidad is an undocumented individual in removal proceedings. He entered the United States in 2003 on a visitor visa and has not departed. He has a U.S. citizen child who is five years old. He was convicted of assault-by contact-elderly victim § 22.01(a)(3), (c)(1), a Class A misdemeanor, for which he was sentenced to and served 179 days. He has no other criminal history. What potential immigration consequences might Trinidad face?

First, note that because Trinidad is undocumented, he is already subject to removal. However, we will analyze whether the conviction will affect his eligibility for relief or bond. The conviction is not a crime of violence aggravated felony because Trinidad did not receive a sentence of a year or more.³⁵ Moreover, the minimum conduct includes an offensive touching, which is

³² *Matter of Chairez*, 26 I&N Dec. 349, 355 (BIA 2014).

³³ *United States v. Fuentes-Rodriguez*, 22 F.4th 504, 505 (5th Cir. 2022).

³⁴ *Gomez-Perez v. Lynch*, 829 F.3d 323, 328 (5th Cir. 2016).

³⁵ INA § 101(a)(43)(F).

insufficiently forceful to satisfy the crime of violence definition.³⁶ Because the minimum offense conduct does not require violent force and therefore does not constitute a crime of violence, Trinidad would not be deportable under the crime of domestic violence ground either.

The BIA does treat certain assault offenses against a protected class of individuals, like the elderly, as CIMTs.³⁷ Under the BIA's caselaw, however, threatening or causing physical injury is a requirement for an assault offense to be a CIMT.³⁸ Trinidad's offense conviction merely requires an offensive touching so it should not be a CIMT under settled BIA law. Since Trinidad is not removable for any criminal conduct, he remains eligible for bond.³⁹ And lastly, because it is not a CIMT and because he served less than 180 days in jail, he is not statutorily barred from showing good moral character. Therefore, Trinidad will be eligible for non-LPR cancellation of removal if he meets the other statutory requirements for such relief.⁴⁰

C. Angel – DACA Recipient

Angel comes to your office to renew their Deferred Action for Childhood Arrivals (DACA) status and reveals that they received a deferred adjudication last month for Assault Family Violence—assault-bodily-injury of a spouse under § 22.01(a)(1). Unfortunately, Angel will not be eligible to renew their DACA because any misdemeanor offense involving domestic violence constitutes a “significant misdemeanor” and therefore bars DACA eligibility under the Department of Homeland Security's current interpretation.⁴¹

IV. Mitigating the Risks in Criminal Proceedings

A. Alternative Offenses

A thorough analysis of potential alternative pleas is beyond the scope of this advisory. That being said, misdemeanor assault-bodily-injury does not trigger exposure to deportability as a CIMT, a crime of violence, or a crime of domestic violence. This means that pleading to misdemeanor assault-bodily injury would be a desirable immigration outcome for practitioners whose clients

³⁶ See *Johnson v. United States*, 576 U.S. 591 (2015) and cases cited in footnotes 22 and 23 above.

³⁷ See, e.g., *Matter of Tran*, 21 I&N Dec. 291, 294 (BIA 1996) (involving domestic partners); *Matter of Danesh*, 19 I&N Dec. 669, 673 (BIA 1988) (involving police officers).

³⁸ *Matter of Sejas*, 24 I&N Dec. 236, 237-38 (BIA 2007); *Matter of Sanudo*, 23 I&N Dec. 968, 972 (BIA 2006).

³⁹ See INA § 236(c) for mandatory detention grounds.

⁴⁰ INA § 240A(b); *Barton v. Barr*, 140 S. Ct. 1442 (2020). See also IDP-ILRC-NIPNLG, Practice Alert: The Impact of *Barton v. Barr* on Eligibility for Cancellation of Removal, (May 5, 2020) <https://www.ilrc.org/practice-alert-impact-barton-v-barr-eligibility-cancellation-removal>.

⁴¹ Consideration of Deferred Action for Childhood Arrivals (DACA), <https://www.uscis.gov/DACA> (last visited February 10, 2022). See also ILRC, *Understanding the Criminal Bars to the Deferred Action for Childhood Arrivals*, (2012) https://www.ilrc.org/sites/default/files/documents/ilrc-2012-daca_chart.pdf.

face higher-level assault charges. Although counterintuitive, certain defendants, for whom immigration consequences are paramount, may consider pleading up to assault-bodily injury in circumstances where the lower-level offense carries clear negative immigration consequences. Practitioners should consult the [Immigration Consequences Texas](#) manual for additional pleading strategies and for more detailed analyses of the crimes discussed in the Appendix.⁴²

As a reminder, an immigration judge and the BIA will assess immigration consequences under a federal standard. This means that familiar concepts to a criminal defense practitioner like conviction,⁴³ enhancement⁴⁴, and sentence⁴⁵ will have discrete meanings under immigration law.

