Nos. 18-____

IN THE

Supreme Court of the United States

J. CRUZ RAMIREZ-BARAJAS,

Petitioner,

v.

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL,

Respondent.

DANIEL OGINGA ONDUSO,

Petitioner,

v.

JEFFERSON B. SESSIONS, III, ATTORNEY GENERAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

18 U.S.C. § 16(a)—which is incorporated into numerous federal statutes including the Immigration and Nationality Act (INA)—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." Many state statutes criminalize acts causing bodily harm or fear of such harm, without having as an element the use, attempted use, or threatened use of physical force.

The question presented is:

Where a state statute criminalizes only the causation or threat of bodily harm, without a distinct element requiring the use or threatened use of physical force, does that offense qualify as a crime of violence within the meaning of § 16(a) as the Seventh, Eighth, and Ninth Circuits have held, or does § 16(a) apply only if the statute also requires the use, attempted use, or threatened use of physical force as the First, Second, and Fifth Circuits have held?

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INTRODUCTION

The courts of appeals are openly and deeply divided over the question presented by this petition.[1] The Seventh, Eighth, and Ninth Circuits have held that where a state statute criminalizes the causation of "bodily harm," courts may assume that crime "has as an element the use, attempted use, or threatened use of physical force" as required to qualify as a "crime of violence" under 18 U.S.C. § 16(a). The First, Second, and Fifth Circuits, in contrast, have held that because a person can cause "bodily harm" without using physical force—for example, by poisoning or trickery—such state crimes do not constitute crimes of violence under § 16(a).

This question is especially significant because § 16(a) supplies the general definition for a "crime of violence" for the Criminal Code. As such, it operates in the context of dozens of other statutes. As relevant here, it is incorporated into the immigration laws' definition of "crime of domestic violence." 8 U.S.C. § 1227(a)(2)(E)(i). Conviction for an offense deemed a "crime of domestic violence" renders all noncitizens removable, and also renders nonpermanent residents ineligible for discretionary relief from removal. *See* 8 U.S.C. §§ 1227(a)(2)(E)(i), 1229b(b)(1)(C). It has these

[1] This is a joint petition seeking review of two Eighth Circuit decisions, as permitted by Supreme Court Rule 12.4 and warranted because of the identity of legal issues and interests in these cases.

severe consequences regardless of the sentence imposed or whether the offense is classified as a misdemeanor or felony.

Petitioners J. Cruz Ramirez-Barajas and Daniel Oginga Onduso are noncitizens who pleaded guilty to misdemeanor domestic assault in violation of a Minnesota statute that applies to anyone who, "against a family or household member …[,] commits an act with intent to cause fear in another of immediate bodily harm or death." Minn. Stat. § 609.2242, subd. 1(1). Both received sentences of probation. After the government initiated removal proceedings against each of them many years later, the Board of Immigration Appeals (BIA) determined that these convictions rendered them ineligible for discretionary relief from removal.

The Eighth Circuit affirmed, holding that the imposition or threat of "bodily harm" necessarily entails the use, attempted use, or threatened use of physical force under §16(a). The court noted the BIA's decision in *In re Guzman-Polanco*, 26 I. & N. Dec. 806 (BIA 2016), which acknowledges "a split among the circuits" on this question but declines to "attempt[] to establish a nationwide rule." *Id*. at 807-08. Instead, the BIA observed, divided "circuit law governs the issue unless the Supreme Court resolves the question." *Id*. at 808. The Eighth Circuit explained that its own precedent regarding similar statutory language compelled the conclusion that § 16(a) applies to the "bodily harm" convictions at issue here, but acknowledged that other circuits disagree. *See* Pet. App. 6a, 31a.

This Court should grant review to resolve this important, acknowledged division of authority. The question presented is a significant and recurring one, both because § 16(a) operates in numerous contexts, and because there are dozens of state crimes across the country that require only "bodily harm," "physical harm," or "physical injury," without an additional "physical force" requirement—meaning that § 16(a)'s application to such crimes is a question that will recur again and again.

These cases present an ideal vehicle for resolving the circuit split. The question presented is squarely posed by the Minnesota statute at issue, and there is no question it was properly preserved.

Lastly, the Court's review is warranted because the Eighth Circuit's decisions are wrong. The plain language of § 16(a) requires that an offense have "as an element the use, attempted use, or threatened use of physical force." Statutes that require only a showing of bodily injury or the fear of bodily injury, like the Minnesota statute here, simply do not satisfy that provision.

The petition should be granted.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals in *Ramirez-Barajas v. Sessions* is reported at 877 F.3d 808 (8th Cir. 2017). Pet. App. 1a-6a. The decisions of the Board of Immigration Appeals are unreported and reproduced at Pet. App. 7a-11a and Pet. App. 12a-16a. The

decision of the Immigration Judge is reproduced at Pet. App. 17a-26a.

The opinion of the court of appeals in *Onduso v. Sessions* is reported at 877 F.3d 1073 (8th Cir. 2017). Pet App. 29a-35a. The decisions of the Board of Immigration Appeals are unreported and reproduced at Pet. App. 36a-44a and Pet. App. 45a-48a. The decision of the Immigration Judge is reproduced at Pet. App. 49a-57a.

JURISDICTION

The judgment of the court of appeals in *Ramirez-Barajas v. Sessions* was entered on December 15, 2017. A petition for rehearing was denied on February 15, 2018. Justice Gorsuch granted an initial extension of time to file the petition for a writ of certiorari to June 15, 2018, and a further extension to July 16, 2018.

The judgment of the court of appeals in *Onduso v. Sessions* was entered December 20, 2017. A petition for rehearing was denied on February 9, 2018. Justice Alito granted an initial extension of time to file the petition for a writ of certiorari to June 11, 2018, and Justice Gorsuch granted a further extension to July 9, 2018.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are reproduced in the Appendix. Pet. App. 60a-68a.

STATEMENT OF THE CASE

A. Statutory Background

The Immigration and Nationality Act (INA) identifies a range of offenses that render noncitizens removable. 8 U.S.C. § 1227(a)(2). Conviction of these offenses also renders all noncitizens who are not permanent residents ineligible for discretionary relief from removal. 8 U.S.C. § 1229b(b)(1)(C). These offenses include a "crime of domestic violence," which the INA defines as "any crime of violence (as defined in section 16 of Title 18) against a person" committed by a person in certain domestic relationships with the victim. 8 U.S.C. § 1227(a)(2)(E)(i).

Section 16(a), in turn, 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." It "requires [courts] to look to the elements and the nature of the offense of conviction, rather than to the particular facts relating to petitioner's crime." *Leocal v. Ashcroft*, 543 U.S. 1, 7 (2004). In applying § 16(a), therefore, courts employ the "categorical approach": they "presume that the conviction rested upon nothing more than the least of the acts criminalized," and then determine whether that conviction matches up with the federal offense. *Moncrieffe v. Holder*, 569 U.S. 184 (2013).

This Court held in *Leocal* that § 16(a)'s use of the term "crime of violence[,] … combined with [its] emphasis on the use of physical force against another person …, suggests a category of violent, active

crimes." 543 U.S. at 11. It thus determined that the crime of operating a vehicle under the influence and thereby "caus[ing] … [s]erious bodily injury to another" does not constitute a "crime of violence." *Id.* at 7. The Court explained that the "use of physical force" most naturally applies to conduct such as "pushing" someone, whereas "it is much less natural to say that a person actively employs physical force against a person by accident." *Id*. at 10.

The Court reached the same result in *Johnson v. United States*, 559 U.S. 133 (2010), which construed a provision of the Armed Career Criminal Act (ACCA) similar to § 16(a). The Court observed that the word "force" might evoke the common-law crime of battery, which "consisted of the intentional application of unlawful force against the person of another," and could "be satisfied by even the slightest offensive touching." *Id*. at 139. But it then rejected that interpretation of ACCA, instead following its interpretation of "use … of physical force" in *Leocal*: "[I]n the context of a statutory definition of a '*violent* felony,' the phrase 'physical force' means violent force—that is, force capable of causing physical pain or injury to another person," or "a substantial degree of force." *Id*. at 140.

Then, in *Castleman v. United States*, 134 S. Ct. 1405 (2014), the Court adopted a different interpretation of the phrase "use … of physical force" in the context of the Domestic Violence Gun Offender Ban. That statute forbids the possession, shipment, or receipt of firearms by anyone convicted of "a misdemeanor crime of domestic violence," which in turn is defined as an offense that "has, as an element, the use or attempted use of physical force, or the threatened use of

a deadly weapon, committed by" a person in certain domestic relationships with the victim. 18 U.S.C. §§ 921(a)(33)(A), 922(g)(9). Notwithstanding the similar phrasing, the Court departed from the interpretation adopted in *Johnson* and *Leocal*. Instead, it held that under § 921(a)(33)(A) a prior conviction has the "use … of physical force" as an element even if it can be satisfied by "the slightest offensive touching," thus adopting for § 921(a)(33)(A) the "common-law meaning of 'force.'" 134 S. Ct. at 1410.

The Court emphasized, however, that "[n]othing" in its decision "casts doubt on" *Leocal*'s and *Johnson*'s holding that a "crime of violence" requires "violent force," not mere common-law force. *Id*. at 1410-11 & n.4. And it emphasized that its holding does not extend to the INA definition of "crime of domestic violence" applied to Petitioners here. *Id.* at 1411 n.4. That INA provision "specifically defines 'domestic violence' by reference to a generic 'crime of violence'" in § 16(a), and § 16(a) has a "more limited" meaning. *Id*. at 1411 n.4. The Court expressly reserved the question presented in this petition: "[w]hether or not the causation of bodily injury necessarily entails violent force," as required by § 16(a). *Id.* at 1413; *see also id.* at 1414 (same).

B. Factual and Procedural Background

1. J. Cruz Ramirez-Barajas

Mr. Ramirez-Barajas entered the United States in 1991 at the age of 17. A.R. 472. He has five U.S. citizen children, who he supported by working in the

construction industry prior to his removal. *Id.* at 474-75, 480.

In 2001, he pleaded guilty to misdemeanor domestic assault under Minn. Stat. § 609.2242, subd. 1. A.R. 327-28. That provision imposes criminal penalties on anyone who, "against a family or household member … (1) commits an act with intent to cause fear in another of immediate bodily harm or death; or (2) intentionally inflicts or attempts to inflict bodily harm upon another." Minn. Stat. § 609.2242, subd. 1. Ramirez-Barajas pleaded guilty to "assault fear," in violation of subd. 1(1). A.R. 327. He represented himself in the proceedings, and received a sentence of probation. *Id*.

Eleven years later, the Department of Homeland Security (DHS) commenced removal proceedings against him. *Id.* at 1032-34. He filed an application for cancellation of removal under 8 U.S.C. § 1229b(b)(1). *Id*. at 472-84. Before the Immigration Judge (IJ), he argued that his conviction did not constitute a "crime of violence" under § 16(a) because Minn. Stat. § 609.2242 criminalizes the causation or threat of bodily harm standing alone, without additionally requiring the use, attempted use, or threatened use of physical force. *Id.* at 286-87.

The IJ rejected that argument based on the Eighth Circuit's decision in *United States v. Salido-Rosas*, 662 F.3d 1254 (8th Cir. 2011), which holds in the context of a similar Sentencing Guidelines provision that "[k]nowingly or purposely … making another person fear imminent bodily harm necessarily requires using, attempting to use, or threatening to

use physical force." Pet. App. 22a (quoting *Salido-Rosas*, 662 F.3d at 1256). The IJ accordingly found Ramirez-Barajas ineligible for discretionary relief from removal. *Id.*

Ramirez-Barajas appealed to the Board of Immigration Appeals (BIA or Board). The Board dismissed his appeal, relying on Eighth Circuit precedent positing in the context of ACCA that a state statute that has bodily harm as an element necessarily entails the use of physical force for the purposes of § 16(a). Pet. App. 14a (citing *United States v. Schaffer*, 818 F.3d 796, 798 (8th Cir. 2016)).

Ramirez-Barajas moved for reconsideration. He argued that the Board's decision ignored its prior decision in *In re Guzman-Polanco*, 26 I. & N. Dec. 713, 717 (BIA 2016) (hereafter, "*Guzman-Polanco I*"), which held that a state statute referring only to the infliction of bodily injury does not constitute a "crime of violence" under § 16(a) because such an offense could be "committed by means that do not require the use of violent physical force," such as "through the use of poison." A.R. 177.

The Board denied the motion. It noted that it had clarified, in a later decision modifying its original *Guzman-Polanco* decision, that it did not intend "to establish a nationwide rule" resolving whether statutes that refer only to bodily harm qualify as crimes of violence under § 16(a). Pet. App. 9a (quoting *In re Guzman-Polanco*, 26 I. & N. Dec. 806, 806 (BIA 2016) (hereafter, "*Guzman-Polanco II*")). Instead, the Board "recognize[d] that there appears to be a split among the circuits on whether conduct such as the use or

threatened use of poison to injure another person is sufficient 'force' to satisfy the 'violent force' requirement in *Johnson*, and thus whether conduct of this nature would constitute a crime of violence under 18 U.S.C. § 16(a)." *Guzman-Polanco II*, 26 I. & N. Dec. at 807. The Board observed that, "for [its] purposes, circuit law governs this issue unless the Supreme Court resolves the question." *Id.* at 808. Hence, whereas *Guzman-Polanco II* applied First Circuit law holding that statutes similar to § 609.2242 are not crimes of violence, "under Eighth Circuit precedent, [the Board] continue[d] to conclude that a violation of Minnesota Statute § 609.2242 necessarily involves the use or attempted use of violent physical force against the person of another." Pet. App. 10a.

