IMMIGRATION CONSEQUENCES OF TEXAS ASSAULT

By Anita Gupta and Julie Wimmer

Criminal 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 advisory[1] analyzes the consequences of a conviction for assault under Texas Penal Code § 22.01. Assault is a common charge in Texas, accounting for 12% of misdemeanor cases and between 5 and 15% of felony charges filed statewide in 2019.[2] This advisory is geared towards immigration attorneys and advocates representing or advising 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 offense. Even so, state law requires the judge to enter an affirmative finding 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] Those cases are typically charged as assault-bodily-injury with the charging and conviction documents reflecting "Assault Family Violence." A misdemeanor "Assault Family Violence" charge like this can be

enhanced to a felony in certain circumstances, in which case the family relationship becomes an element of the offense, as we describe next.

B. Penalties and Common Enhancements

Assault-bodily-injury under § 22.01(a)(1) is a Class A misdemeanor[6] but can be enhanced to a 2nd or 3rd degree felony depending on characteristics of the victim (including the relationship with the defendant), the defendant's prior criminal history, and the manner of assault.

Though a misdemeanor assault charge does not include the relationship between defendant and victim as an element, when enhanced to a felony, it might. For example, assault-bodily-injury becomes a 3rd 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 2nd degree felony.[8] In those cases, the family or household relationship between defendant and victim is an element of the offense.

Other victim characteristics can also lead to an enhancement. Assault-bodily-injury can be enhanced to a 2nd or 3rd degree felony when committed against a public servant, peace officer, judge, or certain other government and public actors.[9]

Similarly, while assault-by-threat and assault-by-contact under § 22.01(a)(2)-(3) are Class C misdemeanors, they can be enhanced to Class A or B misdemeanors when the victim has certain characteristics, like being elderly or disabled.[10]

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).[11]

1. Assault-bodily-injury

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 rather than elements: 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 Circuit[12]—a "reckless" assault-bodily-injury, without more, does not rise to morally turpitudinous levels, so the statute is categorically overbroad.[13]

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 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.[14]

Enhancements

Although assault-bodily-injury itself is not a CIMT, some aggravating factors that increase the penalty range can also elevate the offense to morally turpitudinous levels.

Where the victim is a public servant, peace officer, judge, or certain other government or public actor (2nd or 3rd degree felony): This offense is likely to be CIMT, though the caselaw is sparse. In an unpublished case after *Gomez-Perez*, the BIA found that the aggravating factor of assault on a "peace officer" made it a CIMT.[15]

Where the victim is a family or household member and the offense is committed by strangulation (2nd or 3rd degree felony): The aggravating element of the manner of the offense—"impeding the normal breathing or circulation of the blood of the person by applying pressure to the person's throat or neck or by blocking the person's nose or mouth"—is likely sufficient to constitute a CIMT under *Matter of Sanudo*, though there is little caselaw to that effect.[16]

Where the victim is a family or household member and the defendant has certain prior family violence offense convictions (3rd degree felony): This should be analyzed the same way as an individual's first family violence offense which, to date, is generally considered not to involve moral turpitude. *See CIMT discussion above*. Just as individually non-turpitudinous Driving While Intoxicated (DWI) offenses do not aggregate to a CIMT, nor should individually non-turpitudinous assaults.[17]

2. Assault-by-threat

Assault-by-threat under § 22.01(a)(2) may be a CIMT[18] but as a practical matter, this offense is not commonly charged except as a predicate for an aggravated assault (i.e. involving a deadly weapon) which is a CIMT due to the aggravating factor (the deadly weapon).[19]

3. Assault-by-contact

Under *Matter of Solon*, assault-by-contact under § 22.01(a)(3) will not be a CIMT,[20] but note that the enhanced Class A misdemeanor for assault involving an elderly or disabled person might involve a sufficient aggravating factor to make it a CIMT.

