U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

O[redacted] J[redacted] K[redacted]
[redacted]
[redacted]

DHS/ICE Office of Chief Counsel - DAL
125 E. John Carpenter Fwy, Ste. 500
Irving, TX 75062-2324

Name: O[redacted], J[redacted] K[redacted]

A [redacted]418

Date of this notice: 5/10/2017

Enclosed is a copy of the Board's decision in the above-referenced case. If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of this decision.

Sincerely,

Cynthia L. Crosby
Acting Chief Clerk

Enclosure

Panel Members:
Kelly, Edward F.

Userteam: Docket

File: [redacted] 418 – Dallas, TX

Date: MAY 10 2017

In re: J[redacted] K[redacted] O[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF DHS: Margot Johnson
Assistant Chief Counsel

APPLICATION: Reopening

The Department of Homeland Security ("DHS") appeals the decision of the Immigration Judge, dated December 23, 2014, denying its motion to reopen. We will dismiss the DHS's appeal.

We review Immigration Judges' findings of fact for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in appeals de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent, a native and citizen of Sudan, was previously granted asylum by an Immigration Judge. The DHS contends that these proceedings should be reopened for the purposes of terminating the respondent's asylum status as he was subsequently convicted of a disqualifying crime of violence aggravated felony. *See* sections 101(a)(43)(F), 208(b)(2)(A)(ii), (B)(i), of the Immigration and Nationality Act, 8 U.S.C. §§ 1101(a)(43)(F), 1158(b)(2)(A)(ii), (B)(i); 8 C.F.R. §§ 1003.23(b)(3), 1208.24(f).

The DHS has not established that the respondent's conviction for Injury to a Child, Elderly Individual, or Disabled Individual in violation of TEXAS PENAL CODE. § 22.04(a) constitutes a conviction for a crime of violence aggravated felony. As the respondent was convicted of a third degree felony, he was necessarily convicted under TEXAS PENAL CODE. § 22.04(a)(3), i.e., he intentionally or knowingly by act or intentionally or knowingly by omission caused to a child, elderly individual, or disabled individual . . . bodily injury.[1]

[1] Had the respondent caused serious bodily injury or serious mental deficiency, impairment, or injury in violation of TEXAS PENAL CODE. § 22.04(a)(1) or (2), his offense would have been deemed a first or second degree felony. TEXAS PENAL CODE. § 22.04(e). Moreover, the third degree felony designation precludes the possibility that he committed his offense recklessly or with criminal negligence. TEXAS PENAL CODE. § 22.04(f).

Even recognizing that the respondent committed his offense intentionally or knowingly, his conviction under TEXAS PENAL CODE. § 22.04(a)(3) does not categorically constitute a conviction for a crime of violence as that term is defined by 18 U.S.C. 16(b), i.e., a felony 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.[2] "Because the offense of injury to a child is results-oriented, many convictions for this offense involve an omission rather than an intentional use of force." *United States v. Gracia-Cantu*, 302 F.3d 308, 312 (5th Cir. 2002) (citing *Dusek v. State*, 978 S.W.2d 129 (Tex.App.-Austin 1998, pet. ref'd) (involving a mother's conviction for intentional or knowing serious bodily injury to a child for failing to remove her son from the presence of her abusive boyfriend and for the failure to provide medical care)); *see also Matter of Sweetser*, 22 I&N Dec. 709, 709 (BIA 1999) (holding that an alien convicted of criminally negligent child abuse, whose negligence in leaving his stepson alone in a bathtub resulted in the child's death, was not convicted of a crime of violence under 18 U.S.C. § 16(b) because there was not "substantial risk that physical force" would be used in the commission of the crime).

TEXAS PENAL CODE. § 22.04(a)(3) is not further divisible to discern whether the respondent was convicted of having committed his offense by "act" or "omission." "[T]he Legislature intended . . . that 'act or omission' constitute the means of committing the course of conduct element of injury to a child." *Jefferson v. State*, 189 S.W.3d 305, 312 (Tex. Crim. App. 2006). As such, a jury need not reach a unanimous decision as to whether an offense was committed by "act" or "omission" because the acts or omissions that combine to establish the offense are "basically morally and conceptually equivalent." *Id.* at 312-13 ("We, therefore, decide that 'act or omission' are not elements of an injury to a child offense about which a jury must be unanimous.").