The Eighth Circuit denied Ramirez-Barajas's consolidated petitions for review. Pet. App. 1a-6a. Like the Board, it relied on its prior decisions in *Schaffer* and *Salido-Rosas*, which held in the context of the ACCA and the Sentencing Guidelines that the causation of bodily harm (or fear of such harm) necessarily entails the use (or threatened use) of physical force. Pet. App. 4a-6a. The court rejected Ramirez-Barajas's invitation to follow the Board's decisions in *Guzman-Polanco*, explaining that that case was based on a different circuit's precedent that "contradicts [this court's] jurisprudence," and that the Board had not "attempt[ed] to establish a nationwide rule addressing the scope of the use of force through indirect means, including poisoning.'" Pet. App. 6a. The court concluded that "the BIA appropriately applied this circuit's law." *Id.*

2. Daniel Oginga Onduso

Mr. Onduso entered the United States from Kenya lawfully in 1999. A.R. 425. He subsequently overstayed his visa and has lived here since. *Id*. He is married to a U.S. citizen and has three U.S. citizen step-children. *Id*.

In 2004, Onduso pleaded guilty to misdemeanor domestic assault under Minn. Stat. § 609.2242, subd. 1. A.R. 363-66. His record of conviction does not specify whether he was convicted under subsection (1) or (2) of Minn. Stat. § 609.2242, subd. 1. *Id.* at 363. He received a sentence of probation. A.R. 364.

DHS commenced removal proceedings against Onduso in 2009. *Id*. at 519. He sought cancellation of removal under 8 U.S.C. § 1229b(b)(1). *Id*. at 425, 449. He argued that his conviction was not a crime of violence under § 16(a) because Minn. Stat. § 609.2242, subd. 1 does not require the use of physical force. *Id*. at 287. As an example, he argued that a person could be convicted under the statute for "intentionally storm[ing] out of a room and walk[ing] by another person" if the victim got scared and fell, incurring "bodily harm," even if the perpetrator never touched the victim and never intended to touch the victim. *Id*. at 287-88.

The IJ determined that Onduso's conviction constituted a crime of violence under § 16(a), relying on the Eighth Circuit's decision in *Salido-Rosas*. Pet. App. 55a. The BIA denied his appeal, likewise relying on *Salido-Rosas*. Pet. App. 47a-48a. Like Ramirez-Barajas, Onduso moved for reconsideration based on the

Board's decision in *Guzman-Polanco I*. Pet. App. 43a. The Board denied the motion, noting that *Guzman-Polanco II* clarifies that courts should follow circuit precedent in determining whether a statute that criminalizes the causation or threat of "bodily harm" qualifies as a crime of violence under § 16(a).

The Eighth Circuit denied Onduso's consolidated petitions for review, citing its decision in Ramirez-Barajas's case. Pet. App. 29a-35a. The court noted that it was unclear whether Onduso was convicted of "assault-fear" under subd. 1(1) or "assault-harm" under subd. 1(2), but concluded that did not make a difference with respect to § 16(a)'s application. Pet. App. 34a-35a.

REASONS FOR GRANTING THE WRIT

I. The Question Presented Has Intractably Divided The Courts Of Appeals.

Dozens of state statutes criminalize the causation of bodily harm or fear of such harm, with no requirement that the harm result from the use or threatened use of physical force. *See infra* 17-18 & n.2. The decisions below further entrench a deep circuit split over whether these offenses amount to a "crime of violence" under § 16(a). The First, Second, and Fifth Circuits hold that § 16(a) does not apply to convictions under statutes that do not include physical force as an element of the crime, reasoning that bodily injury can be inflicted without physical force—such as by trickery or poisoning. *See infra* § I.A. The Eighth Circuit now joins the Seventh and Ninth Circuits, however, in holding that § 16(a) covers such offenses on the theory

that any bodily injury at least involves indirect physical force. *See infra* § I.B.

A. The First, Second, and Fifth Circuits hold that § 16(a) does not extend to "bodily harm" offenses that do not require physical force as an element of the crime.

Contrary to the Eighth Circuit's decisions below, the First, Second, and Fifth Circuits hold that § 16(a) does not cover the type of offenses underlying Petitioners' convictions.

In *Chrzanoski v. Ashcroft*, 327 F.3d 188, 191 (2d Cir. 2003), the Second Circuit explained that "[u]nder the plain language of § 16(a), use of force must be an element of that offense for that offense to be a crime of violence under § 16(a)." Therefore, where "nothing in … the language of [the state statute] requires the government to prove that force was used in causing the injury[,]" the force element required by § 16(a) is absent. *Id.* at 193. In so holding, the Second Circuit rejected the Government's argument "that force is implicit in the statute[]," *id.*, because "[s]uch an argument equates the use of physical force with harm or injury," *id.* at 194. The court noted that there are "myriad other schemes, not involving force, whereby physical injury can be caused intentionally," *id.* at 196—including, for example, "guile, deception, or even deliberate omission," *id.* at 195.

In *United States v. Villegas-Hernandez*, 468 F.3d 874, 881, 879 (5th Cir. 2006), the Fifth Circuit expressly endorsed the Second Circuit's reasoning on

this issue, explaining that *"Chrzanoski*'s analysis [is] … fully applicable" to a Texas domestic assault statute criminalizing the causation of "bodily injury to another." The court held that the force element required by § 16(a) was absent because "'bodily injury' … could result from any number of acts" that would not require "the government … to show the defendant used physical force"—e.g., "making available to the victim a poisoned drink while reassuring him the drink is safe, or telling the victim he can safely back his car out while knowing an approaching car … will hit the victim." *Id.* at 879.

The First Circuit reached the same conclusion in *Whyte v. Lynch*, 807 F.3d 463, 468 (1st Cir. 2015), *rehearing denied*, 815 F.3d 92 (1st Cir. 2016) (mem.). The court explained that where the statute "identifies only two elements"—intent to cause physical injury and causing such injury—"[t]he text … speaks to the 'who' and the 'what' of the offense, but not the 'how,' other than requiring 'intent.'" *Id.* "[T]he crime [thus] does not contain as a necessary element the use, attempted use, or threatened use of violent force." *Id.* at 469.

B. The Seventh, Eighth, and Ninth Circuits hold that § 16(a) extends to "bodily harm" offenses even if physical force is not an element of the crime.

In sharp contrast to the three circuits discussed above, the Seventh, Eighth, and Ninth Circuits hold that § 16(a) applies to "bodily harm" offenses even if the relevant state statute does not include physical force as an element of the crime.

In *De Leon Castellanos v. Holder*, 652 F.3d 762, 766 (7th Cir. 2011), the Seventh Circuit held that a misdemeanor conviction for "intentionally causing bodily harm to any family or household member" under Illinois law constitutes a "crime of violence" under § 16(a). The court reasoned that "[b]attery causing bodily harm entails physical force" because "[t]he degree of injury has 'a logical relation to the 'use of physical force' under § 16(a).'" *Id.* The Seventh Circuit acknowledged that the state statute could encompass a battery committed by deception or poisoning, but concluded "that this kind of battery entails force" within the meaning of § 16(a). *Id.*

The Ninth Circuit similarly holds that offenses covering threats of injury, no matter how that injury is effectuated, constitute crimes of violence under § 16(a). In *Arellano Hernandez v. Lynch*, 831 F.3d 1127, 1130 (9th Cir. 2016), the court concluded that a California conviction for a mere attempt to "threaten to commit a crime which will result in death or great bodily injury" involves "'the use, attempted use, or threatened use of force'" contemplated by § 16(a). The Ninth Circuit noted that the Fourth and Fifth Circuits had concluded that the same California statute at issue did *not* establish a "crime of violence" for the purposes of the Sentencing Guidelines because it could be violated by "threaten[ing] to poison another." *Id.* at 1131. The Ninth Circuit concluded, however, that "contrary decisions of our sister circuits have no effect on our own" precedent holding that a threat of bodily injury "necessarily include[s] a threatened use of physical force." *Id.* (quoting *United States v. Villavicencio-Burruel*, 608 F.3d 556, 562 (9th Cir. 2010)).

In the decisions below, the Eighth Circuit joined the Seventh and Ninth Circuits in holding that state statutes criminalizing the causation (or threatened causation) of bodily injury necessarily include the force requirement of § 16(a). The court extended to § 16(a) circuit precedent holding that the same Minnesota domestic assault statute at issue here constitutes a "violent felony" under ACCA's force prong, which "mirrors that in § 16(a)." Pet. App. 3a-4a (extending *United States v. Schaffer*, 818 F.3d 796 (8th Cir. 2016)); *see also* Pet. App. 31a, 34a (following *Ramirez-Barajas* and *Schaffer*). That prior precedent in turn rejected the argument that the Minnesota statute swept too broadly to be a federal "crime of violence" because one could cause bodily harm or fear of imminent bodily harm "by exposing someone to a deadly virus," or by "'employing poison.'" *Schaffer*, 818 F.3d at 798 (quoting *United States v. Rice*, 813 F.3d 704, 706 (8th Cir. 2016)). In the Eighth Circuit's view, such means of causing injury are indirect applications of physical force, and thus a statutory element requiring actual or threatened bodily injury is necessarily equivalent to "an element [requiring] the use, attempted use, or threatened use of physical force." Pet. App. 3a-4a.

II. The Question Presented Is Important And Recurring.

This Court's resolution of the question presented is enormously important. The split implicates two separate but related and frequently invoked provisions of the INA. The first is the "crime of domestic violence" provision at issue in these cases, which makes all noncitizens removable, and further renders

all nonpermanent residents ineligible for discretionary relief from removal. *See* 8 U.S.C. §§ 1227(a)(2)(E)(i), 1229b(b)(1)(C). It has these harsh consequences—amounting to near automatic deportation for nonpermanent residents—regardless of whether the offense at issue was a misdemeanor, and regardless of the sentence imposed.

The second and related INA provision is the definition of an "aggravated felony" crime of violence. *See* 8 U.S.C. § 1101(a)(43)(F). Like conviction for a "crime of domestic violence," conviction of an offense deemed an "aggravated felony" crime of violence renders a noncitizen removable and ineligible for discretionary relief from removal. 8 U.S.C. §§ 1227(a)(2)(A)(iii), 1229b(a)(3). In contrast to a "crime of domestic violence" conviction, a conviction for an aggravated felony "crime of violence" has these harsh consequences for nonpermanent residents and permanent residents alike. A crime of violence for which the term of imprisonment is at least one year is automatically an aggravated felony under § 1101(a)(43)(F).

On the other side of the equation, state criminal codes throughout the country are riddled with "bodily injury" offenses that include no physical force requirement. In the domestic violence context alone, 31 states criminalize—like Minnesota—the causation of "bodily harm," "physical harm," or "physical injury" (or fear of such harm), without requiring that the harm result from the use of physical force.[2] All of

[2] Ala. Code §§ 13A-6-22, 13A-6-139.1; Alaska Stat. §§ 11.41.230, 18.66.990; Ariz. Rev. Stat. §§ 13-1203, 13-3601; Ark. Code § 5-26-305; Conn. Gen. Stat. § 46b-38a; Fla. Stat.

these statutes implicate the circuit split over the question presented here, meaning inconsistent results will occur again and again until this Court intervenes.

This state of affairs is intolerable and contravenes the uniformity in enforcement that this Court has long recognized as particularly important in the context of immigration laws. *See Hines v. Davidowitz*, 312 U.S. 52, 73-74 (1941); *see also Chamber of Commerce v. Whiting*, 563 U.S. 582, 634 (2011) (Sotomayor, J., dissenting). Worse, if the split persists, the government will be empowered to engage in forum-shopping, by purposefully initiating removal proceedings in a circuit with precedent favorable to the government. Indeed, the government appears to have attempted to do just that in *Whyte*: The noncitizen there was a Connecticut resident who was convicted of third-degree assault under Connecticut law. 807 F.3d at 464. Yet the government initiated removal proceedings in Massachusetts. *Id.* at 465 n.1. The petitioner asserted that because the Second Circuit had

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§§ 741.28, 741.283, 784.03; Ga. Code §§ 16-5-23, 19-13-10; Haw. Rev. Stat. § 707-711; Idaho Code §§ 18-903, 18-918; 720 Ill. Comp. Stat. Ann. 5/12-3.2; Iowa Code §§ 708.1, 708.2A; Kan. Stat. § 21-5414; Ky. Rev. Stat. §§ 508.030, 508.032; Me. Rev. Stat. tit. 17-A, §§ 207, 207-A; Minn. Stat. § 609.2242; Miss. Code. Ann. § 97-3-7; Mo. Ann. Stat. § 565.076; Mont. Code Ann. § 45-5-206; N.D. Cent. Code § 12.1-17-01; N.H. Rev. Stat. Ann. § 631:2-b; N.J. Stat. Ann. §§ 2C:12-1, 2C:25-19; N.Y. Fam. Ct. Act § 812; N.Y. Penal Law § 120.00; Neb. Rev. Stat. § 28-323; Ohio Rev. Code Ann. § 2919.25; Or. Rev. Stat. § 107.705, 107.718, 163.192; S.C. Code Ann. § 16-25-20(A); Tenn. Code Ann. §§ 36-13-101, 39-13-111; Tex. Penal Code § 22.01; Wash. Rev. Code §§ 9A.36.011, 10.99.020; Wis. Stat. § 968.075; Wyo. Stat. Ann. § 6-2-510.

already ruled that the exact statute under which the noncitizen had been convicted did not qualify as a crime of violence, the government initiated removal proceedings in a different circuit in order to escape that adverse precedent. *Id*. Such opportunities for forum-shopping will remain until the split is resolved.

Moreover, though the question presented arises most often in the immigration context, as it does in these cases, it also has implications beyond that context. Section 16(a) supplies the general definition for a "crime of violence" for the entire Criminal Code. As such, it operates in the context of more than a dozen criminal provisions, several of which impose severe, mandatory sentences for those deemed to have prior convictions for "crimes of violence," regardless of the sentence imposed for the original offense. *See* 18 U.S.C. §§ 25(a)(1), 119(b)(3), 931(a)(1), 1956(c)(7)(B)(ii), 3181(b)(1), 3663A(c)(1)(A)(i) (expressly incorporating § 16); *see also* 18 U.S.C. §§ 842(p)(2), 929(a)(1), 1039(e)(1), 1952(a)(2), 1959(a)(4), 2250(d), 2261(a), 3142(f)(1)(A), 3559(f), 3561(b) (Criminal Code provisions referencing a "crime of violence"). The issue here thus has repercussions beyond the immigration area, through the cross-references to § 16 contained in a range of purely criminal provisions.

