U.S. Department of Justice

Executive Office for Immigration Review

*Board of Immigration Appeals*
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**Name: GOLTZ, DHYANA ADERNE** **A045-296-896**

**Date of this notice: 6/12/2012**

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Cole, Patricia A.

File: A045 296 896 - Las Vegas, NV

Date: JUN 12 2012

In re: DHYANA ADERNE GOLTZ

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Sylvia L. Esparza, Esquire

ON BEHALF OF DHS: Christian Parke
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(E)(I), I&N Act [8 U.S.C. § 1227(a)(2)(E)(I)] - Convicted of crime of domestic violence, stalking, or child abuse, child neglect, or child abandonment

APPLICATION: Termination of proceedings

The respondent is a native and citizen of Brazil and a lawful permanent resident of the United States. In a decision dated September 16, 2010, the Immigration Judge terminated these removal proceedings upon concluding that the Department of Homeland Security ("DHS") had not presented clear and convincing evidence that the respondent was subject to removal as an alien who had been convicted of a crime of domestic violence in violation of section 237(a)(2)(E)(I) of the Immigration and Nationality Act, 8 U.S.C. §§ 1227(a)(2)(E)(I). The DHS has appealed that decision. The appeal will be dismissed.

Upon de novo review, we will affirm the Immigration Judge's decisions to terminate these removal proceedings. We affirm the Immigration Judge's finding that the evidence presented by the DHS is insufficient, under the jurisprudence of the Board and the United States Court of Appeals for the Ninth Circuit, to establish the respondent's removability. Specifically, for the reasons stated in the Immigration Judge's order, the evidence of the conviction, consisting of a three-page minute order and a charging instrument, does not establish that the respondent's 2004 conviction in Nevada was for a crime of domestic violence (Exh. 2A-B. *See* I.J. at 3-12).

First, we affirm the Immigration Judge's determination that the conviction record is insufficient to show that the respondent was convicted for a battery/domestic violence crime *in violation of sections 200.481 and 200.485 of the Nevada Revised Statutes*, as alleged in the charging document (Exh. 1). Although the charging instrument in the record reflects that those sections of the Nevada statute were at issue in the July 2004 charges levied against the respondent (Exh. 2A), the minute order contains no reference to the charging instrument or to any specific section of the Nevada statute in its various provisions reflecting the respondent's initial plea of not guilty, and then guilty

(Exh. 2B). As such, the Immigration Judge properly found the minute order inadequate to reflect a conviction arising under sections 200.481 and 200.485 of the Nevada statutes. Unlike the evidence described in *Retuta v. Holder*, 591 F.3d 1181 (9th Cir. 2010), and *U.S. v. Snellenberger*, 548 F.3d 699 (9th Cir. 2008), we do not consider the evidence offered by the DHS during the course of these removal proceedings to be sufficiently clear and convincing to establish the respondent's removability.

Furthermore, we also affirm the Immigration Judge's finding that even if the conviction records were found to reflect the respondent's conviction under sections 200.481 and 200.485 of the Nevada Revised Statutes, the record does not, under a modified categorical approach, establish that the respondent was convicted of a crime of domestic violence. *See* I.J. 8-12. On appeal, the DHS extensively argues that the Immigration Judge incorrectly found that the record was inadequate to establish that the respondent's conviction arose under sections 200.481 and 200.485 of the Nevada statutes. Yet the DHS does not specifically present an argument to challenge the Immigration Judge's conclusion that a modified categorical analysis would not support a finding that the respondent's conviction contains the elements of a crime of domestic violence–i.e., that the conviction was marked by the use of violent force indicative of a crime of violence. *Cf.* DHS's Brief.

In the absence of applicable Nevada state court jurisprudence, the Immigration Judge properly analogized the elements of the Nevada statute to a California statute–i.e., section 242 of the California Penal Code–that has been found not to categorically constitute a crime of violence "because it can be based on the least touching and does not fall within the federal definition of a crime of violence under 18 U.S.C. § 16(a), which requires force that is actually violence in nature." I.J. at 9 (*citing Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1016 (9th Cir. 2006)). Furthermore, because the minute order lacked any reference that the guilty plea was tethered to the facts alleged in the charging instrument, the record of conviction lacked evidence to support a conclusion that the respondent's conviction–assuming it was for battery arising under sections 200.481 and 200.485 of the Nevada statues–involved the use of violent force. I.J. at 11-12.