For the several assault subsections for which there is little caselaw on the CIMT analysis, advocates should continue to strongly argue the categorical approach (looking to state law to see whether the statutory piece in question is a means or an element) and the minimum conduct test applicable in the Fifth Circuit for CIMTs.[21]

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. Assault-bodily-injury and Assault-by-threat

A conviction of assault-bodily-injury or assault-by-threat—under § 22.01(a)(1) or (a)(2)—is a "crime of violence" under 18 U.S.C. § 16(a), at least in the Fifth Circuit.[22] That means it will be an aggravated felony if the term of imprisonment is one year or more.

What counts as a one-year sentence? In Texas, deferred adjudication[23] 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 common sentence called "straight probation," which is a sentence to imprisonment that is probated.[24] So 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."[25]

Have assault-bodily-injury and assault-by-threat always been crimes of violence? No. After the Supreme Court invalidated 18 U.S.C. § 16(b)—half of the "crime of violence" definition—in *Sessions v. Dimaya*[26], the Fifth Circuit revisited its definition of "force" in landmark case *United States v. Reyes Contreras*.[27] In that decision, the Court held that indirect force is sufficient "use of force" for the remaining § 16(a) subsection of the crime of violence definition. This explicitly overruled prior precedent that assault-bodily-injury was not a crime of violence.[28] Subsequent cases have confirmed that both assault-bodily-injury and assault-by-threat are crimes of violence under the *Reyes Contreras* definition, which is retroactive.[29]

Enhancements

Even when enhanced to a felony offense because of victim characteristics, the underlying assaultive conduct ("use of force") is the same as the misdemeanor offense. Felonies so enhanced would be analyzed the same as the base offense for "crime of violence" purposes.[30]

2. Assault-by-contact

Assault-by-contact under § 22.01(a)(3)—a Class C misdemeanor unless enhanced—will be neither a "crime of violence" nor an aggravated felony because mere offensive touching does not involve sufficient use of force under the Supreme Court's decision in *Johnson v. U.S.*[31]

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 U.S., any state, tribal, or local government.[32] 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."[33]

1. Assault-bodily-injury and Assault-by-threat

Regardless of the sentence, a conviction for assault-bodily-injury or assault-by-threat—under § 22.01(a)(1) of (a)(2)—will be a crime of domestic violence if one of the domestic relationships described in INA § 237(a)(2)(E) is established under your Circuit's standard.[34] In the Fifth Circuit, that relationship does *not* have to be an element of the offense.[35] Instead, the government can prove the relationship "by clear and convincing evidence, using the kind of evidence generally admissible before an Immigration Judge."[36] That's why even a misdemeanor assault-bodily-injury or assault-by-threat conviction can be a deportable crime of domestic violence, even without a family violence finding.

One major practical impact of *Reyes Contreras* and its progeny, discussed above, is that, in the Fifth Circuit, a Legal Permanent Resident with any assault-bodily-injury or assault-by-threat conviction—no matter the sentence—is deportable for a "crime of domestic violence" if there are sufficient facts showing there was a domestic relationship with the victim.[37]

2. Assault-by-contact

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.*

A summary:

	Domestic relationship to victim[38]?	Aggravated felony	Crime of domestic violence	CIMT
Assault-bodily-injury 22.01(a)(1)	No	Yes, if term of imprisonment 1 year or more	No	No, but note that felony enhancements may elevate it
	Yes	Yes, if term of imprisonment 1 year or more	Yes	No, but note that felony enhancements may elevate it
Assault-by-threat 22.01(a)(2)	No	Yes, if term of imprisonment 1 year or more (if enhanced)	No	Likely
	Yes	Yes, if term of imprisonment 1 year or more (if enhanced)	Yes	Likely
Assault-by-contact 22.01(a)(3)	N/A	No	No	No

III. Examples

A. Amal – Legal Permanent Resident (LPR)

Amal has been a Legal Permanent Resident since 2017. In 2020, 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). In the following scenarios, what potential immigration consequences should Amal be aware of?