We acknowledge that, in *Perez-Munoz v. Keisler*, 507 F.3d 357, 362 (5th Cir. 2007), the United States Court of Appeals for the Fifth Circuit held that it was permissible for an Immigration Judge to examine an alien's conviction record to determine the manner in which his victim was injured. However, in *Descamps v. United States*, 133 S. Ct. 2276, 2281-83 (2013), the Supreme Court clarified that an offense is divisible - so as to warrant a modified categorical inquiry - only if it contains disjunctive sets of "elements," more than one combination of which could support a conviction. As discussed above, the Texas Court of Criminal Appeals has squarely held that jury unanimity is not required in this "act-versus-omission" context. *Jefferson v. State*, *supra*, at 312.

Notwithstanding *Jefferson*, the DHS maintains that TEXAS PENAL CODE. § 22.04(a)(3) is divisible under *Descamps* because it lists acts and omissions as statutory alternatives. However, the subsequent decision in *Mathis v. United States*, 136 S. Ct. 2243 (2016), instructs that there is a difference between alternative elements of an offense and alternative means of satisfying a single element. *United States v. Hinkle*, 832 F.3d 569, 575 (5th Cir. 2016). "The test to distinguish means from elements is whether a jury must agree." *United States v. Howell*, 838 F.3d 489, 497 (5th Cir. 2016). Where, as here, a jury would not have been required to unanimously determine whether the respondent committed his offense by "act" or "omission," the applicable statute is not

[2] TEXAS PENAL CODE. § 22.04(a)(3) does not define a crime of violence under 18 U.S.C. § 16(a) because none of its subsections requires as an element that the perpetrator use, attempt to use, or threaten to use violent physical force. *United States v. Gracia-Cantu*, *supra*, at 311.

further divisible. *See Matter of Chairez*, 26 I&N Dec. 819, 822 (BIA 2016) ("[D]isjunctive statutory language does not render a criminal statute divisible unless each statutory alternative defines an independent 'element' of the offense, as opposed to a mere 'brute fact' describing various means or methods by which the offense can be committed"). Considering these circumstances, the modified categorical approach has "no role to play." *See Descamps v. United States*, *supra*, at 2285.

Based upon the foregoing, the respondent's conviction does not categorically constitute a conviction for a crime of violence aggravated felony. As the modified categorical approach cannot be employed to reach a holding that the respondent committed his offense by "act," as opposed to by "omission," the DHS has not established that these removal proceedings should be reopened for the purposes of terminating the respondent's asylum status. Accordingly, as we affirm the Immigration Judge's decision, the following order is entered.

ORDER: The Department of Homeland Security's appeal is dismissed.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
1100 COMMERCE ST., SUITE 1060
DALLAS, TX 75242

WISE, ROBERT K.
5949 SHERRY LANE
DALLAS, TX 75225

IN THE MATTER OF
O[redacted], J[redacted] K[redacted]

FILE A [redacted]418 DATE: Dec 24, 2014

UNABLE TO FORWARD - NO ADDRESS PROVIDED

ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO:

BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
5107 Leesburg Pike, Suite 2000
FALLS CHURCH, VA 20530

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
1100 COMMERCE ST., SUITE 1060
DALLAS, TX 75242

__ OTHER: _____

_____
COURT CLERK
IMMIGRATION COURT FF

CC: ARRINGTON, SAUNDRA H.
8101 NORTH STEMMONS FREEWAY
DALLAS, TX, 752470000

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE OF IMMIGRATION REVIEW
DALLAS IMMIGRATION COURT

Date: December 23, 2014

File: A [redacted]418

Immigration Removal Proceedings in the Matter of: J[redacted] K[redacted] O[redacted], Respondent

Application: Motion to Reopen

On Behalf of the Respondent: Robert Wise, Esq., 5949 Sherry Lane, Dallas, Texas 75225

On Behalf of Department of Homeland Security/Immigration and Customs Enforcement: Margot Johnson, Esq., Ass't. Chief Counsel, 125 E. John Carpenter Freeway, Suite 500, Irving, Texas 75062

WRITTEN DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

The Respondent is a male, native and citizen of Sudan. Exhibit 1. On July 14, 2006, the Government charged the Respondent with being subject to removal from the United States. *Id.* On July 17, 2006, the Government filed Form I-261, Additional Charge of Inadmissibility/Deportability. Exhibit 2. During the course of proceedings, the Respondent entered the following pleas.