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

FOR THE BOARD

**UNITED STATES DEPARTMENT OF JUSTICE**
**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**
**IMMIGRATION COURT**
**3365 Pepper Lane, Suite 200**
**Las Vegas, Nevada 89120**

| | |
|---|---|
| **IN THE MATTER OF:** | **In Removal Proceedings** |
| **GOLTZ, Dhyana Aderne** | **File No.:** A045-296-896 |
| **Respondent** | |
| | **Date:** September 16, 2010 |
| **On Behalf of the Respondent**<br>Sylvia L. Esparza, Esq.<br>3340 Pepper Lane, Suite 105<br>Las Vegas, Nevada 89120 | **On Behalf of DHS**<br>Christian Parke<br>Assistant Chief Counsel<br>Immigration and Customs Enforcement<br>Department of Homeland Security<br>3373 Pepper Lane<br>Las Vegas, Nevada 89120 |

## DECISION OF THE IMMIGRATION COURT

**CHARGE:** Section 237(a)(2)(E)(i) of the Immigration and Nationality Act (Act), as amended.

### I. Summary

The Department of Homeland Security (DHS) has charged the respondent with removability under section 237(a)(2)(E)(i) of the Act. In support of this charge DHS contends the respondent has been convicted for the offense of battery domestic violence. For the reasons stated herein, the Immigration Court concludes the record of conviction does not establish a generic crime of domestic violence occurs. Accordingly, the section 237(a)(2)(E)(i) of the Act charge of removability is not sustained, and the respondent's removal proceeding is terminated.

### II. Background

The respondent is an age 28 female, native, and citizen of Brazil who adjusted status to a lawful permanent resident on April 16, 2003. (Exh. 1.) On February 10, 2010 the Department of

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Homeland Security (DHS) issued a Notice to Appear (NTA) that charged the respondent with removability pursuant to section 237(a)(2)(E)(i) of the Act. (*Id.*) In support of this removal charge the NTA alleges that on August 31, 2004 the respondent was convicted for the offense of battery domestic violence, in violation of sections 200.481 and 200.485 of the Nevada Revised Statutes (NRS). (*Id.*)

At a master calendar hearing convened on May 20, 2010, the respondent admitted NTA factual allegations 1, 2, and 3; denied factual allegations 4 and 5; and denied the section 237(a)(2)(E)(i) of the Act charge of removability. Subsequently both parties have filed briefs addressing this contested charge of removability.

## III. Contested Removability

### A. Burden of Proof

Section 240(e)(2) of the Act provides that "the term 'removable' means–(A) in the case of an alien not admitted to the United States, that the alien is inadmissible under section 212, or (B) in the case of an alien admitted to the United States, that the alien is deportable under section 237 [of the Act]."

A respondent charged with removability under section 237 of the Act will be found to be removable if DHS proves by clear and convincing evidence she is removable as charged. INA § 240(c)(3)(A); 8 C.F.R. § 1240.8(a). No decision on removability will be valid unless it is based upon reasonable, substantial, and probative evidence. INA § 240(c)(3)(A); *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984) (the "clear and convincing evidence" standard requires an "abiding conviction" on the part of the fact-finder that the truth of a fact is "highly probable"); *Matter of Patel*, 19 I&N Dec. 774, 783 (BIA 1988) (quoting *Matter of Carrubba*, 11 I&N Dec. 914, 917 (BIA 1966) ("We have defined clear and convincing evidence as "that degree of proof though not necessarily conclusive, which will produce in the mind of the court a firm belief or conviction, or as that degree of proof which is more than a preponderance but less than beyond a reasonable doubt."); *Matter of E-M-*, 20 I&N Dec. 77, 80 (BIA 1989) ("[W]hen something has to be proved by clear and convincing evidence, the proof must demonstrate that it is highly probably true.").

### B. Alleged August 31, 2004 Conviction

Before addressing whether a conviction for the offense of battery domestic violence, in violation of NRS §§ 200.481 and 200.485, qualifies as a conviction under section 237(a)(2)(E)(i) of the Act, it first is necessary to resolve whether DHS has submitted sufficient proof to establish by clear and convincing evidence the respondent actually was convicted of this offense. *Cisneros-Perez v. Gonzales*, 465 F.3d 386 (9th Cir. 2006)). "This is a factual determination, not a legal one." *Vasquez-Martinez v. Holder*, 564 F.3d 712, 716 (5th Cir. 2009), *citing*, *Cisneros-Perez, supra*; *see also United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002) (en banc)

(noting the record must "unequivocally establish[] that the defendant was convicted of the generically defined crime"); *Retuta v. Holder*, 591 F.3d 1181, 1184 (9th Cir. 2010) (same).

In support of the claim that the respondent has been convicted for the offense of battery domestic violence, in violation of NRS §§ 200.481 and 200.485, DHS submitted a certified minute order. This is a three-page document. At the top of each of the three pages is a "header" displaying biographical information about the respondent. Below the header are a variety of minute entries detailing the procedural history of the respondent's criminal case. For instance, the July 20, 2004 minute entry indicates a criminal complaint was filed that charged the respondent with "battery constituting domestic violence." Below that is a minute entry for August 9, 2004 indicating the respondent signed an admonishment of rights form and entered a plea of not guilty. The following August 31, 2004 minute entry details that the respondent subsequently entered a plea of guilty.