- **Amal is convicted and receives a sentence of less than one year.** The offense will be a crime of domestic violence, which will render her deportable and subject to removal proceedings, regardless of the sentence. But Amal's charge, Assault-Family Violence, does *not* constitute a CIMT. Therefore, she can continue to accrue the requisite 7 years' residence for LPR cancellation of removal eligibility.[39]

- **Amal is convicted and receives a sentence of one year.** Assume that Amal is sentenced to straight probation of one year probated for three. The offense is an aggravated felony because it is a crime of violence for which the sentence is at least one year, even though the jail time was probated. With an aggravated felony conviction, Amal is deportable, subject to mandatory detention, and ineligible for LPR cancellation of removal. Amal will also be deportable under the domestic violence deportation ground.

- **Amal receives deferred adjudication and is sentenced to community supervision.** As mentioned above, the offense is not a CIMT. And though the offense will not be an aggravated felony because there is no term of imprisonment, it will still render Amal deportable as a crime of domestic violence.

- **What if Amal is instead charged with assault-bodily-injury under § 22.01(a)(1) for an incident involving a non-family neighbor?** If the sentence is under one year, a conviction would not make Amal deportable because it is not an aggravated felony, not a crime of domestic violence, and not a CIMT. If the sentence involves a term of imprisonment of one year (or more), it would be an aggravated felony with the same consequences described above.

B. Trinidad – Undocumented

Trinidad is an undocumented individual in removal proceedings. He entered the United States in 2003 on a visa and has not departed. He has a conviction for misdemeanor assault-bodily-injury under § 22.01(a)(1) for which he was sentenced to and served 179 days. He has no other criminal history. In the following scenarios, what potential immigration consequences should Trinidad be aware of?

First, note that because Trinidad is undocumented, he is already subject to removal.

- **What if the victim is Trinidad's co-worker and they do not have a family, household, or dating relationship?** Because there is no domestic relationship between Trinidad and the victim, the conviction would not be a crime of domestic violence. Although the offense is a crime of violence, because Trinidad's sentence was less than one year, it isn't an aggravated felony, so he remains eligible for bond.[40] 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 remain eligible for non-LPR cancellation of removal.

- **What if the assault involved a person protected under domestic violence laws and that relationship were provable under the applicable Circuit standard?** Trinidad will be ineligible for non-LPR cancellation of removal because the conviction would be a crime of domestic violence, which is a bar to that form of relief.[41]

- **What if Trinidad is married to a U.S. citizen and seeking permanent residence on that basis?** This conviction will not bar him from obtaining status through his spouse, as it is not a CIMT.

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 of 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 June 15, 2012 memorandum.[42]

IV. Mitigating the Risks in Criminal Proceedings

A. Alternative Offenses

For assault-bodily-injury and assault-by-threat offenses committed against family or household members as defined at INA § 237(a)(2)(E)—including Assault Family Violence charged as such in Texas—avoiding the "crime of domestic violence" designation is difficult when Circuit law allows looking at the facts behind the conviction to determine if a domestic relationship exists.[43] That's why merely avoiding a family violence finding is insufficient if there are facts demonstrating the defendant had a domestic relationship with the victim. One option is a reduction to assault-by-contact under Tex. Penal Code § 22.01(a)(3), which is not a crime of violence. Another option is to specify a victim with whom the defendant does not have a domestic relationship, where possible, or obtain a disposition that is not a conviction for immigration purposes, like certain deferred prosecution and pre-trial diversion agreements.[44]

NOTE: While the immigration consequences of some Texas assault convictions have worsened in recent years, remember that many offenses can be immigration-neutral.

B. Sentencing

For assault-bodily-injury and assault-by-threat offenses under § 22.01(a)(1) and (2), obtaining a sentence involving a term of imprisonment of *less* than 1 year will avoid an "aggravated felony."[45] Note that probated or suspended jail time counts as a term of imprisonment for immigration purposes.

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 assault-bodily-injury under Tex. Penal Code § 22.01(a)(1) is not a CIMT, but it is a crime of violence, for example. 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.

End Notes

[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 2019*, Office of Court Administration, available at https://www.txcourts.gov/media/1445760/fy-19-annual-statistical-report.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*, (Dec. 10, 2019), https://www.ilrc.org/how-use-categorical-approach-now; 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).

[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. Jail time ranges for Texas offenses referenced in this advisory are:

2nd degree felony: 2-20 years;
3rd 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] Tex. Penal Code § 22.01(b)(1), (b)(3), (b-1), (b-2).