Allegations:

(1) The Respondent admitted that he is not a citizen or national of the United States;
(2) The Respondent admitted that he is a native and citizen of Sudan;
(3) The Respondent admitted that on June 8, 2004 he was convicted in the Second County Criminal Court of Dallas County, Texas for the offense of Injury to a Child, in violation of the Texas Penal Code;
(4) The Respondent admitted that on February 23, 2000 he was conditionally admitted to the United States as a refugee; and
(5) The Respondent admitted that on July 14, 2006, the United States Citizenship & Immigration Service denied his application for adjustment of status.

Charge: The Government charged the Respondent as being subject to removal from the United States pursuant to Section 212(a)(2)(A)(i)(I), INA, as amended, in that he is an alien who has been convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of a crime involving moral turpitude (other than a purely political offense).

Sustaining of the Charge: Based upon the Respondent's pleas, the Court sustained the allegations and charge of removal, specifically finding the Respondent subject to removal from the United States to his native country of Sudan.

Applications: The Respondent applied for asylum, withholding of removal, and relief under the Convention Against Torture. On November 29, 2006, the Respondent was granted asylum pursuant to Section 208, INA by the Immigration Judge.

II. MOTION

On December 9, 2014, the Government filed a Motion to Reopen requesting that the Court reopen the Respondent's case in order to terminate his asylum status. The Government argues that in 2008 and again in 2009, after the Respondent was granted asylum status, the sentence for his conviction for Injury to a Child under TEX. PEN. CODE ANN. § 22.04 was amended. *See* Motion to Reopen, Tab B. The Government argues that his conviction now qualifies as an aggravated felony under Section 101(a)(43)(F), INA, rendering him statutorily ineligible for asylum status. As such, the Government requests termination of his asylum status.

III. STATEMENT OF THE LAW

A. Motion to Reopen

A party is limited to one motion to reopen and that motion must be filed no later than 90 days after the date on which the final administrative decision was rendered in the proceedings sought to be reopened. 8 C.F.R. § 1003.23(b)(1). A motion to reopen does not have to conform to the above time and numerical limitations where it is (1) filed to apply or reapply for asylum based on changed circumstances in the respondent's home country (2) filed on the basis of a removal order issued *in absentia*, when the motion to reopen is based on lack of notice or exceptional circumstances; (3) agreed upon by all parties and jointly filed (4) filed by the Government. *See* 8 C.F.R. § 1003.23(b)(1), (b)(4).

The granting of a motion to reopen lies within the "broad discretion" of the Immigration Judge. *See INS v. Doherty*, 502 U.S. 314, 323 (1992). A motion may not be granted unless the moving party demonstrates that the evidence sought to be offered is previously unavailable, and could not have been discovered or presented at the original hearing. 8 C.F.R. § 1003.23(b)(3). A motion to reopen must also state the new facts to be proven at the reopened proceeding, supported by affidavits or other evidentiary material. *Id.*

The Court may exercise its *sua sponte* authority to reopen in "truly exceptional situations," where the interests of justice would be served. *Matter of G-D-*, 22 I&N Dec. 1132, 1133 (BIA 1999); *see also Matter of J-J-*, 21 I&N Dec. 976 (BIA 1997).

B. Aggravated Felony

An "aggravated felony" under the Section 101(a)(43)(F), INA is defined as a "crime of violence (as defined in 18 U.S.C. § 16, but not including a purely political offense) for which the

term of imprisonment [is] at least one year." A "crime of violence" includes:

> (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. A determination of whether a crime qualifies as a crime of violence, involves utilization of the categorical approach. *Matter of Chairez*, 26 I&N Dec. 349, 351 (BIA 2014). The categorical approach focuses on the "minimum conduct that has a realistic probability of being prosecuted" under the statute at issue, not the conduct underlying the conviction. *See Moncrieffe v. Holder*, 133 S.Ct. 1678, 1684-85 (2013). The categorical approach compares the "elements" required for conviction under the criminal statute to the "generic" definition of a crime of violence found in 18 U.S.C. § 16. *Id.* at 1684; *Descamps v. U.S.*, 133 S.Ct. 2276, 2283 (2013). If the elements of the statute at issue are broader than that contained at 18 U.S.C. § 16, then the statute is categorically not a crime of violence and the inquiry ends. *Id.* at 2283, 2285. "The key [to the categorical approach] is the elements, not facts." *Id.* at 2283.