It is noteworthy that the August 31, 2004 minute entry does not indicate the precise crime the respondent pled guilty to or the statute under which she was convicted. Perhaps the August 31, 2004 minute entry, disclosing a "plea of guilty," is intended to indicate that the respondent was convicted of "battery constituting domestic violence," as previously referenced in the July 20, 2004 minute entry. But, it is equally reasonable to conclude that the August 31, 2004 "plea of guilty" was entered concerning a different crime than the one referenced in the July 20, 2004 minute entry. *See United States v. Vidal*, 504 F.3d 1072, 1088 (9th Cir. 2007) (en banc) ("The prosecution need not have formally amended the two counts in order for [the defendant] to have pled guilty to conduct other than that alleged in the Complaint."). Simply put, the August 31, 2004 minute order fails to expressly provide that the respondent was convicted for the offense of battery domestic violence. Accordingly, this minute order, relating to the respondent's alleged conviction of August 31, 2004, is incapable of establishing she was convicted for the offense of battery domestic violence, in violation of NRS §§ 200.481 and 200.485, without resorting to reliance on an inference.

DHS apparently contends the United States Court of Appeals for the Ninth Circuit's (Ninth Circuit) decision in *Retuta* permits just such an inference. In *Retuta*, the Ninth Circuit was faced with the task of determining whether a "confusing" minute order was sufficient to establish that the respondent was convicted under section 11377(a) of the California Health and Safety Code. After examining that minute order the Ninth Circuit concluded the content did refer to the precise section of the California Health and Safety Code charged and pled to by the defendant, and this was sufficient to establish the existence of a conviction under the criminal statute at issue. The Ninth Circuit used the following landmarks in the minute order as a guide to analysis:

> The minute order has boxes checked for "PLEADS," "GUILTY," and "DEJ Granted." Under "Violation" the order states that "HS11377(A)" was Count Two. The record contains the criminal complaint, which lists possession of a controlled substance in violation of § 11377(a) of the California Health and Safety Code as Count Two. One does not need a definition of the terms used to conclude that Retuta pled guilty and received a deferred entry of judgment (DEJ) for violation of

California laws relating to the possession of a controlled substance.

*Retuta*, 591 F.3d at 1185.

Similarly, in *United States v. Snellenberger*, 548 F.3d 699 (9th Cir.2008) (en banc),[1] the particular minute order found to be reliable described the specific charge that was pled to by the defendant:

> The minute order is a printed form bearing the name of the court at the top, followed by the case caption. The body consists of numbered lines, each calling for some information to be inserted by checking a box or writing in a blank. Line 56 starts with a box through which an "X" has been drawn; it reads "Defendant personally withdraws plea of not guilty to count(s) _____," and "1" is written in the blank. Line 57 also starts with a box through which an "X" has been drawn, and indicates a plea of nolo contendere to count 1.

*Snellenberger*, 548 F.3d at 701.

The *Snellenberger* minute order additionally referenced the precise section of the California penal code for which the respondent was convicted:

> PLEADS NOLO CONTENDERE WITH CONSENT OF DISTRICT ATTORNEY . . . TO VIOLATION OF SECTION(S) 459 Penal Code (first degree)

*Snellenberger*, 548 F.3d at 703 app. 1.[2]

Unlike the minute orders at issue in *Snellenberger* and *Retuta*, the minute order at issue in the present this case makes no reference to the statutory citation forming the basis of the respondent's guilty plea. Nor does it indicate that the respondent actually pled guilty to the offense of battery domestic violence. Rather, it is clear that only through an inference can it be concluded the respondent entered of plea of guilty to the crime of battery domestic violence. Yet, as the respondent correctly notes, the Ninth Circuit prohibits immigration judges from drawing such inferences. *Renteria-Morales v. Mukasey*, 551 F.3d 1076, 1085 (9th Cir. 2008) (noting that inferences are inadequate to meet the government's burden of proof). The law is clear that a record must unequivocally establish the defendant was convicted of the necessary elements of the generic crime; "'might' simply cannot be enough," and **the court should not be "handed the task of**

[1]While *Snellenberger* involved the modified categorical analytical approach in a criminal sentencing case, the Ninth Circuit in *Retuta* found the *Snellenberger* rationale to be applicable in determining whether DHS had proven the existence of a criminal conviction in an Immigration Court removal proceeding.

[2]The appendix in *Snellenberger* includes the actual image of the minute order relied on by the appellate court to establish the conviction.

**reading between the lines."** *United States v. Sandoval-Venegas*, 292 F.3d 1101, 1106, 1109 (9th Cir. 2002) (emphasis added).