[10] Tex. Penal Code § 22.01(c).

[11] 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 18, 2020). https://www.ilrc.org/all-those-rules-about-crimes-involving-moral-turpitude.

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

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

[14] *J-R-M-,* AXXX XXX 954 (BIA June 16, 2017); available for purchase at 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).

[15] Cases finding assault-bodily-injury to be a CIMT where enhanced because victim is a public servant, peace officer, judge, or certain other government or public actor:

- *Matter of Juan Diego Hernandez-Roman*, 2017 WL 1508915, at *3 (BIA Mar. 16, 2017) (finding that all conduct encompassed by the minimum reading would be turpitudinous; that public servant was sufficient aggravating factor under *Sanudo*; and that statute divisible as to type of public servant and applying modified categorical approach to conclude assault on "peace officer" is a CIMT). Note that the Board left open whether assault of other enumerated "public servants" in (b)(1) might lack moral turpitude.
- *Matter of J-A-B-O-*, 2017 WL 4685457, at *5 (AAO Sept 27, 2017) (in which USCIS AAO found that assault on a public servant under Tex. Penal Code § 22.01(b)(1) is a CIMT).
- *Matter of Maharite Mulu Berhe*, 2008 WL 4722675 (BIA Oct. 8, 2008) (assault on a public servant under Tex. Penal Code § 22.01(b)(1) is a CIMT). Note that this case pre-dates *Gomez-Perez*.

Cases finding such an assault not a CIMT:

- *Matter of Manuel de Jesus Castillo Trejo,* 2017 WL 1330145 (BIA March 3, 2017) (finding assault on public servant under 22.01(b)(1) is not a CIMT but without substantive analysis).
- *Matter of Antonia Xichitl Lopez Leal*, 2017 WL 6555080, at *1 (BIA Sept. 25, 2017) (finding that assault on a public servant under Tex. Penal Code § 22.01(b)(1) is not a CIMT, but referring to it as simple assault).

[16] See *Ex Parte Duque*, 540 S.W.3d 136, 140 (Tex. App.—Houston [1st Dist.] 2017) (referencing pre-*Gomez-Perez* case in which individual was charged as removable for CIMT where convicted under 22.01(b)(2)(B)).

[17] *Matter of Torres Varela,* 23 I. & N. Dec. 78 (BIA 2001).

[18] *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).

[19] 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.")

[20] *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).

[21] See ILRC, *How to Use the Categorical Approach Now*, (Dec. 10, 2019). https://www.ilrc.org/how-use-categorical-approach-now.

[22] *United States v. Reyes Contreras*, 910 F.3d 169 (5th Cir. 2018). But note that the U.S. Supreme Court is considering whether a reckless mental state is sufficient for a crime of violence in *Borden v. United States*, No. 19-5410 (argued Nov. 3, 2020). Pending a decision in that case, advocates may wish to preserve arguments that assault-bodily-injury is not a crime of violence under 18 U.S.C. § 16(a) because it can be committed recklessly.

[23] Tex. Code Crim. Pro. Art. 42A.101 et. seq.

[24] Tex. Code Crim. Pro. Art. 42A.053

[25] See *Matter of Alejandro Castillo Munoz*, AXXX XXX 343 (BIA 19, 2018); available for purchase at www.irac.net/unpublished/index.

[26] *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

[27] *United States v. Reyes Contreras*, 910 F.3d 169 (5th Cir. 2018). A comprehensive discussion of this decision is beyond the scope of this advisory.

[28] *United States v. Villegas-Hernandez*, 468 F.3d 874 (5th Cir. 2006).

[29] *United States v. Gracia-Cantu*, 920 F.3d 252, 254 (5th Cir. 2019) (finding "assault family violence" under § 22.01(a)(1) is a crime of violence); *United States v. Torres*, 923 F.3d 420 (5th Cir. 2019) (finding knowing assault-by-threat under § 22.01(a)(2) is a crime of violence); *United States v. Gomez*, 917 F.3d 332 (5th Cir. 2019) (stating *Reyes Contreras* is retroactive).