III. These Cases Are The Ideal Vehicle For Deciding The Question Presented.

These cases offer an ideal means to resolve this entrenched split. Both Ramirez-Barajas and Onduso clearly raised this issue before the IJ, the BIA, and the Eighth Circuit. And in both cases the IJ, the BIA,

and ultimately the Eighth Circuit addressed and rejected their arguments on the theory that the force element required by § 16(a) is impliedly present whenever a statute has the causation of bodily harm as an element. The question presented, therefore, was properly preserved and is squarely posed by both cases. Finally, for both Ramirez-Barajas and Onduso, the question presented was dispositive of their eligibility for relief from removal.

Moreover, the Minnesota assault statute at issue here is entirely typical of the "bodily injury" statutes at the heart of the circuit split. It imposes criminal penalties on anyone who, "against a family or household member[,] … commits an act with intent to cause fear in another of immediate bodily harm or death." Minn. Stat. § 609.2242, subd. 1(1). Like the other statutes at issue in the split, the "plain language of the statute … does not contain as a necessary element the use, attempted use, or threatened use of violent force." *Whyte*, 807 F.3d at 468-69. The Eighth Circuit nevertheless concluded that the offense constitutes a crime of violence under § 16(a).

Minnesota's assault statute also presents an ideal vehicle for resolving the split because there is at minimum "a realistic probability, not a theoretical possibility, that [Minnesota] would apply its statute" to bodily harm not caused by physical force. *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). Minnesota jurors are specifically instructed that, "[i]n order for an assault to have been committed, it is not necessary that there have been any physical contact with the body of the person assaulted." Domestic Assault—Intent to Cause Fear—Elements, 10 Minn. Prac.,

Jury Instr. Guides—Criminal CRIMJIG 13.01 (6th ed. 2017). "Bodily harm," moreover, is defined broadly under Minnesota law to encompass "physical pain or injury, illness, or any impairment of a person's physical condition." Minn. Stat. § 609.02, subd. 7. The Minnesota Supreme Court has directly addressed the question of poisoning that recurs on both sides of the circuit split. It held that a defendant may "cause … bodily harm" by tricking a person into consuming a drug that the defendant claims is a vitamin. *See State v. Jarvis*, 665 N.W.2d 518, 522 (Minn. 2003). And Minnesota has applied its domestic assault statute to bodily harm that was not caused by the use of physical force against another person. *See, e.g.*, *State v. Swedin*, No. A05-1153, 2006 WL 224325, at *1 (Minn. Ct. App. Jan. 31, 2006) (defendant charged with domestic assault under Minn. Stat. § 609.2242, subd. 1(1) where wife was shocked trying to assist the family dog, on whom the defendant put a "shock collar"). And, tellingly, Minnesota law does *not* categorize misdemeanor assault as a "crime of violence." *See State v. Jorgenson*, 758 N.W.2d 316, 323 (Minn. Ct. App. 2008).

This Court, therefore, need not resort to "legal imagination" to conjure up ways in which the statute might be applied to conduct that does not involve any use, attempted use, or threatened use of physical force. *Duenas-Alvarez*, 549 U.S. at 193. It need look only at how Minnesota juries are instructed and at Minnesota's actual enforcement history to know that the requirement for "bodily harm" does not necessarily entail the use of physical force.

These cases further provide an ideal vehicle for resolving the split because they involve the subsection of the statute that refers merely to putting another *in fear* of bodily harm.[3] In this respect, the statute resembles the California statute considered by the Ninth Circuit, *see supra* 15, which similarly criminalizes acts putting the victim in fear of bodily harm, rather than the actual causation of bodily harm. In the context of such fear-based offenses, the gulf between the language of § 16(a) and the language of the state statute at issue is especially large. The Minnesota "assault fear" statute refers to "an act [committed] with intent to cause fear in another of immediate bodily harm or death." Minn. Stat. § 609.2242, subd. 1(1). The Minnesota courts have made clear that a conviction for "assault fear" in the state "does not require a finding of actual harm to the victim." *State v. Hough*, 585 N.W.2d 393, 395 (Minn. 1998). A defendant may be convicted under the statute "without regard to whether the victim is aware of the conduct. The crime is in the act done with intent to cause fear, not in whether the intended result is achieved." *Id.* at 396.

Consistent with the breadth of this statutory language, Minnesota has used the provision to prosecute defendants for an extremely wide range of conduct—ranging from breaking something in the presence of

[3] In Onduso's case, the record of conviction is unclear as to whether he was convicted under subd. 1(1) or subd. 1(2). The Eighth Circuit's decision, therefore, hinged on its determination that both were crimes of violence under § 16(a). Pet. App. 34a-35a.

the victim,[4] to other forms of menacing behavior.[5] In none of these cases did the prosecution have to prove (or the jury have to find) that the defendant engaged in the specific conduct referred to in § 16(a)—the "threatened use of physical force." Courts have rejected arguments that there was insufficient evidence to support an "assault fear" conviction because there was no evidence that the defendant used or threatened physical force against the victim, observing that the "statute requires only that appellant acted with the intent to cause fear of immediate bodily harm, and intent may be determined from words, actions, and surrounding circumstances." *State v. Fischer*, No. A03-783, 2004 WL 1488535, at *3 (Minn. Ct. App. July 6, 2004). Indeed, in one case, a defendant was prosecuted for domestic assault fear after he shouted at his housemate and "threatened to cause him physical harm in a way no one would notice," *State v. Peterson*, No. A17-0223, 2018 WL 817821, at *1 (Minn. Ct. App. Feb. 12, 2018)—a statement that implies a threat to cause bodily harm through poisoning or

[4] *See State v. Andrade*, No. A05-1548, 2006 WL 1461068, at *1 (Minn. Ct. App. May 30, 2006) (in guilty plea, defendant stated that he "became angry and broke a window and that scared [his] wife").

[5] *See Nov v. State*, No. A16-0887, 2017 WL 562537, at *1 (Minn. Ct. App. Feb. 13, 2017) (defendant sent threatening text messages to victim, rummaged through items in her bedroom, told victim he had burnt her citizenship papers and car title, and placed a utility knife on a table adjacent to the bed where he was sitting and asked the victim to sit next to him).

trickery or some way other than the "use … of physical force."[6]

IV. The Eighth Circuit's Decisions Are Incorrect.

The Eighth Circuit's reasoning is foreclosed by the plain language of § 16(a). Section 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 "element" has a clear, long-established meaning: "'Elements' are the 'constituent parts' of a crime's legal definition—the things the 'prosecution must prove to sustain a conviction.'" *Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016) (quoting Black's Law Dictionary 634 (10th ed. 2014)). The statute under which Petitioners were convicted has two elements: "[1] an act [2] with intent to cause fear in another of immediate bodily harm or death." Minn. Stat. § 609.2242, subd. 1(1). These elements do not include the use, attempted use, or threatened use of physical force. Therefore, the offense does not constitute a crime of violence under § 16(a).

The Eighth Circuit—like the other circuits with which it has aligned—reached the opposite conclusion by embracing an error of logic: Because the use of

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[6] This petition is also well-timed for the Court to consider the question presented here in conjunction with the related but distinct issue raised in *Stokeling v. United States*, No. 17-5554: the amount of force necessary to satisfy the "physical force" requirement of the ACCA's definition of "violent felony." 18 U.S.C. § 924(e)(2)(B)(i).

physical force *may* result in bodily injury, they concluded that any statute that has "bodily injury" as an element *necessarily* entails the use of force. That is a non sequitur. As the circuits on the other side of the split have explained, there are many instances in which a bodily injury results even though there was no "use … of physical force against the person … of another." For example, a person could commit an act with the intent to put another in fear of bodily injury or death without specifically threatening to use force against the person. As noted above, Minnesota's enforcement history of the provision at issue here provides numerous examples.

The Seventh, Eighth, and Ninth Circuits have evaded this problem by classifying every possible way in which bodily injury could occur as a manifestation of "indirect force." In so holding, these circuits contravene *Castleman*'s and *Leocal*'s clear holdings that this reasoning simply does not apply to § 16(a). As *Leocal* explains, the reference to the "use … of physical force against the person" in §16(a)'s definition of "crime of violence," "suggests a category of violent, active crimes." 543 U.S. at 11. *Leocal* emphasized that, in construing § 16, "we cannot forget that we ultimately are determining the meaning of the term "crime of violence." *Id.* Just as that term "cannot be said naturally to include DUI offenses," it does not naturally encompass an offense that can be committed by tricking someone or merely frightening them without any use (or attempted or threatened use) of force.

And although the provision incorporating § 16(a) here—8 U.S.C. § 1227(a)(2)(E)(i)—refers to "domestic violence" like *Castleman*, *Castleman* specifically

carves this provision out from its reasoning, explaining: "Our view that 'domestic violence' encompasses acts that might not constitute 'violence' in a nondomestic context does not extend to a provision like [§ 1227(a)(2)(E)(i)], which specifically defines 'domestic violence' by reference to a generic 'crime of violence [in § 16(a)].'" 134 S. Ct. at 1411 n.4. Moreover, even *Castleman* adheres to the understanding of "physical force" as "force exerted by and through concrete bodies." *Id.* at 1414 (quoting *Johnson*, 559 U.S. at 138).

The notion that bodily injury resulting from guile or deception can be seen as the product of a "fraud on [the] will equivalent to force," *De Leon Castellanos*, 652 F.3d 766, flies in the face of these decisions. As the government itself recently acknowledged, a crime that refers to the use of physical force "describes a more concrete range of conduct" than a crime that encompasses "any offense conduct that could result in physical injury." Br. for the United States at 30, *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018).

The Eighth Circuit's decisions are also contrary to the legislative context and history of § 16(a). The same legislation that established § 16 also included—alongside the definition of "crime of violence"—a definition of "bodily injury."[7] Yet it does not define "crime of violence" in terms of any act causing "bodily injury."

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[7] S. 1630, 97th Cong. § 111 (1981) ("'bodily injury' means physical harm to a person, and includes death, as well as (a) a cut, abrasion, bruise, burn, or disfigurement; (b) physical pain; (c) illness; (d) impairment of the function of a bodily member, organ, or mental faculty; and (e) any other injury to the body no matter how temporary").

Moreover, the Senate Report accompanying the enactment of § 16 specifically distinguishes the narrower meaning of "crime of violence" from the "broader application" of a phrase like "unlawful conduct dangerous to human life." S. Rep. No. 97-307, at 591 (1981). The Report hypothesizes a particular scenario in which a person could commit an act with the intent to cause fear in another of immediate bodily injury or death, but without specifically threatening the use of physical force: "[A]n operator of a dam could threaten to refuse to open the floodgates during a flood, thereby placing the residents of an upstream area in jeopardy of their lives. … [H]is threat would be to engage in unlawful conduct dangerous to human life which is not a crime of violence (since he did not use or threaten to use physical force)." *Id*.

When properly done, the mode of analysis mandated by § 16(a) is very simple. Courts (and the BIA) need simply look at the state offense at issue and determine whether the "use, attempted use, or threatened use of physical force" is one of the elements. The simplicity of that analysis is a virtue, given the number of state statutes that the courts and the BIA must categorize under § 16(a). But the Eighth Circuit has now joined two other circuits in failing correctly to conduct that analysis. Because the error exacerbates an entrenched and acknowledged circuit split and will result in severe and recurring consequences for noncitizens and others, it warrants this Court's review.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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July 9, 2018

APPENDIX A

United States Court of Appeals
for the Eighth Circuit

No. 16-4014

J. Cruz Ramirez-Barajas

Petitioner

v.

Jefferson B. Sessions, III, Attorney General of the United States of America

Respondent

No. 17-1618

J. Cruz Ramirez-Barajas

Petitioner

v.

Jefferson B. Sessions, III, Attorney General of the United States

Respondent

Petition for Review of an Order of the Board of Immigration Appeals

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Submitted: October 20, 2017
Filed: December 15, 2017

Before LOKEN, GRUENDER, and BENTON, Circuit Judges.

BENTON, Circuit Judge.

An Immigration Judge denied J. Cruz Ramirez-Barajas's application for cancellation of removal. The Board of Immigration Appeals dismissed his appeal and denied his motion to reconsider. He petitions for review of both decisions. Having jurisdiction under 8 U.S.C. § 1252, this court denies the consolidated petitions.

I.

Without inspection or admission, Ramirez-Barajas entered the United States in 1991. In 2001, he was convicted of misdemeanor domestic assault. *See* **Minn. Stat. § 609.2242, subd. 1(1)**. The Department of Homeland Security began removal proceedings in 2012, charging him with removability as an alien present without admission or parole. *See* **8 U.S.C. § 1182(a)(6)(A)(i)**.

Conceding removability, Ramirez-Barajas applied for cancellation of removal. *See* **8 U.S.C. § 1229b(b)(1)**. The Immigration Judge denied his application, finding him ineligible because his conviction was a "crime of domestic violence" under 8 U.S.C. § 1227(a)(2)(E). *See* **§ 1229b(b)(1)(C)** (an

alien is ineligible for cancellation of removal if "convicted of an offense under section … 1227(a)(2) … of this title ….").

On appeal, the BIA affirmed the Immigration Judge's decision and later denied reconsideration. Ramirez-Barajas petitions for review, arguing that his conviction is not a crime of domestic violence because it is not a "crime of violence" under 18 U.S.C. § 16(a). This court consolidated the two petitions. *See* **§ 1252(b)(6)**.