Even if the minute order presently at issue established that the respondent had pled guilty to battery domestic violence, this document has a second deficiency in that it makes no reference to the statute at issue, proscribing battery domestic violence in Nevada, under NRS § 200.485. That the July 20, 2004 minute entry contains the label "battery constituting domestic violence" neither cures this problem nor has some other importance for the Immigration Court. *See United States v. Grisel*, 488 F.3d 844, 848 (9th Cir. 2007) (en banc) ("The Court in ***Taylor*** **rejected the use of state statutory labels** of crimes.") (emphasis added); *United States v. Robles-Rodriguez*, 281 F.3d 900, 903 (9th Cir. 2002) ("In determining whether state convictions are aggravated felonies, **courts have consistently favored substance over form, looking beyond the labels** attached to the offenses by state law and considering whether the offenses substantively meet the statutory definition of 'aggravated felony.'") (emphasis added); *Huerta-Guevara v. Ashcroft*, 321 F.3d 883, 888 (9th Cir. 2003) ("The difficulty is that **the conviction's label only goes so far**; the conviction itself must meet the generic definition of theft no matter what the state calls it.") (emphasis added).

Based on ambiguity in the minute order at issue, the Immigration Court determines DHS has failed to establish by clear and convincing evidence that the respondent has been convicted for the offense of battery domestic violence in violation of NRS §§ 200.481 and 200.485, as alleged in the NTA. This shortcoming alone is sufficient for the Immigration Court to terminate the respondent's removal proceeding.

### C. Section 237(a)(2)(E)(i) of the Act

Even if it could be concluded that the minute order at issue establishes the respondent was convicted of battery domestic violence, in violation of NRS §§ 200.481 and 200.485, DHS has not proven that such a conviction qualifies as a crime of domestic violence under section 237(a)(2)(E)(i) of the Act.

#### 1. Crime of Domestic Violence Analytical Framework

The Ninth Circuit previously has held that a conviction qualifies as a "crime of domestic violence" if any and all conduct proscribed by the criminal statute of conviction falls within that category. *See Tokatly v. Ashcroft*, 371 F.3d 613, 620 (9th Cir. 2004) (citing *Taylor v. United States*, 495 U.S. 575, 576 (1990)). If the statute forming the basis of the conviction does not categorically prohibit "domestic violence," then the statute is considered "divisible" and the modified categorical approach is applied. *See id.* Under this approach Immigration Courts must examine a "narrow, specified set of documents that are part of the record of conviction" to determine whether the specific offense committed qualifies as a basis for removal. *Id.* Immigration Courts may not "look beyond the record of conviction itself to the particular facts underlying the conviction" when applying the modified categorical approach. *Id.* The documents that may be examined under the modified

categorical approach include the criminal charging document, as well as the judgment of conviction and any written plea agreement or transcript of a plea colloquy. *Shepard v. United States*, 544 U.S. 13, 16 (2005); *Taylor*, 495 U.S. at 600; *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121, 1132 (9th Cir. 2006) (en banc). The Ninth Circuit has further addressed this topic by clarifying that an Immigration Court may not look beyond the record of conviction to ascertain the "domestic" element of an offense under section 237(a)(2)(E)(i) of the Act. *Cisneros-Perez*, 465 F.3d at 392; *Tokatly*, 371 F.3d at 623 ("[B]oth the BIA and this court must analyze the 'domestic' requirement of the conviction in the same manner as the rest of the offense–namely, by applying the categorical and modified categorical approach.").

The Supreme Court's recent decision in *Nijhawan v. Holder*, 129 S.Ct. 2294 (2009) altered the *Taylor/Shepard* analysis, and this has resulted in a two-track approach for analyzing whether a criminal conviction constitutes a removable offense. "Under this approach, [the Immigration Court] must first decide whether a requirement under a generic crime is an 'element' of the generic crime instead of simply a description of the 'particular circumstances' in which the offender committed the crime on a specific occasion. If the requirement is an 'element,' [the Immigration Court applies] the *Taylor* approach; if the requirement is 'circumstance specific,' [the Immigration Court] . . . use[s] "fundamentally fair procedures" to determine whether the offender's crime satisfies the description of the generic offense." *Kawashima v. Holder*, ___ F.3d ___, 2010 WL 3025017, at *9 (9th Cir. 2010).

As stated above, a crime of domestic violence under section 237(a)(2)(E)(i) of the Act exists where the respondent has been convicted of (1) of an offense pursuant to 18 U.S.C. § 16 that has been committed (2) against a protected individual. *Tokatly*, 371 F.3d at 619 ("In order to determine that [the alien] was convicted of a 'crime of domestic violence' under section 237(a)(2)(E)(i), we would have to conclude that his crime was not only one of 'violence,' but also that the violence was 'domestic' within the meaning of that section.").