An immigration judge may only utilize the modified categorical approach under a very "narrow range of cases." *Id.* (internal quotations omitted). The modified categorical approach applies when a statute of conviction is "divisible," that is "the statute sets out one or more elements of the offense in the alternative." *Id.* at 2281. If one of the alternatives corresponds to the generic crime, but the other does not, the modified approach clarifies "which element played a part in the defendant's conviction" by consulting the record of conviction to determine which alternative formed the basis of the conviction. *Id.* The record of conviction includes the "charging document, jury instructions, plea agreement, or comparable judicial record that formed the factual basis for the plea." *Moncrieffe*, 133 S.Ct. at 1684.

In interpreting *Descamps*, the Board of Immigration Appeals explained that "a criminal statute is divisible, so as to warrant a modified categorical inquiry, only if (1) it lists multiple discrete offenses as enumerate alternatives or defines a single offense by reference to disjunctive sets of "elements," more than one combination of which could support a conviction; *and* (2) at least one, but not all, of those offenses or combinations of disjunctive elements is a categorical match to the relevant generic standard." *Matter of Chairez*, 26 I&N Dec. at 353. The "elements" of a crime, for purposes of the modified categorical approach, includes "those facts about the crime which 'the Sixth Amendment contemplates that a jury—not a sentencing court—will find . . . unanimously and beyond a reasonable doubt.'" *Id.* (quoting *Decamps*, 133 S.Ct. at 2281, 2283.

IV. ANALYSIS

The Government contends that new facts have arisen since the previous hearing. At the prior hearing the Respondent's conviction for Injury to a Child had resulted in a sentence of five years' probation. *See* Exhibit 3, Tab 2. Thus, the Respondent's conviction could not be classified as an "aggravated felony" under Section 101(a)(43)(F), INA because the conviction did not result in a term of imprisonment of at least one year. *See* INA §§ 101(a)(43)(F), (48)(B); *U.S. v.*

Banda-Zamora, 178 F.3d 728, 730 (5th Cir. 1999) ("[W]hen a court does not order a period of incarceration and then suspend it, but instead imposes probation directly, the conviction is not an 'aggravated felony.'"). However, the Government has submitted evidence that the state criminal court issued a formal judgment in 2008 sentencing the Respondent to ten years confinement, probated for ten years. *See* Motion to Reopen, Tab B. Moreover, the Government has also proffered evidence that in 2009, the Respondent's community supervision was revoked and the Respondent was sentenced to three years confinement. *See id.* at Tab C. These facts were unavailable, could not have been discovered at the prior hearing, and materially relate to the Respondent's eligibility for asylum. *See* 8 C.F.R. § 1003.23(b)(3). Thus, the only remaining issue is whether the Respondent's crime of Injury to a Child under TEX. PEN. CODE ANN. § 22.04 now renders him statutorily ineligible for asylum.

An Immigration Judge may reopen a case for the purpose of terminating asylum status if the Government demonstrates by a preponderance of the evidence that a termination ground applies. *See* 8 C.F.R. § 1208.24(f). Asylum status may be terminated if the Government shows that the Respondent was convicted of a "particularly serious crime." INA § 208(b)(2)(A)(ii). A "particularly serious crime" includes a conviction for an aggravated felony. INA § 208(b)(2)(B)(i). The Government contends that the Respondent's conviction for Injury to a Child, in violation of TEX. PEN. CODE ANN. § 22.04, resulting in a sentence of three years confinement is an aggravated felony as defined in Section 101(a)(43)(F), INA.