This court lacks jurisdiction to review the discretionary denial of cancellation of removal under § 1229b, but has jurisdiction to review questions of law raised in a petition for review. ***Pinos-Gonzalez v. Mukasey***, 519 F.3d 436, 439 (8th Cir. 2008), citing **§§ 1252(a)(2)(B)(i)**, **1252(a)(2)(D)**. This court reviews "the BIA's legal determinations *de novo*, according substantial deference to the BIA's interpretation of the statutes and regulations it administers." ***Roberts v. Holder***, 745 F.3d 928, 930 (8th Cir. 2014). This court reviews for abuse of discretion the BIA's denial of a motion to reconsider. ***Esenwah v. Ashcroft***, 378 F.3d 763, 765 (8th Cir. 2004).

II.

Section 1227(a)(2)(E)(i) defines a crime of domestic violence as "any crime of violence (as defined in section 16 of Title 18)" in a domestic relationship. Ramirez-Barajas concedes the domestic-relationship element. He argues only that the Minnesota statute—whoever "commits an act with intent to cause fear in

[a family or household member] of immediate bodily harm or death"—is not a crime of violence, because it does not have "as an element the use, attempted use, or threatened use of physical force against the person or property of another." *Compare* **Minn. Stat. § 609.2242, subd. 1(1)**, *with* **§ 16(a)**.

United States v. Schaffer controls this issue. This court there held that a conviction under the same statute is a "violent felony" under the force clause of the Armed Career Criminal Act, because it has "as an element 'the threatened use of physical force against the person of another.'" ***United States v. Schaffer***, 818 F.3d 796, 798 (8th Cir. 2016), *quoting* **18 U.S.C. § 924(e)(2)(B)(i)**. Although *Schaffer* addresses the ACCA, its language—threatened use of physical force against the person of another—mirrors that in § 16(a). *See* ***Roberts***, 745 F.3d at 930 (recognizing "violent felony" under the ACCA as "virtually identical" to "crime of violence" under § 16).

Misdemeanor domestic assault under the Minnesota statute is a crime of violence under § 16(a). The BIA did not err in finding Ramirez-Barajas ineligible for cancellation of removal, nor abuse its discretion in denying his motion for reconsideration.

III.

Ramirez-Barajas argues that this court erred in *Schaffer* by relying on *United States v. Salido-Rosas*. *See* ***Schaffer***, 818 F.3d at 798, *citing* ***United States v. Salido-Rosas***, 662 F.3d 1254, 1256 (8th Cir. 2011). He reasons that recent Supreme Court decisions—*Johnson v. United States*, 135 S. Ct. 2551, 2557-61

(2015), and *Moncrieffe v. Holder*, 569 U.S. 184, 190-91 (2013)—call *Salido-Rosas* into question. This and his other attacks on *Schaffer* ask this court to overrule it, which can only be considered en banc. *See* ***United States v. Eason***, 829 F.3d 633, 641 (8th Cir. 2016) ("It is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel."). This court decided *Schaffer* after *Johnson* and *Moncrieffe*. *See* ***id.*** ("This rule, however, does not apply when the earlier panel decision is cast into doubt by an intervening Supreme Court decision."). He cites only two (unpublished) Minnesota cases postdating *Schaffer*, neither of which affects it. *See* ***State v. Caruthers***, 2017 WL 164417, at *1-2 (Minn. Ct. App. Jan. 17, 2017) (finding evidence sufficient to support conviction for fifth-degree assault based on fact-finder's inference that the defendant threatened to fight his son's hockey coach); ***State v. Sabahot***, 2016 WL 7041708, at *4-5 (Minn. Ct. App. Dec. 5, 2016) (spitting in an officer's face without causing bodily harm is not fourth-degree assault of a police officer).

The *Schaffer* decision is also not contradicted by *United States v. Horse Looking*, 828 F.3d 744, 746-47 (8th Cir. 2016). This court there held that "[a]ttempt[] by physical menace or credible threat to put another in fear of imminent bodily harm, with or without the actual ability to harm the other person" is not a "misdemeanor crime of domestic violence" under 18 U.S.C. § 921(a)(33)(A). **Id.** But as applicable in that case, § 921(a)(33)(A) required the "threatened use of a deadly weapon," which was not an element of the state law. *See* ***id.***, at 747, *comparing* **§ 921(a)(33)(A)(ii)** *with* **S.D.C.L. § 22-18-1(4)**.

Under § 16(a), the "threatened use of physical force" is sufficient.

Finally, the BIA's decision in *In re Guzman-Polanco*, 26 I. & N. Dec. 713, 717-18 (BIA 2016), is not relevant. The BIA there found that Puerto Rico battery, requiring infliction of bodily injury "through any means or form," is not a crime of violence under § 16(a). ***Id.***, *quoting* **P.R. Laws Ann. tit. 33, § 4749**. The BIA reasoned that a person could violate the Puerto Rico statute without involving violent force, by poisoning a victim. ***Id.***, *citing* ***Whyte v. Lynch***, 807 F.3d 463, 469 (1st Cir. 2015). Importantly, the BIA's initial reasoning about poisoning contradicts this court's jurisprudence. *See* ***Schaffer***, 818 F.3d at 798 ("[E]ven though the act of poisoning a drink does not involve physical force, the act of employing poison knowingly as a device to cause physical harm does." (internal quotation marks omitted) (quoting ***United States v. Castleman***, 134 S. Ct. 1405, 1415 (2014))). At any rate, the BIA reissued its decision, clarifying that it relied on First Circuit law and "should not be read as attempting to establish a nationwide rule addressing the scope of the use of force through indirect means, including poisoning." ***In re Guzman-Polanco***, 26 I. & N. Dec. 806, 807-08 (BIA 2016). Here, the BIA appropriately applied this circuit's law.

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The petitions for review are denied.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals
Falls Church, Virginia 22041

File No: A205 505 755— Date: Mar 17, 2017
Bloomington, MN

In re: J CRUZ *RAMIREZ*-BARAJAS

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: David Lee Wilson, Esquire

ON BEHALF OF DHS: Laura W. Trosen
Assistant Chief Counsel

This case was last before us on September 26, 2016, at which time we dismissed the respondent's appeal from the Immigration Judge's March 11, 2015, decision to deny his request for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). The respondent has now filed a timely motion to reconsider this decision on October 25, 2016. The Department of Homeland Security (DHS) opposes the motion, which will be denied.

A motion to reconsider is "a request that the Board reexamine its previous decision in light of

additional arguments, a change of law, or perhaps an argument or aspect of the case which was overlooked." *Matter of O-S-G-*, 24 I&N Dec. 56, 57 (BIA 2006). A motion to reconsider challenges the Board's original decision and alleges that it is defective in some regard. *Id.* The motion must specify the errors of fact or law in the prior Board decision, and it must be supported by pertinent authority. 8 C.F.R. § 1003.2(b)(1).

In our prior decision, we agreed with the Immigration Judge that the respondent is statutorily ineligible for cancellation of removal under section 240A(b)(1)(C) of the Act, 8 U.S.C. § 1229b(b)(1)(C) (Bd. Dec. at 1-2; I.J. at 2-3). In arriving at that conclusion, the Immigration Judge determined that the respondent's 2000 conviction for domestic assault in violation of § 609.2242.1(1) of the Minnesota Statutes qualified as a crime of domestic violence as described in section 237(a)(2)(E)(i) of the Act, 8 U.S.C. § 1227(a)(2)(E)(i) (I.J. at 3; Bd. Dec. at 1-2).

In his motion to reconsider, the respondent alleges that the Board erred in not analyzing his case under *Matter of Guzman-Polanco* ("*Guzman-Polanco I*"), 26 I&N Dec. 713 (BIA 2016). He argues that we should not have relied on the United States Court of Appeals decision in *United States v. Schaffer*, 818 F.3d 796 (8th Cir. 2016) because the Board failed to resolve the Circuit split, acknowledged in *Guzman-Polanco I*, regarding, inter alia, the definitional application of a crime of violence under 18 U.S.C. § 16 in immigration proceedings. The respondent further argues that the Board erred in relying on *U.S. v.*

Schaffer, *supra*, because, therein, the Eighth Circuit performed its crime of violence analysis within the context of criminal sentencing rather than immigration proceedings. In sum, the respondent continues to argue that, analyzed under *Guzman-Polanco I*, *supra*, his conviction for domestic assault in violation of Minnesota Statute § 609.2242.1(1) categorically does not qualify as a conviction for a crime of violence, and thus does not bar him from cancellation of removal. In supplemental briefing, he also argues that the Eighth Circuit's recent decision in *United States v. Horse Looking*, 828 F.3d 744 (8th Cir. 2016) supports his position.[1]

We find no merit to the respondent's arguments. As he acknowledges, we clarified, in *Matter of Guzman-Polanco*, 26 I&N Dec. 806 (BIA 2016) (*Guzman-Polanco II*), that our decision in *Matter of Guzman-Polanco I* should not be read as "attempting to establish a nationwide rule" concerning the use of force through indirect means for purposes of a crime of violence under 18 U.S.C. § 16. *Id.* at 806. As such, considering the meaning of the term "bodily harm" under Minnesota law, as well as the scope of force that qualifies as "violent physical force" under Eighth

[1] We find no merit to the respondent's argument that the Board should have requested supplemental briefing prior to the issuance of its September 26, 2016, decision. The respondent has been free to submit, and has submitted, supplemental briefing before the Board. Moreover, we note that the respondent's request for reconsideration would negate any alleged prejudice which resulted from the lack of a formal request for supplemental briefing subsequent to the issuance of *State v. Sturzyk*, 869 N.W.2d 280 (Minn. 2015).

Circuit precedent, we continue to conclude that a violation of Minnesota Statute § 609.2242 necessarily involves the use or attempted use of violent physical force against the person of another. *See United States v. Schaffer*, *supra*; *United States v. Rice*, 813 F.3d 704 (8th Cir. 2016). We find no reason to revisit our holding therein. *See Matter of Anselmo*, 20 I&N Dec. 25 (BIA 2989) (as a general rule, the Board follows the precedent decisions of the circuit in which the particular case arises).[2]

Lastly, in a supplement to the motion to reconsider, received at the Board on January 13, 2017, the respondent argues that a subsequent decision by the Court of Appeals for the Eighth Circuit undermines *United States v. Schaffer*, *supra*. *See United States v. Horse Looking*, 828 F.3d 744 (8th Cir. 2016). Counsel for the DHS argues to the contrary that Horse Looking does not apply, as that decision is

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[2] Moreover, we disagree with the respondent's argument that *U.S. v. Schaffer*, *supra*, is limited to the sentencing enhancement question under the Armed Career Criminal Act (ACCA). While the Eighth Circuit found that Minnesota Statute § 609.2242, subdivision 1(1) qualifies as a violent felony under the Armed Career Criminal Act ("ACCA"), we have observed that the ACCA's definition of a "violent felony" is, in pertinent part, identical to the definition of a "crime of violence" set forth in 18 U.S.C. § 16(a). *Matter of Velasquez*, 25 I&N Dec. 278, 282 (BIA 2010); *see also Roberts v. Holder*, 745 F.3d 928, 930-31 (8th Cir. 2014) (observing that the same provision of the ACCA at issue in *Schaffer* is "virtually identical" to 18 U.S.C. § 16(a)). Moreover, as the DHS noted in its response brief, the respondent also relies on *Descamps v. United States*, 133 S.Ct. 2276 (2013), which deals with the ACCA and has been embraced within the immigration context.

limited to a South Dakota statutory definition of a "misdemeanor crime of domestic violence" under 18 U.S.C. § 921(a)(33) and not the definition of a crime of violence under 18 U.S.C. § 16(a), discussed in *United States v. Schaffer*, *supra*. We agree.

Consequently, we do not find an error of fact or law in our earlier decision. Accordingly, the following order will be entered.

ORDER: The respondent's motion to reconsider is denied.

/s/_____
FOR THE BOARD

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals
Falls Church, Virginia 22041

File No: A205 505 755— Date: Sep 26, 2016
Fort Snelling, MN

In re: J CRUZ *RAMIREZ-BARAJAS*

IN REMOVAL PROCEEDINGS APPEAL

ON BEHALF OF RESPONDENT: Nadezda Polukhin-Pratt, Esquire

ON BEHALF OF DHS: Laura W. Trosen
Assistant Chief Counsel

CHARGE:

- Notice: Sec. 212(a)(6)(A)(i), I&N Act [8 U.S.C. § 1182(a)(6)(A)(i)]—Present without being admitted or paroled

APPLICATION: Cancellation of removal

The respondent appeals the Immigration Judge's March 11, 2015, decision denying his application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). The appeal will be dismissed.

In her decision, the Immigration Judge found the respondent did not meet his burden in establishing his eligibility for cancellation of removal under section 240A(b) of the Act due to his conviction for the offense of domestic assault in violation of Minnesota Statutes section 609.2442.1(1) (I.J. at 3). Specifically, the Immigration Judge, relying on the decision in *United States v. Salido-Rosas*, 662 F.3d 1254 (8th Cir. 2011), found that section 609.2242.1(1) of the Minnesota Statutes defines a "crime of violence" as defined by 18 U.S.C. § 16(a) and is an offense defined by section 237(a)(2)(E)(i) of the Act, 8 U.S.C. § 1227(a)(2)(E)(i), rendering the respondent ineligible for cancellation of removal (I.J. at 2-3). The respondent appealed.

Section 609.2242.1(1) provides, in pertinent part, "[w]hoever does any of the following against a family or household member …, commits an assault and is guilty of a misdemeanor: commits an act with intent to cause fear in another of immediate bodily harm." *See id*. A "crime of domestic violence" means any crime of violence defined by 18 U.S.C. §§ 16(a) or (b) which is committed by a current or former spouse, or an individual with whom the person shares a child, with whom he/she cohabits or has cohabitated as a spouse, who is similarly situated to a spouse under the laws of the jurisdiction of the offense, or by any other individual against a person who is protected from their acts under the laws of the United States or State, Indian tribal government, or unit of local government. *See* section 237(a)(2)(E)(i) of the Act. A crime of violence is defined, in pertinent part, 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." 18 U.S.C. § 16(a). Minnesota defines "bodily harm" as "physical pain or injury, illness, or any impairment of a person's physical condition." Minn. Stat. Ann. § 609.2(7).