B. Sentencing

For assault-by-threat offenses under § 22.01(c), obtaining a sentence involving a term of imprisonment of *less* than one year will avoid an “aggravated felony.”⁴⁶ Note that probated or suspended jail time counts as a term of imprisonment for immigration purposes.⁴⁷

V. Conclusion

Noncitizens can experience a variety of immigration consequences due to convictions for assault in Texas. And these consequences have changed dramatically in recent years: now misdemeanor assault-bodily-injury under Tex. Penal Code § 22.01(a)(1) is not a CIMT nor a crime of violence, but assault offenses that carry higher punishments could still have negative immigration consequences. Given this shifting landscape, advocates are encouraged to negotiate for immigration-neutral pleas and to continue forcefully arguing for proper application of the categorical approach where caselaw is unsettled.

⁴² Please note that practitioners will need to register for access to the manual at <https://www.immigrationconsequencetx.org/user/register>.

⁴³ See INA § 101(a)(48)(A) for definition of conviction under immigration law. In addition, certain pre-trial diversion agreements can still constitute a conviction for federal immigration purposes, particularly if they involve a guilty plea, admission of guilt, or stipulation of facts. See *Matter of Mohamed*, 27 I&N Dec. 92 (BIA 2017); see also ILRC, Immigration Consequences of Pretrial Diversion and Intervention Agreements (June 3, 2021) <https://www.ilrc.org/immigration-consequences-pretrial-diversion-and-intervention-agreements-0>.

⁴⁴ See *Matter of German-Santos*, 28 I&N Dec. 552, 554 (BIA 2022) (discussing when state law’s categorization as a “sentence enhancement” creates a distinct offense for federal immigration law).

⁴⁵ In interpreting the definition of “sentence” under INA § 101(a)(48)(B), the Fifth Circuit held that treatment in a substance-abuse felony punishment facility as a condition of community supervision constituted a sentence to a “term of imprisonment.” *Calvillo Garcia v. Sessions*, 870 F.3d 341, 344 (5th Cir. 2017).

⁴⁶ INA § 101(a)(43)(F).

⁴⁷ INA § 101(a)(48)(B).

VI. Appendix – Immigration Consequences for Texas Assault by Statutory Subsection

Statutory Subsection	Aggravated Felony	Crime Involving Moral Turpitude	Crime of Domestic Violence
Assault-bodily-injury - § 22.01(a)(1)	(a)(1) – No	(a)(1) - No	(a)(1) – No
Assault-by-threat - § 22.01(a)(2)	(a)(2) – No	(a)(2) – Likely	(a)(2) – Yes, if probative evidence establishes domestic relationship element ¹
Assault-by-contact - § 22.01(a)(3)	(a)(3) – No	(a)(3) – No	(a)(3) – No
Knowing Assault on a Public Servant - § 22.01(b)(1)	(b)(1) - No	(b)(1) - Likely ²	(b)(1) - No
Assault against a family member with a prior family violence conviction - § 22.01(b)(2)(A)	(b)(2)(A) - No	(b)(2)(A) - Possibly ³	(b)(2)(A) - No
Assault by strangulation - § 22.01(b)(2)(B)	(b)(2)(B) - No	(b)(2)(B) - Yes ⁴	(b)(2)(B) – No
Assault against a government contractor in a correctional or secure detention facility while performing contractual services, if the defendant knows the person is a government contractor, or in retaliation for, or on account of the government contractor’s contractual services - § 22.01(b)(3)(A)-(B)	(b)(3)(A) & (B) – No	(b)(3)(A) & (B) – Possibly	(b)(3)(A) & (B) – No
Assaulting security officer, emergency service worker, or process server while performing respective duties - § 22.01(b)(4)-(6)	(b)(4)-(6) – No	(b)(4)-(6) – Possibly ⁵	(b)(4)-(6) – No

Statutory Subsection	Aggravated Felony	Crime Involving Moral Turpitude	Crime of Domestic Violence
Assault-bodily-injury on a pregnant person to force abortion - § 22.01(b)(7)	(b)(7) - No	(b)(7) – Yes ⁶	(b)(7) – No
Knowing assault on a pregnant person - § 22.01(b)(8)	(b)(8) - No	(b)(8) – Yes ⁷	(b)(8) – No
Assault by civilly committed person against employee or contractor at civil commitment facility - § 22.01(b-1)(A) & (B)	(b-1) – No	(b-1) – Possibly ⁸	(b-1) – No
Assault against a person the actor knows is a peace officer or judge while the officer or judge is lawfully discharging an official duty or in retaliation or on account of an exercise of official power or performance of an official duty as a peace officer or judge - § 22.01(b-2)	(b-2) – No	(b-2) – Yes	(b-2) - No
Assault by strangulation with prior family violence conviction - § 22.01(b-3)	(b-3) – No	(b-3) - Yes ⁹	(b-3) – No
Assault-by-contact against an elderly or disabled person - § 22.01(c)(1)	(c)(1) – No ¹⁰	(c)(1) – No	(c)(1) – No
Assault-by-contact against a sports participant - § 22.01(c)(2)	(c)(2)– No ¹¹	(c)(2)(A) – Likely if conduct under (a)(2), but not a CIMT if conduct under (a)(3)	(c)(1) – No
Assault-by-threat or Assault-by-contact against a pregnant person to force abortion - § 22.01(c)(3)	(c)(3) – No, unless based on conduct under (a)(2) and sentenced to a full year ¹²	(c)(3) – Yes under (a)(2), but not a CIMT if conduct under (a)(3), assuming statute is divisible as to nature of underlying assault ¹³	(c)(3) – Yes under (a)(2), but not a crime of domestic violence if conduct under (a)(3) assuming statute is divisible as to nature of underlying assault ¹⁴