A. Categorical Approach

The Respondent was convicted under TEX. PEN. CODE ANN. § 22.04, which states: "A person commits an offense if he intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission causes to a child, elderly individual, or disabled individual: (1) serious bodily injury; (2) serious mental deficiency, impairment, or injury; or (3) bodily injury." The sentence under this statute ranges from 180 days to life. *See* TEX. PEN. CODE ANN. §§ 12.32-35, 22.04 (e)-(g) (noting that conviction under various subparts of statute range from a state jail felony to a first degree felony). The Respondent's conviction now satisfies the part of the aggravated felony definition requiring that the sentence imposed for the conviction be a term of imprisonment of at least one year. *See* Motion to Reopen, Tab C. Thus, if his offense constitutes a "crime of violence" under 18 U.S.C. § 16(a) or (b), the offense is an "aggravated felony" under Section 101(a)(43)(F), INA.

The Government contends that the Respondent's conviction under § 22.04 is a crime of violence under the modified categorical approach. In support of this argument, the Government references the Respondent's conviction documents which indicate that he was convicted of "intentionally and knowingly" by act committing the crime at issue. *See* Exhibit 3, Tab 2. The Government urges an intentional and knowing act causing bodily injury to a child is a crime of violence as it involves the use or risk of use of physical force in committing the offense.

The Court must first determine, under the categorical approach, whether the statute of conviction qualifies as a "crime of violence." Under the categorical approach, the Court will assess the "minimum conduct that has a realistic probability of being prosecuted" under the statute of conviction. *Matter of Chairez*, 26 I&N Dec. at 351; *see Moncrieffe*, 133 S.Ct. at 1684 ("'Because we examine what the state conviction necessarily involved, not the facts underlying

the case, we must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized."). The minimum conduct that has a realistic probability of being prosecuted under the statute is "recklessly by omission causing a child, elderly individual, or disabled individual bodily injury." *See* TEX. PEN. CODE ANN. § 22.04(a)(3); *Prescott v. State*, 123 S.W.3d 506 (Tex. App. 2003) (finding evidence sufficient to uphold conviction for conduct committed recklessly by omission). These elements must be compared to the generic crime of a "crime of violence" under both 18 U.S.C. § 16(a), (b).

1. 18 U.S.C. § 16(a)

18 U.S.C. § 16(a) defines a "crime of violence" as "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." The word "use," as employed in this statute, denotes volition and requires active employment. *See Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004) (finding that DUI conviction was not a "crime of violence" under 18 U.S.C. §16(a)). This definition "suggests a higher degree of intent than negligent or merely accidental conduct" but "connotes the *intentional* application of force." *Id.*; *see also U.S. v. Vargas-Duran*, 356 F.3d 598 (5th Cir. 2004) ("We hold that the "use" of force requires that a defendant intentionally avail himself of that force.").

The Fifth Circuit has held that a conviction under § 22.04 does not involve the "use, attempted use, or threatened use of physical force against the person of another" as required by U.S.C. § 16(a). *See U.S. v. Andino-Ortega*, 608 F.3d 305 (5th Cir. 2010); *Gracia-Cantu*, 302 F.3d 308 (5th Cir. 2002); *U.S. v. Shelton*, 325 F.3d 553 (5th Cir 2003) ("By including acts of omission, the injury to a child statute encompasses conduct that, unlike the instant case, does not require the use of physical force by the defendant."). The court reasoned that the offense is "results-oriented[,] in that the culpable mental state must relate to the result of a defendant's conduct rather than to the conduct itself." *Gracia-Cantu*, 302 F.3d at 311-12 (citing *Patterson v. State*, 46 S.W.2d 294, 301 (Tex. App. 2001)); *see also Jefferson v. State*, 189 S.W.3d 305, 312 (Tex. Crim. App. 2006) ("[T]he conduct is inconsequential to its commission as long as "the conduct (whatever it may be) is voluntary and done with the required culpability to effect the *result* the Legislature specified."). Furthermore, § 22.04 is not a crime of violence under § 16(a) because a conviction may be had for a reckless act or omission rather than the intentional application of force. *See Matter of Chairez*, 26 I&N Dec. at 352. As such, § 22.04 does not explicitly require the "intentional application of force as an element," and is therefore not categorically a crime of violence under § 16(a). *Gracia-Cantu*, 302 F.3d at 312.

