

## **Assault and Battery Conviction not Categorical Crime of Domestic Violence under INA**

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An illegal immigrant's conviction of assault and battery in Virginia is by itself insufficient to establish a crime of domestic violence under the Immigration and Naturalization Act (INA), according to the Board of Immigration Appeals ("BIA") decision in *Matter of Velasquez* (2010).

Velasquez, a citizen of El Salvador, entered the United States illegally on an unknown date. In August 2004, Velasquez was convicted in Virginia of assault and battery of a family member and was sentenced to 10 days in jail. A year later, the Department of Homeland Security ("DHS") began deportation proceedings against him. At that time, Velasquez requested the removal/deportation be cancelled, but the DHS argued Velasquez was not eligible for cancellation because he was convicted of a "categorical" crime of domestic violence. An immigration judge agreed with the DHS and ordered Velasquez deported to El Salvador.

The BIA, however, rejected the judge's ruling, concluding the crime of assault and battery in Virginia is not categorically a crime of domestic violence under the INA because conviction of the crime does not, in all cases, require the actual, attempted or threatened use of violent force.

An illegal immigrant is ineligible for cancellation if he/she has been convicted of a crime of domestic violence under section 237(a)(2)(E)(i) of the Act. A crime of domestic violence is defined as any crime of violence. Relying on the Supreme Court's ruling in *Johnson v. United States* (2010), the BIA concluded in order for a crime to be considered a categorical crime of violence, the level of physical force required for a conviction of the crime must be violent force – force capable of causing physical pain or injury. Because under Virginia law neither the crime of assault nor the crime of battery require violent force to be convicted, a conviction for those crimes does not definitively establish a crime of domestic violence under the INA.

Although a conviction of assault and battery of a family member in Virginia is not a categorical crime of violence and, therefore, not a categorical crime of domestic violence under the Act, the BIA concluded Velasquez could nonetheless be ineligible for cancellation of deportation if the evidence shows Velasquez used violent force against his victim in committing the offense. As such, the BIA ordered the immigration judge to review the evidence to determine whether violent force was used and, accordingly, whether Velasquez is eligible for cancellation of removal.