There is no doubt the "categorical approach" described in *Taylor* appropriately is applied to determine if the respondent's conviction constitutes an offense under 18 U.S.C. § 16. *Nijhawan*, 129 S.Ct. at 2299 ("[W]e made clear that courts must use the "categorical method" to determine whether a conviction for 'attempted burglary' was a conviction for a crime that . . . 'involved conduct that presents a serious potential risk of physical injury to another.'").

As a consequence of *Nijhawan*, and as previously recognized by the United States Court of Appeals for the Seventh Circuit (Seventh Circuit), it then becomes necessary to apply a "circumstance specific" analysis to determine whether a crime is "domestic" within the meaning of section 237(a)(2)(E)(i) of the Act:

> Although § 16(a) directs attention to the statutory elements, § 237(a)(2)(E) of the immigration laws departs from that model by making the "domestic" ingredient a real-offense characteristic. Thus it does not matter for purposes of federal law that

> the crime of battery in Indiana is the same whether the victim is one's wife or a drinking buddy injured in a barroom. The injury to a "domestic partner" is a requirement based entirely on federal law and may be proved without regard to the elements of the state crime. Substantial evidence, independent of Flores's admission, shows that the victim was his wife. When classifying the state offense of battery for purposes of § 16(a), however, the inquiry begins and ends with the elements of the crime.

*Flores v. Ashcroft*, 350 F.3d 666, 670 (7th Cir. 2003) (citations omitted).

This use of the circumstance specific approach, to ascertain whether there is a domestic element attaching to a crime of violence, also is informed by the recent United States Supreme Court decision in *United States v. Hayes*, 129 S.Ct. 1079, 1082 (2009), *cited in*, *Nijhawan*, 129 S.Ct at 2302. In *Hayes* the Supreme Court held that a misdemeanor crime of domestic violence, in the context of a conviction for possession of a firearm by a person convicted of a misdemeanor crime of domestic violence under 18 U.S.C. § 921(a)(33)(A), does not require the predicate-offense statute to "include, as a discrete element, the existence of a domestic relationship between offender and victim." *Id.* at 1084. Rather, in *Hayes* the Supreme Court endorsed a circumstance specific type of analysis identical to that articulated in *Nijhawan*:

> Most sensibly read, then, § 921(a)(33)(A) defines "misdemeanor crime of domestic violence" as a misdemeanor offense that (1) "has, as an element, the use [of force]," and (2) is committed by a person who has a specified domestic relationship with the victim. To obtain a conviction in a § 922(g)(9) prosecution, the Government must prove beyond a reasonable doubt that the victim of the predicate offense was the defendant's current or former spouse or was related to the defendant in another specified way. But that relationship, while it must be established, **need not be denominated an element of the predicate offense.**

*Id.* at 1087 (emphasis added).

Accordingly, the Immigration Court currently concludes that an analysis of the "domestic element" of the respondent's conviction, allegedly resulting in a conviction described in section 237(a)(2)(E)(i) of the Act, need not be restricted to the record of conviction. Where necessary, the Immigration Court may adopt other "fundamentally fair procedures" in a further effort to determine whether a domestic element exists. *See Kawashima*, 2010 WL 3025017, at *9 ("Given that in *Nijhawan*, the Supreme Court relied on such a stipulation to conclude that a . . . prior crime was an 'aggravated felony' under subsection (M)(i), we cannot conclude that . . . reliance on such a stipulation in this case was improper."); *Matter of Velasquez*, 25 I&N Dec. 278, 280 n.1 (BIA 2010) ("[W]e note that the domestic or family relationship need not be an element of the predicate offense to qualify as a misdemeanor crime of domestic violence under this section."); *see also Aguilar-Turcios v. Holder*, 582 F.3d at 1110 (Bybee, J., dissenting) ("Although the [Supreme] Court did not explain the specific contours of fundamentally fair procedures, it noted that the *Taylor* and

*Shepard* framework was unnecessary in such an analysis.").

### 2. Crime of Violence

Mindful of the analytical framework set out above, the Immigration Court first must determine whether the respondent's conviction qualifies as a "crime of violence." The term "crime of violence" is defined as follows:

> (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, or
> (b) any other offense that is a **felony** and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