2. 18 U.S.C. § 16(b)

A "crime of violence" under 18 U.S.C. § 16(b) includes "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." Section 16(b)'s inclusion of the term "physical force" suggests "violent, active force capable of causing pain or injury to another person." *Matter of Chairez*, 26 I&N Dec. 349, 351 (BIA 2014) (citing *Matter of Velasquez*, 25 I&N Dec. 278, 281-82 (BIA 2010)). "A substantial risk that an event may occur does not mean that it must occur in every instance; rather, a substantial risk requires only a strong probability that the event, in this case the application of physical force during the commission of the crime, will occur." *U.S. v. Velazquez-Overa*, 100 F.3d 418, 420 (5th Cir. 1996)

(quoting *U.S. v. Rodriguez-Guzm*an, 56 F.3d 18, 20 (5th Cir. 1995)).

The Fifth Circuit has held that a conviction under TEX. PEN. CODE ANN. § 22.04 is not categorically a crime of violence under 18 U.S.C. § 16(b), because there is not a substantial risk that physical force would be used in the commission of the offense. *Gracia-Cantu*, 302 F.3d at 312. The statute criminalizes "acts or omissions that intentionally, knowingly, recklessly, or negligently result in injury" to three classes of individuals. *Id.* As noted above, the culpable mental state relates to the "*result* of a defendant's conduct rather than to the conduct itself." *Id.* (emphasis added). As such, "many convictions for this offense involve an omission rather than an intentional use of force." *Id.* at 312-13 (citations omitted). However, offenses of omission are not by their "nature" crimes of violence within the meaning of § 16(b). *Id.* (noting that the categorical approach determines whether a conviction under the statute is "by its nature" a crime of violence under § 16(b)). Furthermore, a conviction may be had for a reckless act rather than the intentional application of force and under the minimum reading of the statute, no intent higher than recklessness is required. Thus, the minimum conduct that has a realistic probability of being prosecuted under the statute "does not involve the substantial likelihood of an intentional use of force" and is therefore not categorically a crime of violence under § 16(b). *Id.* at 313.

B. Modified Categorical Approach

As the Court has found that this conviction is not categorically a crime of violence, the issue is whether the Court may consult the record of conviction under the modified categorical approach. The Government argues that § 22.04 is divisible and thus the Court may consult the Respondent's record of conviction to determine the elements of the crime for which he was convicted. DHS cites to the Fifth Circuit's decision in *Perez-Munoz v. Keisler* for its contention that § 22.04 is a divisible statute. 507 F.3d 357 (5th Cir. 2007). At issue in *Perez-Munoz*, was whether the respondent's conviction for injury to a child under § 22.04 was a crime of violence under § 16(b). Based on its prior holding in *Gracia-Cantu,* the court held that injury to a child is not categorically a crime of violence because the offense may involve an omission rather than a deliberate act. *Perez-Munoz*, 507 F.3d at 361 (noting examples of withholding food or medical care from a child as sufficient acts to sustain a conviction under § 22.04). However, the Fifth Circuit determined that it could utilize the modified categorical approach to determine whether the offense was a crime of violence because the offense at issue could be committed in one of two ways: (1) an act causing injury to a child, which would constitute a crime of violence, or (2) an omission causing injury to a child, which would not constitute a crime of violence. *Id.* at 362.

In consulting the charging document, the court noted that Perez was charged with an intentional or knowing act, not an omission. *Id.* As such, the court held that "in the ordinary case, when the defendant is charged with causing bodily injury to a child by an intentional act, the perpetrator uses or risks the use of physical force in committing the offense." *Id.* at 364. As such, the court found that Perez's crime was a crime of violence under § 16(b). *Id.* The Government urges that we follow the analysis in *Perez-Munoz*. However, the Court notes that this case precedes the Supreme Court's decision in *Descamps* and the Board's decision in *Matter of Chairez*. The divisibility analysis used by the Fifth Circuit in *Perez-Munoz* does not comport with the analysis provided these two cases.