[30] *See, e.g., United States v. De La Rosa*, 759 F. App'x. 321 (5th Cir. 2019) (assault on a peace officer under Tex. Penal Code 22.01(b)(1) a "crime of violence" under *Reyes Contreras* definition of force). 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 does not involve a specific intent to "interfere … in an investigation or proceeding that is ongoing, pending, or reasonably foreseeable by the defendant." *See Matter of Agustin Valenzuela Gallardo*, 27 I. & N. Dec. 460 (BIA 2018).

[31] 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, 2005). https://www.ilrc.org/some-felonies-should-no-longer-be-%E2%80%9Ccrimes-violence%E2%80%9D-immigration-purposes-under-johnson-v-united.

[32] 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.

[33] Tex. Family Code § 71.0021(b), 71.003, or 71.005.

[34] See ILRC, *Case Update: The Domestic Violence Deportation Ground,* (June 27, 2018). https://www.ilrc.org/case-update-domestic-violence-deportation-ground. *See also Matter of H. Estrada*, 26 I. & N. Dec. 749 (BIA 2016).

[35] *Bianco v. Holder*, 624 F.3d 265, 272 (5th Cir. 2010) (for INA § 237(a)(2)(E), "a crime of domestic violence need not have as an element the domestic relation of the victim to the defendant.")

[36] *Id.* at 273.

[37] *Id.* at 273.

[38] Provable under the standard applicable in your Circuit. See Crime of Domestic Violence discussion above.

[39] INA § 240A(a); *Barton v. Barr*, 140 S. Ct. 1442 (2020). *See also* IDP-ILRC-NIP, Practice Alert: The Impact of Barton v. Barr on Eligibility for Cancellation of Removal, (May 5, 2020). https://www.ilrc.org/sites/default/files/resources/barton_practice_alert_final_5.5.20.pdf.

[40] *See* INA § 236(c) for mandatory detention grounds. Note that if Trinidad had not entered on a visa and were subject to inadmissibility grounds, an aggravated felony conviction would not subject him to mandatory detention. But it would affect his eligibility for relief, which, in turns, affects his bond prospects.

[41] INA § 240A(b)(1)(C).

[42] USCIS, *Policy Memorandum: Exercising Prosecutorial Discretion with Respect to Individuals Who Came to the United States as Children*, (June 15, 2012), https://www.dhs.gov/xlibrary/assets/s1-exercising-prosecutorial-discretion-individuals-who-came-to-us-as-children.pdf. *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.

[43] *Bianco v. Holder*, 624 F.3d 265, 272 (5th Cir. 2010) (for INA § 237(a)(2)(E), "a crime of domestic violence need not have as an element the domestic relation of the victim to the defendant."); *Matter of H. Estrada*, 26 I. & N. Dec. 749 (BIA 2016).

[44] Certain pre-trial diversion agreements can still constitute a conviction for federal immigration purposes, particularly if they involve a guilty plea. *See Matter of Mohamed*, 27 I. & N. Dec. 92 (BIA 2017); *see also* ILRC, Diversion and Immigration Law, (May 29, 2019). https://www.ilrc.org/diversion-and-immigration-law.

[45] INA § 101(a)(43)(F).

San Francisco
1458 Howard Street
San Francisco, CA 94103
t: 415.255.9499
f: 415.255.9792

Washington D.C.
1015 15th Street, NW
Suite 600
Washington, DC 20005
t: 202.777.8999
f: 202.293.2849

Austin
6633 East Hwy 290
Suite 102
Austin, TX 78723
t: 512.879.1616

San Antonio
500 6th Street
Suite 204
San Antonio, TX 78215
t: 210.760.7368

ilrc@ilrc.org www.ilrc.org

About the Immigrant Legal Resource Center

The Immigrant Legal Resource Center (ILRC) works with immigrants, community organizations, legal professionals, law enforcement, and policy makers to build a democratic society that values diversity and the rights of all people. Through community education programs, legal training and technical assistance, and policy development and advocacy, the ILRC's mission is to protect and defend the fundamental rights of immigrant families and communities.