During the pendency of this appeal, the United States Court of Appeals for the Eighth Circuit, where this case arises, held that a conviction for the offense of domestic assault under section 609.2242.1(1) of the Minnesota Statutes is a crime of violence as defined by 18 U.S.C. § 16(a), concluding that committing an act with the intent to cause fear in another of immediate bodily harm or death has, as an element, the threatened use of physical force against the person of another. *See United States v. Schaffer*, 818 F.3d 796, 798 (8th Cir. 2016) (citing *Johnson v United States*, 559 U.S. 133 (2010)).[1] Further, we are unpersuaded by the respondent's contention that his conviction does not fall within the purview of section 237(a)(2)(E)(i), for purposes of his eligibility for cancellation of removal, because he was never "admitted." *See Matter of Almanza*, 24 I&N Dec. 771 (BIA 2009) (arriving alien status does not bar the use of a conviction described under section 237(a)(2) for purposes of section 240A(b)(1)(C)). Because the respondent's conviction is a crime of domestic violence, he is not eligible for cancellation of removal. *See* section 240A(b)(1)(C) of the Act.

Accordingly, the appeal will be dismissed.

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[1] While the conviction in *Schaffer* was for a felony, the elements are the same. Felony status arises on the basis of recidivism. *See* section 609.2242.4.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the Immigration Judge's order and conditioned upon compliance with conditions set forth by the Immigration Judge and the statute, the respondent is permitted to voluntarily depart the United States, without expense to the Government, within 60 days from the date of this order or any extension beyond that time as may be granted by the Department of Homeland Security ("DHS"). *See* section 240B(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229c(b); *see also* 8 C.F.R. §§ 1240.26(c), (f). In the event the respondent fails to voluntarily depart the United States, the respondent shall be removed as provided in the Immigration Judge's order.

NOTICE: If the respondent fails to voluntarily depart the United States within the time period specified, or any extensions granted by the DHS, the respondent shall be subject to a civil penalty as provided by the regulations and the statute and shall be ineligible for a period of 10 years for any further relief under section 240B and sections 240A, 245, 248, and 249 of the Act. *See* section 240B(d) of the Act.

WARNING: If the respondent files a motion to reopen or reconsider prior to the expiration of the voluntary departure period set forth above, the grant of voluntary departure is automatically terminated; the period allowed for voluntary departure is not stayed, tolled, or extended. If the grant of voluntary departure is automatically terminated upon the filing of a motion, the penalties for failure to depart under

section 240B(d) of the Act shall not apply. *See* 8 C.F.R. § 1240.26(e)(1).

WARNING: If, prior to departing the United States, the respondent files any judicial challenge to this administratively final order, such as a petition for review pursuant to section 242 of the Act, 8 U.S.C. § 1252, the grant of voluntary departure is automatically terminated, and the alternate order of removal shall immediately take effect. However, if the respondent files a petition for review and then departs the United States within 30 days of such filing, the respondent will not be deemed to have departed under an order of removal if the alien provides to the DHS such evidence of his or her departure that the Immigration and Customs Enforcement Field Office Director of the DHS may require and provides evidence DHS deems sufficient that he or she has remained outside of the United States. The penalties for failure to depart under section 240B(d) of the Act shall not apply to an alien who files a petition for review, notwithstanding any period of time that he or she remains in the United States while the petition for review is pending. *See* 8 C.F.R. § 1240.26(i).

/s/_____
FOR THE BOARD

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
FORT SNELLING, MINNESOTA

File Number: A205-505-755

Date: March 11, 2015

In the Matter of:	)	**In Removal**
	)	**Proceedings**
J Cruz RAMIREZ- BARAJAS,	)	
	)	
Respondent.	)	
	)	

CHARGE: INA § 212(a)(6)(A)(i)—An alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

APPLICATION: Cancellation of Removal for Certain Non-Permanent Residents under INA § 240A(b)(1).

ON BEHALF OF RESPONDENT:
Nadezda Polukhin-Pratt, Esq.
Pratt International Law Firm, LLC

6465 Wayzata Blvd., Ste. 400
St. Louis Park, MN 55426

ON BEHALF OF DHS:
Laura Trosen, Esq.
Asst. Chief Counsel/ICE
1 Federal Dr., Ste. 1800
Fort Snelling, MN

WRITTEN DECISION OF THE IMMIGRATION JUDGE

I. Background

J Cruz Ramirez-Barajas, Respondent, is a 40-year-old, native and citizen of Mexico. Exh. 1. He first entered the United States in May of 1991 and last entered on February 15, 2006 at or near San Ysidro, California. *Id.* On November 2, 2012, the Department of Homeland Security (DHS) commenced removal proceedings against Respondent with the filing of a Notice to Appear (NTA), charging Respondent with being removable pursuant to the above-captioned charge of the Immigration and Nationality Act (the Act or INA). *Id.*

Respondent conceded service of the NTA and admitted the allegations. He conceded the charge, and the Court sustained it. 8 C.F.R. § 1240.10(c). Respondent designated Mexico as the country of removal should such action become necessary. Respondent subsequently filed the above listed application for relief. Exh. 4. Respondent also requested voluntary departure in the alternative.

II. Evidence Presented

Exh. 1: Notice to Appear, dated September 12, 2012, and filed November 2, 2012.

Exh. 2: Form I-213, Record of Deportable/Inadmissible Alien, dated September 12, 2012.

Exh. 3: Respondent's 512-page Filing, dated April 1, 2013.

Exh. 4: Respondent's Form EOIR-42B, Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents, filed April 2, 2013.

Exh. 5: Respondent's 129-page Filing, dated June 5, 2013.

Exh. 6: Respondent's 15-page Filing, dated June 25, 2013.

Exh. 7: Respondent's 12-page Memorandum in Support of Application for Cancellation of Removal, dated August 22, 2013.

Exh. 8: DHS's 2-page Filing, dated October 8, 2013.

Exh. 9: Respondent's 12-page Filing, dated December 16, 2014.1

III. Eligibility for Cancellation of Removal

In removal proceedings, an applicant for relief from removal has the burden of proof to establish that he meets the eligibility criteria set out in the Act and that he merits a favorable exercise of discretion. INA § 240(c)(4)(A). To be eligible for cancellation of removal under section 240A(b)(1) of the Act, Respondent must establish that he has been physically present in the United States for a continuous period of not less than ten years immediately preceding the date of his application; that he has been a person of good moral character during such period; that he has not been convicted of an offense under sections 212(a)(2), 237(a)(2), or 237(a)(3) of the Act; and that removal would result in exceptional and extremely unusual hardship to a U.S. citizen or lawful permanent resident spouse, parent, or child. INA § 240A(b)(1).

Here, Respondent has been convicted of Domestic Assault in violation of Minnesota Statute 609.2242.1(1). This statute states in relevant part:

> Whoever does any of the following against a family or household member as defined in section 518B.01, subdivision 2, commits an assault and is guilty of a misdemeanor:

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[1] Through this order the Court marks Exhibit 9 into evidence.

> (1) commits an act with intent to cause fear in another of immediate bodily harm or death[.]

Minn. Stat. § 609.2242.1(1). This conviction may render the applicant ineligible for cancellation of removal. If the Court finds Respondent statutorily ineligible for cancellation of removal, the Court may pretermit the application regardless of the availability of grant numbers for cancellation of removal. 8 CFR § 1240.21(c)(1).

IV. Crime of Domestic Violence

One offense under section 237(a)(2) of the Act is the offense of domestic violence. *See* INA § 237(a)(2)(E)(i). The term "crime of domestic violence" is defined as

> any crime of violence (as defined 18 U.S.C. § 16) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabitating with or has cohabitated with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who protected from that individual's acts under the domestic or family laws of the United States or any State, Indian tribal government, or unit of local government.

INA § 237(a)(2)(E)(i). Minnesota Statute 609.2242.1(1) states the act must be committed

against a "family or household member." The victim of Respondent's act was his live-in girlfriend, Rosa Perez, Exh. 5. Therefore, the Court finds that the crime in Respondent's case was committed against a person in a protected relationship. Accordingly, the Court moves on to determine if the crime was a crime of violence.

In order for a crime to be considered a crime of domestic violence, the crime must be classified as a crime of violence. A crime of violence is defined as:

> (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. The Eighth Circuit has held that "knowingly or purposely…making another person fear imminent bodily harm necessarily requires using, attempting to use, or threatening to use physical force" and, therefore, is a crime of violence. *United States v. Salido-Rosas*, 662 F.3d 1254, 1256 (8th Cir. 2011) (citing *Johnson v. United States*, 130 S. Ct 1265, 1271 (2010)). The Eighth Circuit held that because the statute at issue referred to "bodily injury" or "bodily harm" physical force was required; and therefore, the statute was categorically a crime of violence. *Salido-Rosas* 662 F.3d at 1256-7.

Here, Respondent's statute of conviction requires intentionally causing fear of bodily harm in another. The Court finds that this is within the holding of *Salido-Rosas* and therefore is categorically a crime of violence.[2] As this crime was committed against a family or household member the Court finds that Respondent has been convicted of a crime of domestic violence as defined in section 237(a)(2)(E)(i) of the Act. Accordingly, the Court finds Respondent is ineligible for cancellation of removal under section 240A(b)(1) of the Act and his application for relief under this section is pretermitted and denied.

V. Voluntary Departure

Section 240B of the Act permits the Attorney General to grant a non-citizen the privilege of voluntary departure at the conclusion of proceedings, if Respondent can establish that: (1) he has been physically present in the United States for a period of at least one year immediately preceding the date the NTA was served; (2) he has been a person of good moral character during the five-year period immediately preceding the application for relief; (3) he is not removable under section 237(a)(2)(A)(iii) or 237(a)(4)(B) of the Act; (4) he has the means to depart the United States voluntarily and intends to do so; and (5) he merits the relief as a matter of discretion. *See* INA § 240B(b)(1).

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[2] As the Court finds a conviction under this statute is categorically a crime of violence, the Court does not look beyond the statute to examine how the statute has been applied by state courts.

Because the record indicates that the Respondent is eligible and reveals no materially adverse discretionary factors, Respondent is granted the privilege of voluntary departure. This grant is pursuant to the conditions specified below. *See* INA § 240B(b)(3).

Accordingly, the Court enters the following orders:

ORDERS

IT IS HEREBY ORDERED that Respondent's application for cancellation of removal under section 240A(b)(1) of the Act be **DENIED**

IT IS FURTHER ORDERED that, in lieu of removal, Respondent be granted the privilege of voluntarily departing the United States at no expense to the Government on or before May 10, 2015 (60 days).

IT IS FURTHER ORDERED that Respondent post a voluntary departure bond in the amount of $500 to the Department of Homeland Security within the next five (5) business days.

IT IS FURTHER ORDERED that Respondent present current, valid travel documents to the DHS within the next sixty (60) calendar days.

IT IS FURTHER ORDERED that if Respondent fails to post the required bond within five (5) business days, to present a current valid travel document within sixty (60) calendar days, or to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings

and the following order shall become thereupon immediately effective: Respondent shall be removed from the United States to Mexico based upon the charge contained in the Notice to Appear.

IT IS FURTHER ORDERED that if Respondent fails to voluntarily depart the United States within the time specified, Respondent will be subject to a civil penalty of not less than $1,000 and not more than $5,000; the Court has set the presumptive amount of $3,000.

IT IS FURTHER ORDERED that if Respondent fails to voluntarily depart as ordered, Respondent would be ineligible, for a period of 10 years, to receive cancellation of removal, adjustment of status, registry, voluntary departure, or a change of nonimmigrant status.

IT IS FURTHER ORDERED that if Respondent has reserved the right to appeal, then he has the absolute right to appeal the decision. If Respondent does appeal, he must provide the Board of Immigration Appeals, within 30 days of filing an appeal, sufficient proof of having posted the voluntary departure bond. The Board will not reinstate the voluntary departure period in its final order if Respondent does not timely prove to the Board that the voluntary departure bond has been posted. 8 C.F.R. § 1240.26(c)(3)(ii).

IT IS FURTHER ORDERED that if Respondent does not appeal and instead files a motion to reopen or reconsider during the voluntary departure period, the period allowed for voluntary departure will not be

stayed, tolled, or extended, the grant of voluntary departure will be terminated automatically, the alternate order of removal will take effect immediately, and the penalties for failure to depart voluntarily under section 240B(d) of the Act will not apply. 8 C.F.R. § § 1240.26(c)(3)(iii), (e)(1).

/s/
Susan Castro
Immigration Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 16-4014

J. Cruz Ramirez-Barajas

Petitioner

v.

Jefferson B. Sessions, III,
Attorney General of the United States of America

Respondent

No: 17-1618

J. Cruz Ramirez-Barajas

Petitioner

v.

Jefferson B. Sessions, III,
Attorney General of the United States

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals
(A205-505-755)
(A205-505-755)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

February 15, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX F

United States Court Of Appeals for the Eighth Circuit

No. 16-2164

Daniel Oginga Onduso

Petitioner

v.

Jefferson B. Sessions, III,
Attorney General of the United States

Respondent

No. 17-1526

Daniel Oginga Onduso

Petitioner

v.

Jefferson B. Sessions, III, Attorney General of the United States

Respondent

Petition for Review of an Order of the Board of Immigration Appeals

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Submitted: October 18, 2017
Filed: December 20, 2017

Before SMITH, Chief Judge, GRUENDER and BENTON, Circuit Judges.

GRUENDER, Circuit Judge.

Daniel Onduso petitions for review of the Board of Immigration Appeals' ("BIA") decision dismissing his appeal of a removal order. The BIA correctly determined that Minnesota misdemeanor domestic assault qualifies as a crime of domestic violence and, accordingly, that Onduso's conviction for this offense rendered him ineligible for cancellation of removal. Therefore, we deny the petition.