After *Descamps* and *Chairez*, in order for the statute to be divisible, permitting this Court to consult the record of conviction, the statute must (1) "list[] multiple discrete offenses as enumerated alternatives or define[] a single offense by reference to disjunctive sets of 'elements,' more than one combination of which would support a conviction; and (2) at least one, but not all, of those listed offenses, or combinations of disjunctive elements is a categorical match to the relevant generic standard." *Matter of Chairez*, 26 I&N Dec. at 353 (citing *Descamps*, 133 S.Ct. at 2281, 2283). The Supreme Court has made clear that for purposes of the modified categorical approach, the "elements" of an offense include those facts which a jury must find "unanimously and beyond a reasonable doubt." *Id.* (internal quotations omitted). Therefore, to make a finding as to the divisibility of § 22.04, the Court must determine the "elements" of the statute.

In Texas, "where the legislature has specified that any of the several different mental states will satisfy the intent or means rea element of a particular crime, unanimity is not required on the specific alternate mental state as long as the jury unanimously agrees that that the State has proven the intent element beyond a reasonable doubt." *Huffman v. State*, 234 S.W.3d 185, 191 (Tex. App. 2007); *see also Contreras v. State*, 312 S.W.3d 566 (Tex. Crim. App. 2010) ("Proof of one of the four culpable mental states recognized in Chapter 6 of the Penal Code necessarily suffices to prove any lesser culpable mental state recognized in that chapter. A juror who believes that the least of the underlying offenses has been committed also believes that the least of the underlying offenses has been committed, so there is no actual divergence between the jurors with respect to the underlying offense."); *Jefferson v. State*, 189 S.W.2d at 311 ("[W]here the legislature has specified that any of several different mental states will satisfy the intent or mens rea element of a particular crime, unanimity is not required on the specific alternate mental state."). Thus, because the mental states present in § 22.04 are not required to be proven beyond a reasonable doubt by a unanimous jury, they are not considered "elements" for purposes of the modified categorical approach.

Similarly, whether the conviction occurred as a result of an "act" or an "omission" is also not an "element" of the crime. *Jefferson*, 189 S.W.3d at 312 (finding that the jury was not required to be unanimous on this issue). However, Texas courts have required a unanimous verdict regarding whether the conviction caused serious bodily injury, serious mental deficiency, impairment, or injury, or bodily injury. *Stuhler v. State*, 218 S.W.3d 706, 718-19 (Tex. Crim. App. 2007). As such, § 22.04 meets the first requirement for a "divisible" statute in that the offense contains a disjunctive set of "elements," namely the resulting harm under § 22.04(a)(1), (2), or (3). Thus, the question then becomes whether "at least one, but not all of those combinations of disjunctive elements is a categorical match to the relevant generic standard." *Matter of Chairez*, 26 I&N Dec. at 353. The minimum conduct under each combination of disjunctive elements would include:

(1) A person commits an offense if he recklessly by omission causes to a child, elderly individual, or disabled individual serious bodily injury;
(2) A person commits an offense if he recklessly by omission causes to a child, elderly individual, or disabled individual serious mental deficiency, impairment, or injury;
(3) A person commits an offense if he recklessly by omission causes to a child, elderly individual, or disabled individual bodily injury.

However, none of these options would be a categorical match for a crime of violence because the minimum conduct would always involve an "omission." As detailed above, the Fifth Circuit has made clear that an omission is not a categorical match to the generic definition of a crime of violence under either § 16(a) or 16(b). Consequently, the statute is not divisible and the Court cannot proceed to the modified categorical approach and consult the Respondent's record of conviction. As the modified categorical approach is inappropriate in this case, the Court may only consider whether the Respondent's crime is a "crime of violence" under the categorical approach, which, as discussed above, the Court has determined it is not.

Court's Finding: The Respondent has not been convicted of an aggravated felony as described in Section 101(a)(43)(F), INA rendering him statutorily ineligible for asylum. As such, the Court will not reopen this case for purposes of terminating asylum status as the Government has not shown by a preponderance of the evidence that a ground for such termination exists.

Accordingly, the following Order shall be entered:

V. ORDER

IT IS ORDERED THAT the Government's Motion to Reopen be and is **DENIED.**

Date: December 23, 2014

Richard Randall Ozmun
Immigration Judge
USDOJ/EOIR

Copy to:
Chief Counsel, DHS/ICE