End Notes

¹ The categorical approach does not apply to proving the domestic relationship element of the crime of domestic violence ground of deportability. *Bianco v. Holder*, 624 F.3d 265, 272–73 (5th Cir. 2010); *Matter of H. Estrada*, 26 I&N Dec. 749, 751-52 (BIA 2016). According to the Fifth Circuit, a conviction may be a deportable crime of domestic violence if the “evidence generally admissible for proof of facts in administrative proceedings” establishes the domestic relationship. *Bianco v. Holder*, 624 F.3d 265, 272–73 (5th Cir. 2010).

² Assault is a third-degree felony if it is committed against “a person the actor knows is a public servant while the public servant is lawfully discharging an official duty, or in retaliation or on account of an exercise of official power or performance of an official duty as a public servant.” In *Matter of Danesh*, the BIA ruled an earlier version of this Texas offense involving assault on a peace officer to be a CIMT. 19 I&N Dec. 669 (BIA 1988). The legislature amended the statute so it now covers a “public servant” instead of a “peace officer.” While one can argue that the distinction between “peace officer” and “public servant” is sufficient to change the outcome, both current and former versions require “bodily injury” and knowledge that the victim was an official, so *Danesh* likely controls. If necessary, one can argue that by expanding the victim to “public servant” from “peace officer,” the legislature reduced a defendant’s blameworthiness because “public servant” is such a broad term.

³ According to the BIA, a conviction for assault with a reckless mental state is not a CIMT unless the conviction necessarily requires “serious bodily injury” or an “aggravating factor.” *Matter of Fualaau*, 21 I&N Dec. 475, 478 (BIA 1996). The BIA recognizes that an offense where the victim is a protected family member is an aggravating factor that increases a defendant’s moral culpability. *Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465, 466 (BIA 2011). In assessing whether an offense is a CIMT against a protected person, the BIA treats the existence of a physical injury as a key factor. See, e.g., *Matter of Sejas*, 24 I&N Dec. 236, 238 (BIA 2007); *Matter of Sanudo*, 23 I&N Dec. 968, 972 (BIA 2006). Texas law defines the “bodily injury” required by section 22.01(a)(1) as “physical pain, illness, or any impairment of physical condition.” Tex. Pen. Code Ann. § 1.07(a)(8). A conviction under § 22.01(b)(2)(A) has both the elements of bodily injury and the victim’s status as a family member that likely raise a non-turpitudinous simple assault into a CIMT. Nevertheless, an immigration practitioner may argue that an adjudicator should analyze felony assault against a family member the same way as an individual’s first family violence offense which, to date, is generally considered not to involve moral turpitude.

⁴ The assault statute includes two distinct offenses involving assault by strangulation. Penal code section (b)(2)(B) is a third-degree felony while § 22.01(b-3) is a second-degree felony if the defendant is a recidivist offender. A conviction for this offense necessarily involves a level of harm (strangulation) that is significantly more serious than simple bodily injury. A conviction also requires the victim to be a member of a protected group. These elements make this offense a CIMT under the BIA’s caselaw. See *Matter of Sanudo*, 23 I&N Dec. 968, 972 (BIA 2006); *Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465 (BIA 2011). In *Ex parte Duque*, the Texas Appeals court confirmed that a conviction under this statute would be a CIMT resulting in immigration consequences. 540 S.W.3d 136, 140 (Tex. App.—Houston [1st Dist.] 2017) (court affirmed that counsel was deficient by failing to advise defendant that assault of a family member—impeding breathing—was a CIMT).

⁵ There is very little caselaw on these provisions. Immigration counsel may argue this offense is not a CIMT because the offense can be committed recklessly and the victims under these subsections should not receive special protections. See *Matter of Jing Wu*, 27 I&N Dec. 8, 11 (BIA 2017); See *Matter of B-*, 5 I&N Dec. 538, 541 (BIA 1953) (modified on other grounds) (finding Assault on a prison guard not a CIMT).