Onduso, a native and citizen of Kenya, legally entered the United States as a temporary visitor in January 1999. He overstayed his six-month visa and has resided here unlawfully ever since. On June 8, 2009, the Department of Homeland Security commenced removal proceedings against Onduso by issuing a Notice to Appear ("NTA"), charging him as removable for remaining in the United States for a period longer than permitted. *See* 8 U.S.C. § 1227(a)(1)(B). After a series of proceedings not relevant here, an immigration judge ("IJ") found Onduso removable as charged in the NTA and ineligible for cancellation of removal pursuant to 8 U.S.C. § 1229b(b)(1)(C), due to his 2004 Minnesota conviction for domestic assault. *See* Minn. Stat.

§ 609.2242, subd. 1. On appeal, the BIA rejected Onduso's claim that this misdemeanor offense does not categorically qualify as a "crime of domestic violence" based on its analysis of Minnesota case law and our relevant crime-of-violence determination in *United States v. Salido-Rosas*, 662 F.3d 1254, 1256 (8th Cir. 2011) (concluding that "[k]nowingly or purposely causing or attempting to cause bodily injury or making another person fear imminent bodily harm necessarily requires using, attempting to use, or threatening to use physical force").

Onduso then filed a motion to reconsider, arguing that the BIA's analysis was "starkly in opposition" to in its approach in *Matter of Guzman-Polanco I*, 26 I&N Dec. 713 (B.I.A. 2016). In that case, which arose in the First Circuit, the BIA held that Puerto Rico third-degree battery was not a crime of violence because it could be committed "by means that do not require the use of violent physical force," such as by poisoning a victim. *See id*. at 717-18. Applying similar logic, Onduso argued that Minnesota misdemeanor domestic assault did not categorically qualify as a crime of domestic violence under 8 U.S.C. § 1227(a)(2)(E)(i). In ruling on Onduso's motion, the BIA first observed that "[t]he record … does not specify whether [he] violated subsection 1 or subsection 2" of Minn. Stat. § 609.2242, subd. 1. It went on to conclude, however, that this ambiguity was irrelevant, as both subsections categorically qualify as crimes of domestic violence under Eighth Circuit precedent. *See Matter of Guzman-Polanco II*, 26 I&N Dec. 806, 808 (B.I.A. 2016) ("Our decision in *Matter of Guzman-Polanco [I]* should not be read as attempting to establish a nationwide rule addressing the scope of

the use of force through indirect means, including poisoning. Rather, for our purposes, circuit law governs this issue ….”). Onduso then petitioned this court for review, primarily arguing that we should reverse several of our prior opinions concerning the application of the minimum-conduct test in light of the Supreme Court’s decision in *Moncrieffe v. Holder*. *See* 569 U.S. 184, 190-91 (2013). We decline his invitation to “rescue” the BIA from these purportedly “stale” cases, particularly given that our recent decision in *Ramirez-Barajas v. Sessions* rejected a similar set of arguments in a case involving subsection 1 of the same Minnesota statute. *See* Nos. 16-4014 & 17-1618, 2017 WL 6390314 (8th Cir. Dec. 15, 2017); *see also United States v. Eason*, 829 F.3d 633, 641 (8th Cir. 2016) (“It is a cardinal rule in our circuit that one panel is bound by the decision of a prior panel.”).

“We review the BIA’s legal determinations *de novo*,” including whether a state offense qualifies as a bar to cancellation of removal. *Roberts v. Holder*, 745 F.3d 928, 930 (8th Cir. 2014) (*per curiam*). The Immigration and Nationality Act authorizes the Attorney General to cancel the removal of nonpermanent residents, provided that, among other things, they have not been convicted of a disqualifying criminal offense. *See* 8 U.S.C. § 1229b(b). This includes “crime[s] of domestic violence,” *see id*. § 1227(a)(2)(E)(i), which are offenses involving any “crime of violence”—as that term is defined in 18 U.S.C. § 16—directed against a person in a qualifying domestic relationship,” *id*. Title 18, in turn, defines “crime of violence” as:

> (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. Onduso concedes that he was in a qualifying domestic relationship with the victim of his assault, and it is undisputed that his conviction was for a misdemeanor offense, not a felony, thereby negating the application of § 16(b). Thus, the only question before us is whether Minnesota misdemeanor domestic assault categorically qualifies as a crime of violence under § 16(a), which we have treated as equivalent to the force clause of the United States Sentencing Guidelines and the Armed Career Criminal Act ("ACCA"). *See Roberts*, 745 F.3d at 930-31.

Onduso was convicted of misdemeanor domestic assault under Minn. Stat. § 609.2242, subd. 1, which provides:

> Whoever does any of the following against a family or household member … commits an assault and is guilty of a misdemeanor:
>
> (1) commits an act with intent to cause fear in another of immediate bodily harm or death; or

(2) intentionally inflicts or attempts to inflict bodily harm upon another.

For purposes of this statute, "bodily harm" is defined as "physical pain or injury, illness, or any impairment of physical condition." *Id.* § 609.02, subd. 7. Although Onduso urged the IJ to find that he was convicted under subsection 2 of the statute, the BIA correctly determined that the record is unclear as to which subsection—(1) assault-fear or (2) assault-harm—served as the basis for his conviction. Thus, we consider whether both offenses categorically qualify as crimes of violence.

As an initial matter, we agree with the BIA that the then-applicable Eighth Circuit and Minnesota precedent suggested that both subsections satisfy § 16(a). First, the BIA correctly recognized that our decision in *United States v. Schaffer* guided its crime-of-violence determination concerning subsection 1. *See* 818 F.3d 796 (8th Cir. 2016) (concluding that this offense qualified as a violent felony for ACCA purposes). However, this analysis became considerably simpler after our decision in *Ramirez-Barajas* extended *Schaffer* to the § 16(a) context and further concluded that intervening Minnesota case law did not affect its conclusion. *See* 2017 WL 6390314, at *1-2. We follow *Ramirez-Barajas*'s express holding that subsection 1 categorically qualifies as a crime of domestic violence. *See id.* at *2.

Second, although we have not directly addressed whether subsection 2 also qualifies as a crime of violence, the logic underlying relevant circuit

precedent resolves the issue. As the BIA noted, by its very terms this offense requires the intentional or attempted infliction of bodily harm, and we previously have explained that "it is impossible to cause bodily injury without using force 'capable of' producing that result." *United States v. Rice*, 813 F.3d 704, 706 (8th Cir. 2016) (quoting *United States v. Castleman*, 134 S. Ct. 1405, 1416-17 (2014) (Scalia, J., concurring)). Moreover, our conclusion that subsection 2 categorically qualifies as a crime of violence follows naturally from the analysis of subsection 1 in *Ramirez-Barajas*. Given that convictions for both offenses include the same element of "bodily harm," we see no basis for reaching the opposite result here. Thus, whichever provision served as the basis for Onduso's conviction, we find that it necessarily involved a crime of violence and thereby qualifies as a crime of domestic violence under 8 U.S.C. § 1227(a)(2)(E)(i).

Accordingly, because Onduso's conviction for Minnesota misdemeanor domestic assault rendered him statutorily ineligible for cancellation of removal, we deny the petition.

APPENDIX G

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals
Falls Church, Virginia 22041

File No: A078 118 717— Date: Mar 6, 2017
Bloomington, MN

In re: DANIEL OGINGA *ONDUSO*

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: David L. Wilson, Esquire

ON BEHALF OF DHS: Amy K.R. Zaske
Assistant Chief Counsel

APPLICATION: Reconsideration

This matter was last before the Board on April 12, 2016, when we dismissed the respondent's appeal from the Immigration Judge's decision. The respondent has now filed a motion to reconsider pursuant to section 240(c)(6) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(c)(6). The Department of Homeland Security ("DHS") opposes the motion. The motion will be denied.

A motion to reconsider is "a request that the Board reexamine its previous decision in light of

additional arguments, a change of law, or perhaps an argument or aspect of the case which was overlooked." *Matter of O-S-G-*, 24 I&N Dec. 56, 57 (BIA 2006). A motion to reconsider challenges the Board's original decision and alleges that it is defective in some regard. *Id*. The motion must specify the errors of fact or law in the prior Board decision, and it must be supported by pertinent authority. 8 C.F.R. § 1003.2(b)(1). We will reexamine our prior decision in light of the arguments raised in the respondent's motion as well as intervening precedent.

In our prior decision, we concluded that the respondent is statutorily ineligible for cancellation of removal under section 240A(b)(1)(C) of the Act, 8 U.S.C. § 1229b(b)(1)(C). In arriving at that conclusion, we determined that the respondent's July 6, 2004, conviction for domestic assault in violation of Minnesota Statute § 609.2242, subdivision 1 qualified as a crime of domestic violence as described in section 237(a)(2)(E)(i) of the Act, 8 U.S.C. § 1227(a)(2)(E)(i).

In his motion to reconsider, the respondent alleges that the Board's decision in *Matter of Guzman-Polanco* ("*Guzman-Polanco I*"), 26 I&N Dec. 713 (BIA 2016), "is starkly in opposition" to the holding in his case, and we erred by not analyzing his case under *Guzman-Polanco I* (Respondent's Motion at 3-4, 16-20). He argues that in light of our decision in *Guzman-Polanco I*, "domestic assault is not a crime of domestic violence under the categorical approach because non-forceful conduct and minimal force is sufficient to sustain a conviction" (Respondent's Motion at 20). Thus, the respondent contends that his

conviction for domestic assault in violation of Minnesota Statute § 609.2242, subdivision 1 categorically does not qualify as a conviction for a crime of violence, and thus does not bar him from cancellation of removal (Respondent's Motion at 16-20).

The respondent's statute of conviction, Minnesota Statute § 609.2242, subdivision 1, states as follows:

> Whoever does any of the following against a family or household member as defined in section 518B.01, subdivision 2, commits an assault and is guilty of a misdemeanor:
>
> (1) commits an act with intent to cause fear in another of immediate bodily harm or death; or
>
> (2) intentionally inflicts or attempts to inflict bodily harm upon another.

For purposes of the foregoing statute, "bodily harm" is defined as "physical pain or injury, illness, or any impairment of physical condition." Minnesota Statute § 609.02, subdivision 7.

A "crime of domestic violence" means any "crime of violence," as that term is defined in 18 U.S.C. § 16, that is committed by a specified person against one of a defined set of victims. Section 237(a)(2)(E)(i) of the Act. In turn, a crime of violence is defined at 18 U.S.C. § 16(a) 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."[1]

The record reflects that the respondent was convicted of violating Minnesota Statute § 609.2242, subdivision 1, but it does not specify whether the respondent violated subsection 1 or subsection 2 (I.J. at 2-3; Exh. 3 at 12-13; Respondent's Motion at 10 n.6). However, it is irrelevant which subsection the respondent was convicted of violating, because both subsections categorically constitute crimes of violence under 18 U.S.C. § 16(a).

On April 12, 2016, the same day that we issued our prior decision in the respondent's case, the United States Court of Appeals for the Eighth Circuit published *United States v. Schaffer*, 818 F.3d 796 (8th Cir. 2016),[2] which held that Minnesota Statute

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[1] As the respondent was convicted of a misdemeanor, we need not address the definition of "crime of violence" provided in 18 U.S.C. § 16(b), as that provision applies only to felony convictions.

[2] In his motion, the respondent contends that the Board should not follow *Schaffer*, arguing that the Eighth Circuit did not follow controlling Supreme Court precedent in that case (Respondent's Motion at 15 n.12). However, that determination is not within our purview. *See, e.g.*, *Matter of Assaad*, 23 I&N Dec. 553, 560 (BIA 2003) (holding that it is beyond this Board's limited authority as an administrative decision-making body to decree, considering relevant Supreme Court precedent, that a circuit court has reached an incorrect result), *abrogated on other grounds by Rafiyev v. Mukasey*, 536 F.3d 853 (8th Cir. 2008); *see also Matter of Anselmo*, 20 I&N Dec. 25, 31-32 (BIA 1989) (providing that as a general rule, the Board follows the precedent decisions of the circuit in which a particular case arises).

§ 609.2242, subdivision 1(1) "qualifies as a violent felony because it has as an element the 'threatened use of physical force against the person of another.'"[3] *United States v. Schaffer*, *supra*, at 798 (citation omitted). The Court also clarified that the type of force required to sustain a conviction under the foregoing statute is *violent* physical force.[4] *Id*. As a conviction under Minnesota Statute § 609.2242, subdivision 1(1) requires as an element the threatened use of violent physical force against the person of another, it qualifies as a crime of violence under 18 U.S.C. § 16(a).[5] *See Matter of Guzman-*

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[3] While the Eighth Circuit found that Minnesota Statute § 609.2242, subdivision 1(1) qualifies as a violent felony under the Armed Career Criminal Act ("ACCA"), we have observed that the ACCA's definition of a "violent felony" is, in pertinent part, identical to the definition of a "crime of violence" set forth in 18 U.S.C. § 16(a). *Matter of Velasquez*, 25 I&N Dec. 278, 282 (BIA 2010); *see also Roberts v. Holder*, 745 F.3d 928, 930-31 (8th Cir. 2014) (observing that the same provision of the ACCA at issue in *Schaffer* is "virtually identical" to 18 U.S.C. § 16(a)).

[4] The respondent's contention that § 609.2242, subdivision 1(1) may be violated by the use of non-violent force is thus foreclosed by *Schaffer*, which explicitly rejected the argument that a conviction could be obtained under this subsection "based on acts that do not involve violent physical force." *United States v. Schaffer*, *supra*, at 798.

[5] In support of his motion, the respondent has submitted an unpublished Board decision, *Matter of Santamaria*, A089 713 036 (BIA Dec. 30, 2015), which reached a contrary conclusion (Respondent's Motion at 2, 14 at n.11). However, unpublished Board decisions do not constitute binding precedent. *See Matter of D-K-*, 25 I&N Dec. 761, 764 n.2 (BIA 2012); *see also* 8 C.F.R. § 1003.1(g). Moreover, we note that *Santamaria* was decided without the benefit of the intervening precedent decision *United States v. Schaffer*, *supra*.

Polanco I, 26 I&N Dec. 713 (holding that in order for a State offense to qualify as a crime of violence under 18 U.S.C. § 16(a), the statute must require as an element the use, attempted use, or threatened use of violent physical force).