18 U.S.C. § 16 (emphasis added).

Notably, it remains unclear whether the term "felony" contained in 18 U.S.C. § 16(b) refers to the federal or a state definition. *See Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1015 (9th Cir. 2006) (recognizing the lack of clarity in the Ninth Circuit's prior decisions regarding the issue). *Compare Matter of Velasquez*, 25 I&N Dec. 278, 280 (BIA 2010) ("[B]ecause the respondent's offense is not a felony under Federal law, it cannot constitute a crime of violence under 18 U.S.C. § 16(b)."), *Matter of Martin*, 23 I&N Dec. 491, 493 (BIA 2002) ("[B]ecause the offense is punishable by a maximum term of imprisonment of 1 year, it is . . . a misdemeanor for purposes of federal law [and] . . . cannot constitute a crime of violence under 18 U.S.C. § 16(b), which is confined to felony offenses by its terms."), *and Lopez v. Gonzales*, 549 U.S. 47, 48 (2006) ("To determine what felonies might qualify, the Court naturally looks to the definitions of crimes punishable as felonies under the [Controlled Substances Act]. If Congress had meant the Court to look to state law, it would have found a much less misleading way to make its point."), *with Singh v. Ashcroft*, 386 F.3d 1228, 1231 n.3 (9th Cir. 2004) (using state law to determine whether an offense is a "felony" under 18 U.S.C. 16(b)).

Regardless of which rule is relied on, a conviction for battery domestic violence in violation of NRS §§ 200.481 and 200.485 is not a felony under either federal or state law. *See* NRS § 200.485(a)(1) (indicating that a person who has been convicted of a first offense of domestic battery, pursuant to NRS § 30.018, is guilty of a misdemeanor and shall be sentenced to "[i]mprisonment in the city or county jail or detention facility for not less than 2 days, but not more than 6 months."); 18 U.S.C. § 3559(a) (unless otherwise indicated a federal offense is a felony if and only if it is punishable by a term of imprisonment exceeding one year). It follows that the Immigration Court is permitted to analyze respondent's conviction only under the standard set forth in 18 U.S.C. § 16(a).

#### i. Categorical Approach

DHS, in its May 24, 2010 brief, properly concedes that a conviction for battery domestic violence, in violation of NRS §§ 200.481 and 200.485, is not categorically a crime of domestic violence under section 237(a)(2)(E)(i) of the Act. Supporting this DHS position is the Ninth Circuit's decision in *Ortega-Mendez, supra*, and the Supreme Court's more recent decision in *Johnson v. United States*, 130 S.Ct. 1265 (2010).

In *Ortega-Mendez* the Ninth Circuit held that simple battery, in violation of Cal. Penal Code § 242, does not categorically constitute a crime of violence because it can be based on "the least touching" and does not fall within the federal definition of a crime of violence under 18 U.S.C. § 16(a), which requires force that actually is violent in nature. *Ortega-Mendez*, 450 F.3d at 1016. The Supreme Court's recent decision in *Johnson* similarly has resolved whether a conviction for simple battery, under section 784.03(1)(a) of the Florida Annotated Statues,[3] categorically can be considered a violent crime under 18 U.S.C. § 924(e)(2)(B). This federal statute defines a violent felony as "any crime punishable by imprisonment for a term exceeding one year," and where that felony also: "(i) has as an element the use, attempted use, or threatened use of physical force against the person of another; or (ii) is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another." As the Supreme Court has noted, 18 U.S.C. § 16(a) "is very similar to § 924(e)(2)(B)(i), in that it includes any felony offense which "has as an element the use . . of physical force against the person or property of another." *See Johnson*, 130 S.Ct. at 1270-71. Similar to the Ninth Circuit's decision in *Ortega-Mendez*, the Supreme Court concluded in *Johnson* that, "in the context of a statutory definition of 'violent felony,' the phrase 'physical force' means violent force—that is, force capable of causing physical pain or injury to another person." *Id.* at 1271. Hence, in *Johnson* the Supreme Court held that the defendant's conviction for simple battery was not a "violent felony" because under Florida state law the crime of battery includes any intentional touching. *Id.*

In contrast to the previous attention given by various courts to Cal. Penal Code § 242, courts have not construed the phrase "force or violence," as used in NRS § 200.481. Nevertheless, a comparison discloses the text of NRS § 200.481 is identical to Cal. Penal Code § 242.

| California Penal Code § 242 | Nevada Rev. Stat. § 200.481 |
|---|---|
| "A battery is any willful and unlawful use of force or violence upon the person of another." | "'Battery' means any willful and unlawful use of force or violence upon the person of another." |

[3]Fla. Stat § 784.03(1)(a) provides the following definition for the offense of simple battery:
The offense of battery occurs when a person:
1. Actually and intentionally touches or strikes another person against the will of the other; or
2. Intentionally causes bodily harm to another person.