⁶ There is scant caselaw on this provision. The text of this offense does *not* explicitly require that the defendant know that the victim is pregnant. DHS would likely argue that law provides special protection for someone that is pregnant person and that recklessly committing an assault with injury to coerce the victim to end the pregnancy is sufficiently blameworthy to be a CIMT.

⁷ Again, scant caselaw exists on this provision. This offense would likely come under BIA's ruling in *Matter of Jing Wu* that a reckless assault with an aggravating element, such as being a protected person under the law, is a CIMT. See *Matter of Jing Wu*, 27 I&N Dec. 8, 11 (BIA 2017).

⁸ This offense punishes a civilly committed person for an assault with injury against an employee or contractor at a mental health facility. Of the four offenses that 22.01(b-1)(A) & (B) define, knowledge that the victim is an employee is an element of § 22.01(b-1)(B)(i) only, which the BIA has considered crucial to a finding of moral turpitude against guards. *Matter of Danesh*, 19 I&N Dec. 669, 672 (BIA 1988). For § 22.01(b-1)(B)(i), which includes the knowledge element, an advocate or respondent may argue that being a contractor at a mental health facility is not a protected status and therefore the offense is not a CIMT. See *Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465, 466 (BIA 2011) (describing rationale for protected individuals).

⁹ See endnote 4.

¹⁰ The minimum conduct for violating § 22.01(c)(1) includes a reckless mental state so it can never be an aggravated felony.

¹¹ A conviction for violating § 22.01(c)(2) is a Class B misdemeanor and carries a maximum sentence of 180 days. Tex. Penal Code § 12.22. Such a conviction can never satisfy the crime of violence sentence threshold of a one-year sentence.

¹² Either an assault-by-threat or assault-by-contact against a designated victim violates the statute. Tex. Penal Code § 22.01(c). It is unclear whether the underlying type of assault (assault-by-threat or assault-contact) is an element of a distinct offense or a means to commit a single offense. For purposes of deportability, DHS bears the burden of establishing whether a fact is an element or a means. *Matter of Chairez*, 26 I&N Dec. 349, 355 (BIA 2014). If § 22.01(c)(3) is indivisible as to the underlying type of assault, the offense should never be an aggravated because the minimum conduct, an assault-by-contact, includes an offensive touching, which lacks sufficient force to be a crime of violence. *Matter of Dang*, 28 I&N Dec. 541, 551 (BIA 2022). If § 22.01(c)(3) is divisible as to the underlying offense, then whether a conviction under this section satisfies the definition of crime of violence would depend on the type of underlying assault. On the one hand, an assault-by-threat against a pregnant person to force an abortion has a knowing or intentional mens rea, requires use of violent force, and is potentially punishable by a one-year sentence. This means that a § 22.01(c)(3) conviction based on § 22.01(a)(2) conduct could be an aggravated felony crime of violence if the defendant receives a one-year sentence. On the other hand, a § 22.01(c)(3) conviction based on assault-by-contact conduct includes an offensive touching, which the BIA has ruled lacks sufficient force to be a crime of violence. *Matter of Dang*, 28 I&N Dec. 541, 551 (BIA 2022). Of course, the special nature of pregnancy could change the analysis.

¹³ As discussed in endnote 12, it is unsettled if § 22.01(c)(3) is divisible as to the type of underlying assault conduct (assault-by-threat or assault-by-contact). For deportability purposes, DHS bears the burden of establishing whether the underlying type of assault is an element or a means to commit a single offense. *Matter of Chairez*, 26 I&N Dec. 349, 355 (BIA 2014). If § 22.01(c)(3) is divisible, then the minimum conduct would be assault by contact, which merely requires an offensive touching against a pregnant person to force an abortion. Under settled CIMT assault analysis, an offense that lacks a bodily injury requirement is not a CIMT. See, e.g., *Matter of Sejas*, 24 I&N Dec. 236, 238 (BIA 2007); *Matter of Sanudo*, 23 I&N Dec. 968, 972 (BIA 2006). That being said, the special nature of forcing an abortion might alter the analysis and be outcome determinative. If § 22.01(c)(3) is divisible as to the underlying offense, then whether a conviction constitutes a CIMT would depend on the type of underlying assault. A § 22.01(c)(3) offense—assault by threat requires threatened bodily injury against a pregnant person to force an abortion. Under settled BIA law, this would constitute a CIMT. *Matter of Ajami*, 22 I&N Dec. 949 (BIA 1999) (discussing threats). A § 22.01(c)(3) offense based on assault-by-contact would arguably not be a CIMT because the minimum conduct would be offensively touching a pregnant person to force an abortion. Nevertheless, practitioners should be wary of this offense because the special nature of abortion might be outcome determinative.

¹⁴ See endnote 12.



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