Minnesota Statute § 609.2242, subdivision 1(2) also qualifies as a crime of violence under 18 U.S.C. § 16(a). By its very terms, this subsection of the state statute requires the intentional or attempted infliction of bodily harm. The respondent nevertheless argues that the intentional or attempted infliction of bodily harm does not necessarily involve the use or attempted use of violent physical force, as the level of "bodily harm" involved in a violation of Minnesota Statute § 609.2242, subdivision 1(2) may be minimal, and may be inflicted without any direct use of force against the victim (Respondent's Motion at 10-12).

With respect to the level of bodily harm required for a conviction under Minnesota Statute § 609.2242, subdivision 1(2), the relevant state case law clearly establishes that mere "offensive touching" is insufficient to establish the infliction of "bodily harm." *See generally Johnson v. United States*, 559 U.S. 133, 137 (2010) (providing that "violent force" involves a greater degree of force than mere offensive or unwanted touching); *see also Matter of Guzman-Polanco I*, 26 I&N Dec. at 715-17. Specifically, the Minnesota Supreme Court has observed that "[w]hile the threshold for what constitutes bodily harm under

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Consequently, *Santamaria* does not require us to reach a different result in the respondent's case.

section 609.02, subdivision 7, is minimal, our legal standard nonetheless requires proof of pain or discomfort." *State v. Struzyk*, 869 N.W.2d 280, 289 (Minn. 2015). The level of force required to inflict this type of bodily harm qualifies as "violent force" under Eighth Circuit precedent. *See, e.g., United States v. Eason*, 829 F.3d 633, 642 n.7 (8th Cir. 2016) (reiterating that "force that produces even a minimal degree of bodily injury constitutes violent force," while acknowledging that "not every unwanted touching constitutes violent force").

In support of his contrary position, the respondent argues that a conviction may be obtained under Minnesota Statute § 609.2242, subdivision 1(2) where the defendant did not directly use or attempt to use any physical force against the victim, but instead inflicted bodily harm by deceiving the victim into ingesting harmful drugs or poison (Respondent's Motion at 11-12, 16, 18-19). However, the Eighth Circuit has held that such circumstances involve a sufficient use of force to qualify as "violent force," because "the act of employing [a harmful substance] knowingly as a device to cause physical harm" involves the use of physical force. United *States v. Schaffer*, *supra*, at 798 (intentionally exposing a victim to a deadly virus involves the use of violent physical force) (citation and internal quotation marks omitted); *see also United States v. Lindsey*, 827 F.3d 733, 739-40 (8th Cir. 2016) (defendant uses violent physical force where he or she "administers poison to a victim, draws a bath for the victim using scalding hot water, or exposes the victim to excessive ultraviolet radiation by intentionally leaving a tanning bed on for too long"); *United States v. Rice*,

813 F.3d 704, 706 (8th Cir. 2016) (offering victim a poisoned drink involves the use of violent physical force).[6]

While the respondent argues that Eighth Circuit precedents concerning the use of indirect force conflict with our holding in *Guzman-Polanco I*, we have clarified in *Matter of Guzman-Polanco* ("*Guzman-Polanco II*"), 26 I&N Dec. 806, 808 (BIA 2016), that we will follow circuit law concerning the use of force through indirect means. As such, considering the meaning of the term "bodily harm" under Minnesota law, as well as the scope of force that qualifies as "violent physical force" under Eighth Circuit precedent, we conclude that "intentionally inflict[ing] or attempt[ing] to inflict bodily harm upon another" in violation of Minnesota Statute § 609.2242, subdivision 1(2) necessarily involves the use or attempted use of violent physical force against the person of another.

In view of the foregoing discussion, a conviction under either subsection of Minnesota Statute § 609.2242, subdivision 1 categorically qualifies as a

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[6] In a supplement to the motion to reconsider, received at the Board on Junuary 13, 2017, the respondent argues that a subsequent decision by the Court of Appeals for the Eighth Circuit undermines *United States v. Schaffer*, *supra*. *United States v. Horse Looking*, 828 F.3d 744 (8th Cir. 2016). Counsel for the DHS argues to the contrary that *Horse Looking* does not apply, as that decision is limited to a South Dakota statutory definition of a "misdemeanor crime of domestic violence" under 18 U.S.C. § 921(a)(33) and not the definition of a crime of violence under 18 U.S.C. § 16(a), discussed in *United States v. Schaffer*, *supra*. We agree.

conviction for a crime of violence under 18 U.S.C. § 16(a).[7] *See generally Matter of Guzman-Polanco I*, 26 I&N Dec. 713. Moreover, the respondent concedes that Minnesota Statute § 609.2242, subdivision 1 involves the domestic relationship element required under section 237(a)(2)(E)(i) of the Act (Respondent's Motion at 7 n.4). Thus, the respondent's conviction categorically qualifies as a conviction for a crime of domestic violence under section 237(a)(2)(E)(i) of the Act.

Consequently, we cannot find that an error of fact or law exists in our earlier decision. Accordingly, the following order will be entered.

ORDER: The respondent's motion to reconsider is denied.

/s/_____
FOR THE BOARD

[7] Because we conclude that any violation of Minnesota Statute § 609.2242, subdivision 1 categorically qualifies as a crime of violence under 18 U.S.C. § 16(a), the statute is not "divisible," and we therefore do not proceed to the "modified categorical" approach which would require analysis of the respondent's record of conviction (*cf.* Respondent's Motion at 10). *See generally Matter of Chairez*, 26 I&N Dec. 819 (BIA 2016) (addressing methodology for determining whether a criminal statute is "divisible").

APPENDIX H

U.S. Department of Justice
Executive Office for Immigration Review
Decision of the Board of Immigration Appeals
Falls Church, Virginia 22041

File No: A078 118 717— Date: April 12, 2016
Bloomington, MN

In re: DANIEL OGINGA ONDUSO

IN REMOVAL PROCEEDINGS APPEAL

ON BEHALF OF RESPONDENT:	Bruce Douglas Nestor, Esquire
ON BEHALF OF DHS:	Amy K.R. Zaske Assistant Chief Counsel
APPLICATION:	Cancellation of removal under section 240A(b)(1)

The respondent, a native and citizen of Kenya, appeals the Immigration Judge's decision of March 4, 2015, denying his application for cancellation of removal under section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1). The Department of Homeland Security ("DHS") has opposed the appeal. The appeal will be dismissed.

We review for clear error the findings of fact, including any determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i). We

review de novo all other issues, including whether the parties have met the relevant burden of proof, and issues of discretion. 8 C.F.R. § 1003.1(d)(3)(ii). The respondent filed his application for cancellation of removal after May 11, 2005; therefore, his claim is governed by the provisions of the REAL ID Act (Exh. 2; I.J. at 2). *See Matter of Almanza*, 24 I&N Dec. 771, 774 (BIA 2009).

The respondent was convicted of domestic assault on July 6, 2004, in violation of section 609.2242.1 of the Minnesota Statutes (Exh. 3 at 12; I.J. at 2). On appeal, he argues that this conviction is not categorically a crime of violence, and thus does not bar him from cancellation of removal under section 240A(b)(1) of the Act (Respondent's Brief at 3). *See* MINN. STAT. § 609.2242.1; *see also* section 240A(b)(1)(C) of the Act. He contends that an act that causes fear of—or actually inflicts—pain, injury, illness, or impairment of physical condition contemplates acts broader than those requiring the use of violent physical force (Respondent's Brief at 7-9). The respondent points to the case of *State v. Kelley*, 734 N.W.2d 689 (Minn. App. 2007), in which the Minnesota Court of Appeals concluded that under a different statute, MINN. STAT. § 609.2231, subd.1,[1] a person is guilty of committing fourth-degree assault by merely spitting on a police officer. He argues that spitting or even threatening to spit on another person could place the person in fear of bodily harm as defined by Minnesota law and that typically spitting

[1] MINN. STAT. § 609.2231 states "person intentionally throws or otherwise transfers bodily fluids or feces at or onto the officer."

is considered an act that employs "violent force" (Respondent's Brief at 5-6).

However, in *State v. Cogger*, 802 N.W.2d 407 (Minn. App. 2011), the Minnesota Court of Appeals clarified *State v. Kelley*, *supra*, and noted that MINN. STAT. § 609.2231, subd.1, "clearly differentiates between an assault inflicting bodily harm and an assault by means of intentionally transferring bodily fluids." *State v. Cogger*, *supra*, at 411. The Minnesota Court of Appeals further clarified that its analysis in *State v. Kelley*, *supra*, was "limited to determining whether a person could commit fourth-degree assault by only spitting on a police officer, without committing an additional assault that met the general definition" and anything outside of this scope was "dictum and not binding in later cases." *State v. Cogger*, *supra*, at 411, n.l. Thus, the analysis in *State v. Kelley*, *supra*, is not applicable in this case, which deals with MINN. STAT. § 609.2242.1, and the respondent does not point to any cases that specifically analyze this statute.

Moreover, the United States Court of Appeals for the Eighth Circuit, in whose jurisdiction this case arises, has held that making another person fear imminent bodily harm necessarily requires using, attempting to use or threatening to use physical force, and is therefore a crime of violence. *See United States v. Salido-Rosas*, 662 F.3d 1254, 1256 (8th Cir. 2011) (because the statute at issue referred to "bodily injury" or "bodily harm," physical force was required, and thus, the statue was categorically a crime of violence). In the present case, the respondent's statute of conviction requires "intentionally inflicting

or attempting to cause fear of bodily harm in another," and thus, a conviction under the statute is categorically a crime of violence. *See* MINN. STAT. § 609.2242.1.

Therefore, the Immigration Judge correctly determined that the respondent's conviction under MINN. STAT. § 609.2242.1 qualifies as a crime of domestic violence as described in section 237(a)(2)(E)(i) of the Act, 8 U.S.C. § 1227(a)(2)(E)(i) (I.J. at 4). Consequently, we affirm the Immigration Judge's determination that the respondent is statutorily ineligible for cancellation of removal under section 240A(b)(1)(C) of the Act. Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

/s/
FOR THE BOARD

APPENDIX I

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
FORT SNELLING, MINNESOTA

File Number:
A 078-118-717

Date: March 4, 2015

In The Matter of:	)	**In Removal**
	)	**Proceedings**
Daniel Oginga ONDUSO	)	
Respondent.	)	
	)	

Charge: INA § 237(a)(1)(B)—an alien who after admission as a nonimmigrant under section 101(a)(15) of the Act remained in the United States for a time longer than permitted

Application: Cancellation of Removal for Certain Non-Permanent Residents under INA § 240A(b)(1)

ON BEHALF OF THE RESPONDENT:	**ON BEHALF OF DHS**:
Vincent Martin	Laura Trosen, Esq.
Cundy & Martin, L.L.C	Asst. Chief Counsel/ICE
7900 Xerxes Ave. S.,	1 Federal Dr., Suite1800

Suite 1125 Fort Snelling, MN 55111
Bloomington, MN 55431

WRITTEN DECISION OF THE IMMIGRATION JUDGE

I. Background

Daniel Oginga Onduso, Respondent, is a 46-year-old man, native and citizen of Kenya. He arrived in the United States at Dallas, Texas, on or about January 26, 1999, as a nonimmigrant visitor with authorization to remain in the United States for a temporary period not to exceed July 24, 1999. (Ex. 1). He remained in the United States beyond July 24, 1999 without authorization. *Id*. The Department of Homeland Security ("DHS") commenced removal proceedings against Respondent with the filing of a Notice to Appear ("NTA"), charging Respondent with removability pursuant to the above-captioned section of the Immigration and Nationality Act ("INA" or "the Act"). *Id*.

Respondent conceded service of the NTA and admitted the allegations. He conceded the charge, and the Court sustained it. 8 C.F.R. 1240.10(c). Respondent designated Kenya as the country of removal should such action become necessary. Respondent subsequently filed the above listed application for relief. (Ex. 2). Respondent also requested voluntary departure in the alternative. *Id*.

II. Evidence Presented

A. Testimony

Respondent testified on September 10, 2013. He spoke about his marriages and life in the United States and Kenya. He has four children in Kenya and three step-children in the United States with his current wife. He does not work and his wife is the main breadwinner in the family.

B. Documentation

Ex. 1: Notice to Appear, dated June 08, 2009.
Ex. 2: Respondent's EOIR-42B Application for Cancellation of Removal, filed November 23, 2009 with the Court.
Ex. 2a: Written Pleading, filed November 23, 2009 with the Court.[1]
Ex. 3: Respondent's 60-page Supporting Documents, including domestic assault, filed June 13, 2012;
Ex. 4: Copy of CIS I-130 Denial Notice, dated April 23, 2012;
Ex. 5: Respondent's 35-page Supplemental Documents, filed August 22, 2012;
Ex. 6: Respondent's Memorandum, filed September 17, 2012;
Ex. 7: Respondent's False Name Conviction, filed August 22, 2013;
Ex. 8: Respondent's Witness List, filed August 22, 2013;

[1] The Court marks this as Exhibit 2a for convenience. It was previously marked as Exhibit 2 with the application.

Ex. 9: Respondent's Supplemental Criminal Case, filed August 23, 2013;
Ex. 10: Respondent's Updated Criminal Record, filed September 6, 2013;
Ex. 11: Respondent's updated EOIR-42B Application for Cancellation of Removal, dated September 10, 2013.[2]

III. Relief—Cancellation of Removal

I. Eligibility for Cancellation of Removal

In removal proceedings, an applicant for relief from removal has the burden of proof to establish that he meets the eligibility criteria set out in the Act and that he merits a favorable exercise of discretion. INA § 240(c)(4)(A). To be eligible for cancellation of removal under section 240A(b)(1) of the Act, Respondent must establish that he has been physically present in the United States for a continuous period of not less than ten years immediately preceding the date of his application; that he has been a person of good moral character during such period; that he has not been convicted of an offense under sections 212(a)(2), 237(a)(2), or 237(a)(3) of the Act; and that removal would result in exceptional and extremely unusual hardship to a U.S. citizen or lawful permanent resident spouse, parent, or child. INA § 240A(b)(1).