The Immigration Court recognizes that under *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 188 (2007), to "find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language. It requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime." *Duenas-Alvarez*, 549 U.S. at 193. Still, the Ninth Circuit has gone on to point out that, "*Duenas-Alvarez* has not fundamentally changed the categorical approach . . . ." *Nunez v. Holder*, 594 F.3d 1124, 1129 n.2 (9th Cir. 2010). Indeed, "when 'the text of the statute expressly includes in its definition that which [is] expressly excluded from the generic, federal definition,' the statute is overly inclusive." *United States v. Vidal*, 504 F.3d 1072 (9th Cir. 2007) (en banc) (quoting *Grisel*, 488 F.3d at 850). Likewise, "'[when a] state statute explicitly defines a crime more broadly than the generic definition, no "legal imagination" is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime. The state statute's greater breadth is evident from its text.'" *Id.* (quoting *Grisel*, 488 F.3d at 850) (internal citation omitted).

Though Nevada state courts have not interpreted the phrase "force or violence" contained in NRS § 200.481, Nevada state jurisprudence requires that such statutes be "construed according to the fair import of its terms." NRS § 193.030; *Ortega-Mendez v. Gonzales*, 450 F.3d 1010, 1016 (9th Cir. 2006) ("[I]n determining the categorical reach of a state crime, [the Immigration Court] consider[s] not only the language of the state statute, but also the interpretation of that language in judicial opinions."). In accordance with the State of Nevada's established method of statutory interpretation, the Immigration Court initially must first attempt to discern the plain meaning of the statute in question. *See State v. State, Employees Assoc.*, 102 Nev. 287, 289, 720 P.2d 697, 698 (1986) ("When a statute uses words which have a definite and plain meaning, the words will retain that meaning unless it clearly appears that such meaning was not so intended.") *Berry v. State*, 212 P.3d 1085, 1095 (Nev. 2009) ("[W]hen an offense has not been defined by the Legislature, we generally look to the common law definitions of the related term or offense.").

To this end, in the State of Nevada, NRS § 1.030 requires that "the common law of England, so far as it is not repugnant to or in conflict with the Constitution and laws of the United States, or the constitution and laws of this state, shall be the rule of decision in all the courts of this state." By comparison, under common law the "element of 'force' [could] be satisfied by even the slightest offensive touching." *Johnson*, 130 S.Ct. at 1270-71; *Singh v. Ashcroft*, 386 F.3d 1228, 1233 (9th Cir. 2004) (quoting 3 Blackstone, Commentaries on the Law of England 120 (Univ. of Chicago Press ed. 1979)) ("The least touching of another's person wilfully, or in anger, is a battery; for the law cannot draw the line between different degrees of violence, and therefore totally prohibits the first and lowest stage of it: every man's person being sacred, and no other having a right to meddle with it, in . . . the slightest manner.") (brackets omitted). Perhaps even more insightful is the recognition that the State of Nevada has copied most of the content of its Constitution and statutes from California sources. *See State v. Millain*, 3 Nev. 409 (1867) ("We have copied most of our constitution and most of our laws from the sister State of California."). Because NRS § 200.481 and Cal. Penal Code § 242 both use the identical phrase "force or violence," and that phrase then has been interpreted by the State of California to require only the "least touching," there indeed is a realistic probability that only

the "least touching" is necessary to convict a defendant of battery in Nevada. *See Ortega-Mendez, supra*; *Matter of Sanudo*, 23 I&N Dec. 968, 972 (BIA 2006). Because the plain language of NRS § 200.481, like the Cal. Penal Code § 242, requires only a "slight touching," this Nevada statute is not categorically a crime of violence under 18 U.S.C. § 16(a).

### ii. Modified Categorical Approach

As occurs here, when the statute forming the basis of a conviction proscribes conduct greater than a generic criminal offense, an Immigration Court then employs a second step modified categorical analytical approach. *Shepard*, 544 U.S. at 16. Under the modified categorical approach the Immigration Court is limited "to 'a narrow, specified set of documents that are part of the record of conviction.'" *S-Yong v. Holder*, 600 F.3d 1028, 1036 (9th Cir. 2010) (quoting *Tokatly*, 371 F.3d at 620). "That is to say, the modified categorical approach hews to the categorical. It is a narrow exception. The set of noticeable documents includes **the indictment (but only in conjunction with a signed plea agreement)**, the judgment of conviction, the minute order fully documenting the judgment, jury instructions, a signed guilty plea or the transcript from the plea proceedings." *Id.* (citing *Snellenberger*, 548 F.3d at 702) (emphasis added).

In the instant case DHS has submitted a State of Nevada criminal complaint and a minute order to support the contention that the respondent was convicted of a crime of domestic violence, under section 237(a)(2)(E)(i) of the Act. The criminal complaint alleges that the respondent

> did then are there willfully and unlawfully use force or violence against or upon the person of his spouse, former spouse, any other person to whom he is related by blood or marriage, a person with whom he is or was actually residing, a person with whom he has had or is having a dating relationship, a person with whom he has a child in common, the minor child of any of those persons or his minor child, to-wit: ALDO SAM, by striking the said ALDO SAM on the head with her hand and/or telephone.