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[2] The Court marks Exhibit 11 into evidence through this order.

On July 06, 2004, Respondent was convicted of Domestic Assault in violation of Minnesota Statute 609.2242.1. (Ex. 3 at 12). This statute states in relevant part:

> Whoever does any of the following against a family or household member as defined in section 518B.01, subdivision 2, commits an assault and is guilty of a misdemeanor:
>
> (1) commits an act with intent to cause fear in another of immediate bodily harm or death; or
>
> (2) intentionally inflicts or attempts to inflict bodily harm upon another.

Minn. Stat. § 609.2242.1. This conviction may render the applicant ineligible for cancellation of removal. If the Court finds Respondent statutorily ineligible for cancellation of removal, the Court may pretermit the application regardless of the availability of grant numbers for cancellation of removal. 8 CFR § 1240.21(c)(1).

II. Crime of Domestic Violence

One offense under section 237(a)(2) of the Act is the crime of domestic violence. *See* INA § 237(a)(2)(E)(i). The term "crime of domestic violence" is defined as

> any crime of violence (as defined 18 U.S.C. § 16) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is

> cohabitating with or has cohabitated with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who protected from that individual's acts under the domestic or family laws of the United States or any State, Indian tribal government, or unit of local government.

Id. Minnesota Statute 609.2242.1 states the act or infliction must be committed against a "family or household member." Section 518B.01, Subd.2 defines a family or household member to include "persons who are presently residing together or who have resided together in the past." MN Stat. 518B.01, Subd. 2(b)(4). The victim was Respondent's girlfriend with whom he resided periodically. (Ex. 5 at 21-22). Therefore, the Court finds that the crime in Respondent's case was committed against a person in a protected relationship.

The Court now determines if the crime was a crime of violence. A crime of violence is defined as:

> 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. The Eighth Circuit has held that "knowingly or purposely…making another person fear imminent bodily harm necessarily requires using, attempting to use, or threatening to use physical force" and, therefore, is a crime of violence. *United States v. Salido-Rosas*, 662 F.3d 1254, 1256 (8th Cir. 2011) (citing *Johnson v. United States*, 130 S. Ct. 1265, 1271 (2010)). The Eighth Circuit held that because the statute at issue referred to "bodily injury" or "bodily harm" physical force was required; and therefore, the statute was categorically a crime of violence. *Salido-Rosas*, 662 F.3d at 1256-7.

Here, Respondent's statute of conviction requires intentionally inflicting or attempting to cause fear of bodily harm in another. The Court finds that this is within the holding of *Salido-Rosas* and therefore is categorically a crime of violence. As this crime was committed against a family or household member the Court finds that Respondent has been convicted of a crime of domestic violence as defined in section 237(a)(2)(E)(i) of the Act. Accordingly, the Court finds Respondent is ineligible for cancellation of removal under section 240A(b)(1) of the Act and his application for relief under this section is pretermitted and denied.

Citizenship and Immigration Services ("CIS") has denied I-130 applications filed on behalf of the Respondent by two different U.S. citizen spouses because of fraud. The only qualifying relatives the Respondent has are the U.S. citizen spouses with

whom he was found to have a fraudulent marriage and her children (his step-children). However, the Court does not reach the issue of whether Respondent has a fraudulent marriage and if a fraudulent marriage relationship is a qualifying relationship under section 240A(b)(1) because Respondent is not eligible for this relief based on his criminal conviction.[3]

V. Voluntary Departure

Section 240B of the Act permits the Attorney General to grant a non-citizen the privilege of voluntary departure at the conclusion of proceedings, if Respondent can establish that: (1) he has been physically present in the United States for a period of at least one year immediately preceding the date the NTA was served; (2) he has been a person of good moral character during the five-year period immediately preceding the application for relief; (3) he is not removable under sections 237(a)(2)(A)(iii) or 237(a)(4)(B) of the Act; (4) he has the means to depart the United States voluntarily and intends to do so; and (5) he merits the relief as a matter of discretion. *See* INA § 240B(b)(1).

The Court denies Respondent's application for voluntary departure as a matter of discretion. The Court recognizes Respondent has been physically present in the United States for at least ten years, however, the Court finds that this favorable equity is

[3] The Court does not reach the issue of Respondent's Adjustment of Status because there is no I-130 approval. *See* 8 C.F.R. § 1245.1(a)

outweighed by the unfavorable factors. The record indicates that CIS has denied two I-130 applications from two different spouses because of marriage fraud. He also has criminal convictions, including domestic assault and disorderly conduct, and owes approximately $20,000 to the IRS. Respondent does not warrant a favorable exercise of discretion. Therefore, the Court denies Respondent's application for voluntary departure.

Accordingly, the Court enters the following orders:

ORDERS

IT IS HEREBY ORDERED that Respondent's application for cancellation of removal under section 240A(b)(1) of the Act be **DENIED.**

IT IS FURTHER ORDERED that Respondent's request for voluntary departure under section 240B(b)(1) of the Act be **DENIED.**

IT IS FURTHER ORDERED that Respondent be removed from the United States to **KENYA.**

/s/
Susan Castro
Immigration Judge

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 17-1526

Daniel Oginga Onduso

Petitioner

v.

Jefferson B. Sessions, III,
Attorney General of the United States

Respondent

No: 16-2164

Daniel Oginga Onduso

Petitioner

v.

Jefferson B. Sessions, III,
Attorney General of the United States

Respondent

Petition for Review of an Order of the
Board of Immigration Appeals
(A078-118-717)
(A078-118-717)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

February 09, 2018

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

APPENDIX K

18 U.S.C § 16

§ 16. Crime of violence defined

The term "crime of violence" means—

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

8 U.S.C § 1229b

§ 1229b. Cancellation of removal; adjustment of status

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien—

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5); and

8 U.S.C. § 1227

§ 1227. Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

(2) Criminal offenses

(E) Crimes of domestic violence, stalking, or violation of protection order, crimes against children and

(i) Domestic violence, stalking, and child abuse

Any alien who at any time after admission is convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment is deportable. For purposes of this clause, the term "crime of domestic violence" means any crime of violence (as defined in section 16 of

Title 18) against a person committed by a current or former spouse of the person, by an individual with whom the person shares a child in common, by an individual who is cohabiting with or has cohabited with the person as a spouse, by an individual similarly situated to a spouse of the person under the domestic or family violence laws of the jurisdiction where the offense occurs, or by any other individual against a person who is protected from that individual's acts under the domestic or family violence laws of the United States or any State, Indian tribal government, or unit of local government.

Minn. Stat. § 609.2242

609.2242. Domestic assault

Subdivision 1. Misdemeanor. Whoever does any of the following against a family or household member as defined in section 518B.01, subdivision 2, commits an assault and is guilty of a misdemeanor:

(1) commits an act with intent to cause fear in another of immediate bodily harm or death; or

(2) intentionally inflicts or attempts to inflict bodily harm upon another.

Subd. 2. Gross misdemeanor. Whoever violates subdivision 1 within ten years of a previous qualified

domestic violence-related offense conviction or an adjudication of delinquency is guilty of a gross misdemeanor and may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than $3,000, or both.

Subd. 3. Domestic assaults; firearms. (a) When a person is convicted of a violation of this section or section 609.221, 609.222, 609.223, 609.224, or 609.2247, the court shall determine and make written findings on the record as to whether:

(1) the assault was committed against a family or household member, as defined in section 518B.01, subdivision 2;

(2) the defendant owns or possesses a firearm; and

(3) the firearm was used in any way during the commission of the assault.

(b) If the court determines that the assault was of a family or household member, and that the offender owns or possesses a firearm and used it in any way during the commission of the assault, it shall order that the firearm be summarily forfeited under section 609.5316, subdivision 3.

(c) When a person is convicted of assaulting a family or household member and is determined by the court to have used a firearm in any way during commission of the assault, the court may order that the person is prohibited from possessing any type of firearm for any period longer than three years or for the remainder of

the person's life. A person who violates this paragraph is guilty of a gross misdemeanor. At the time of the conviction, the court shall inform the defendant for how long the defendant is prohibited from possessing a firearm and that it is a gross misdemeanor to violate this paragraph. The failure of the court to provide this information to a defendant does not affect the applicability of the firearm possession prohibition or the gross misdemeanor penalty to that defendant.

(d) Except as otherwise provided in paragraph (c), when a person is convicted of a violation of this section or section 609.224 and the court determines that the victim was a family or household member, the court shall inform the defendant that the defendant is prohibited from possessing a firearm for three years from the date of conviction and that it is a gross misdemeanor offense to violate this prohibition. The failure of the court to provide this information to a defendant does not affect the applicability of the firearm possession prohibition or the gross misdemeanor penalty to that defendant.

(e) Except as otherwise provided in paragraph (c), a person is not entitled to possess a pistol if the person has been convicted after August 1, 1992, or a firearm if a person has been convicted on or after August 1, 2014, of domestic assault under this section or assault in the fifth degree under section 609.224 and the assault victim was a family or household member as defined in section 518B.01, subdivision 2, unless three years have elapsed from the date of conviction and, during that time, the person has not been convicted of any other violation of this section or section 609.224. Property rights may not be abated

but access may be restricted by the courts. A person who possesses a firearm in violation of this paragraph is guilty of a gross misdemeanor.

(f) Except as otherwise provided in paragraphs (b) and (h), when a person is convicted of a violation of this section or section 609.221, 609.222, 609.223, 609.224, or 609.2247 and the court determines that the assault was against a family or household member, the court shall order the defendant to transfer any firearms that the person possesses, within three business days, to a federally licensed firearms dealer, a law enforcement agency, or a third party who may lawfully receive them. The transfer may be permanent or temporary, unless the court prohibits the person from possessing a firearm for the remainder of the person's life under paragraph (c). A temporary firearm transfer only entitles the receiving party to possess the firearm. A temporary transfer does not transfer ownership or title. A defendant may not transfer firearms to a third party who resides with the defendant. If a defendant makes a temporary transfer, a federally licensed firearms dealer or law enforcement agency may charge the defendant a reasonable fee to store the person's firearms and may establish policies for disposal of abandoned firearms, provided such policies require that the person be notified by certified mail prior to disposal of abandoned firearms. For temporary firearms transfers under this paragraph, a law enforcement agency, federally licensed firearms dealer, or third party shall exercise due care to preserve the quality and function of the transferred firearms and shall return the transferred firearms to the person upon request after the expiration of the prohibiting time

period imposed under this subdivision, provided the person is not otherwise prohibited from possessing firearms under state or federal law. The return of temporarily transferred firearms to a person shall comply with state and federal law. If a defendant permanently transfers the defendant's firearms to a law enforcement agency, the agency is not required to compensate the defendant and may charge the defendant a reasonable processing fee. A law enforcement agency is not required to accept a person's firearm under this paragraph. The court shall order that the person surrender all permits to carry and purchase firearms to the sheriff.

(g) A defendant who is ordered to transfer firearms under paragraph (f) must file proof of transfer as provided for in this paragraph. If the transfer is made to a third party, the third party must sign an affidavit under oath before a notary public either acknowledging that the defendant permanently transferred the defendant's firearms to the third party or agreeing to temporarily store the defendant's firearms until such time as the defendant is legally permitted to possess firearms. The affidavit shall indicate the serial number, make, and model of all firearms transferred by the defendant to the third party. The third party shall acknowledge in the affidavit that the third party may be held criminally and civilly responsible under section 624.7144 if the defendant gains access to a transferred firearm while the firearm is in the custody of the third party. If the transfer is to a law enforcement agency or federally licensed firearms dealer, the law enforcement agency or federally licensed firearms dealer shall provide proof of transfer to the defendant. The proof of

transfer must specify whether the firearms were permanently or temporarily transferred and include the name of the defendant, date of transfer, and the serial number, make, and model of all transferred firearms. The defendant shall provide the court with a signed and notarized affidavit or proof of transfer as described in this section within two business days of the firearms transfer. The court shall seal affidavits and proofs of transfer filed pursuant to this paragraph.

(h) When a person is convicted of a violation of this section or section 609.221, 609.222, 609.223, 609.224, or 609.2247, and the court determines that the assault was against a family or household member, the court shall determine by a preponderance of the evidence if the person poses an imminent risk of causing another person substantial bodily harm. Upon a finding of imminent risk, the court shall order that the local law enforcement agency take immediate possession of all firearms in the person's possession. The local law enforcement agency shall exercise due care to preserve the quality and function of the defendant's firearms and shall return the firearms to the person upon request after the expiration of the prohibiting time period, provided the person is not otherwise prohibited from possessing firearms under state or federal law. The local law enforcement agency shall, upon written notice from the person, transfer the firearms to a federally licensed firearms dealer or a third party who may lawfully receive them. Before a local law enforcement agency transfers a firearm under this paragraph, the agency shall require the third party or federally licensed firearms dealer receiving the firearm to submit an affidavit or proof of

transfer that complies with the requirements for affidavits or proofs of transfer established in paragraph (g). The agency shall file all affidavits or proofs of transfer received with the court within two business days of the transfer. The court shall seal all affidavits or proofs of transfer filed pursuant to this paragraph. A federally licensed firearms dealer or third party who accepts a firearm transfer pursuant to this paragraph shall comply with paragraphs (f) and (g) as if accepting transfer from the defendant. If the law enforcement agency does not receive written notice from the defendant within three business days, the agency may charge a reasonable fee to store the defendant's firearms. A law enforcement agency may establish policies for disposal of abandoned firearms, provided such policies require that the person be notified via certified mail prior to disposal of abandoned firearms.

Subd. 4. Felony. Whoever violates the provisions of this section or section 609.224, subdivision 1, within ten years of the first of any combination of two or more previous qualified domestic violence-related offense convictions or adjudications of delinquency is guilty of a felony and may be sentenced to imprisonment for not more than five years or payment of a fine of not more than $10,000, or both.