However, it presently is necessary to recognize that this criminal complaint is "**insufficient alone to prove the facts to which [the respondent] admitted.**" *Penuliar v. Mukasey*, 528 F.3d 603, 613 (9th Cir. 2008) (emphasis added). As indicated above, this is because a charging document is **only sufficient under the modified categorical approach "in conjunction with a signed plea agreement."** *S-Yong*, 600 F.3d at 1036. Even in that narrow permissible circumstance, Ninth Circuit law is clear that "a plea of guilty admits only the elements of the charge necessary for a conviction." *Malta-Espinoza v. Gonzales*, 478 F.3d 1080, 1083 n.3 (9th Cir. 2007). Consequently, a plea does not automatically admit additional facts that are alleged but not required to sustain a conviction. *Id.*; *United States v. Cazares*, 121 F.3d 1241, 1246-47 (9th Cir. 1997) (holding that "allegations not necessary to be proved for a conviction . . . are not admitted by a plea").

In this case DHS has not submitted a guilty plea in conjunction with the criminal complaint. Rather, DHS has submitted merely an ambiguous minute order that fails to disclose whether the respondent was convicted "as charged in the criminal complaint." Such an anomaly has been

described as a particular concern by the Ninth Circuit:

> We have repeatedly held that charging documents are insufficient alone to prove the facts to which [a defendant] admitted.
>
> . . .
>
> [W]hen the record of conviction comprises **only the indictment and the judgment**, the judgment **must contain the critical phrase "as charged in the Information."**

*Vidal*, 504 F.3d at 1087-88 (citations and quotations omitted) (emphasis added); *Fregozo v. Holder*, 576 F.3d 1030, 1040 (9th Cir. 2009) (emphasizing post-*Snellenberger* that the Board must observe *Vidal's* "as charged" requirement); *United States v. Velasco-Medina*, 305 F.3d 839, 852-53 (9th Cir. 2002) (charging papers contain the elements the government sets out to prove, but do not by themselves establish the elements the respondent admitted in a guilty plea; the government must prove that by a plea the respondent admitted all of the elements of the generic crime); *see also United States v. Parker*, 5 F.3d 1322, 1327 (9th Cir. 1993) ("We hold that the sentencing court may not rely upon the charging paper alone in determining if a prior jury conviction was for a 'violent felony.' We further hold that **the court may not rely solely upon the charging instrument and verdict form if the latter fails to reflect the actual facts found by the jury in convicting the defendant.**") (emphasis added).[4]

Based on this line of cases, the Immigration Court concludes that the record of conviction is insufficient to resolve whether the respondent's conviction at issue constitutes a crime of violence under 18 U.S.C. § 16(a). Given the failure of DHS to establish by clear and convincing evidence that the respondent's conviction is a crime of violence under 18 U.S.C. § 16, it follows that her conviction does not qualify as a crime of domestic violence under section 237(a)(2)(E)(i) of the Act.

Accordingly, the following orders shall be entered:

**IT IS HEREBY ORDERED** that the section 237(a)(2)(E)(i) of the Act charge of removability is **NOT SUSTAINED**.

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[4]The DHS brief in this case contends that *Retuta* has overruled *Vidal* and its progeny. This argument is unpersuasive. The three-judge panel in *Retuta* placed no reliance whatsoever in *Vidal*. *Retuta* also was not permitted to overrule the en banc decision in *Vidal* or any other decision of the Ninth Circuit. *See Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc) (holding that, in the absence of an intervening Supreme Court decision, only the en banc court may overrule a decision by a three-judge panel). Of importance, *Reuta* did not concern utilization of the modified categorical analytical approach. Instead, the sole issue in *Retuta* was whether a minute order was sufficient to prove the existence of that alien's criminal conviction. *Retuta*, 591 F.3d at 1184 ("Retuta argues that the minute order used to prove his 2002 conviction for possession of a controlled substance was insufficient to prove **the fact of his conviction** by the required clear, unequivocal, and convincing evidence standard because the minute order contains several unexplained acronyms.") (emphasis added).

**IT IS HEREBY FURTHER ORDERED** that the respondent's removal proceeding be **TERMINATED.**[5]

Ronald L. Mullins
Immigration Judge

CERTIFICATE OF SERVICE
SERVICE BY: Mail (M) Personal Service (P)
TO: [ ] DHS [ ] Alien [ ] Alien's Attorney
DATE:
BY: Court Staff

[5]A notice of appeal must be filed with the Board of Immigration Appeals within 30 calendar days of the issuance date of this decision. If the final date for filing the notice of appeal occurs on a Saturday, Sunday, or legal holiday, the time period for filing will be extended to the next business day. If the time period expires and no appeal has been filed, this decision then becomes final.