

Immigration Court: BIA**Case:** *Matter of Medina-Jimenez*, 27 I&N Dec. 399 (BIA 2018)**Date:** Aug. 7, 2018**Adjudicated by:** Cole, Guendelsberger*, and Kendall Clark**Tags:** Cancellation of removal, protection order, violation, conviction, contempt of court, categorical approach, circumstance-specific approach**Question Presented:** Did respondent's violation of a protection order disqualify him from cancellation of removal?**Holdings:** Yes, respondent is disqualified from discretionary cancellation of removal. Appeal is dismissed.**Rationale:** The statute lists violation of a protection order as a "criminal offense," which would disqualify someone from the discretionary cancellation of removal.

- "[T]he categorical approach does not apply when deciding whether an alien's violation of a protection order renders him 'convicted of an offense.'" (401)
- IJ should consider *what the State court has determined* about the alien's violation of the protection order to see if it meets the INA's threshold for disqualification.

Facts: Citizen of MX, entered U.S. without inspection in 1995. In 2010 pled guilty to violating a protection order. DHS picked up his trail, charged him with inadmissibility.**History of the Case:**

- **OR Circuit Court (2010):** pled guilty to violation of protection order
- **IJ (2011):** defendant conceded removability, applied for cancellation of removal. Denied because of violation of protection order.
- **BIA (2013):** Dismissed appeal.
- **OR Circuit Court (2014):** defendant filed motion to change "conviction" to "contempt of court" judgment, which court issued nunc pro tunc to the date of original order.
- **9th Circuit CA (2015):** Granted government's motion to remand this to BIA
- **BIA, on remand from 9th Circuit (2015):** regardless of what OR court calls it, it's a criminal conviction according to 8 U.S.C.
- **9th Circuit CA (2016):** granted second motion from gov't to remand case to BIA to examine this question re. "conviction" and whether "the categorical approach, the 'circumstance-specific' approach, or some other approach" ought to be the rubric for determining ineligibility for cancellation of removal.

- **BIA, on remand from 9th Circuit (2018):** dismisses appeal because defendant’s violation of protection order meets threshold for “conviction” (even though the word wasn’t used in the original court’s judgment).

Appeals to Statute & Precedent:

- **8 U.S.C. § 1101(a)(48)(A):** defining “conviction”
- **8 U.S.C. § 1229b(b)(1):** rules re. cancellation of removal for certain nonpermanent residents—discretionary grant by AG if physically present in U.S. for at least 10 years, good moral character, *not convicted of any criminal offenses*, extreme hardship to citizen/spouse/child/ parent if removed. **[240A(b)(1)(C)]**
- **8 U.S.C. § 1227(a)(2)(E)(ii):** Defining criminal offenses that would preclude discretionary cancellation of removal, specifically “violation of a protection order.” **[237(a)(2)(E)(ii)]**
- **Gonzalez-Gonzales v. Ashcroft, 390 F.3d 649, 652 (9th Cir. 2004):** If violation of protection order has been committed, it’s enough to satisfy the INA threshold re. conviction if the violation resulted in a conviction (i.e., punitive measures were taken against the defendant).
- **Matter of Strydom, 25 I&N Dec. 507, 510 (BIA 2011):** violation of a protection order’s ‘stay-away’ provision meets threshold for disqualification for cancellation of removal.
- **Descamps v. United States, 570 U.S. 254 (2013):**
- **Mathis v. United States, 136 S. Ct. 2243 (2016):**
- **Matter of Obshatko, 27 I&N Dec. 173 (BIA 2017):** “a ‘conviction’ is not required to establish an alien’s removability”—IOW, if a violation of a protection order is called something else, it still makes alien ineligible for cancellation of removal. (No “categorical approach.”)
- **Rodriguez v. Sessions, 876 F.3d 280 (7th Cir. 2017):** rejected application of categorical approach in cases re. violation of protection order
- **Garcia-Hernandez v. Boente, 847 F.3d 869, 872 (7th Cir. 2017):** rejected application of categorical approach in cases re. violation of protection order. Language in INA “does not require a conviction of a particular kind or the categorical approach at all. What matters is what the court ‘determines.’”

Attorney Arguments:

- **For Respondent:**
 - Categorical approach should be applied—if the OR court did not call it a “conviction,” then respondent is still eligible for cancellation of removal.
- **For DHS:**
 - “[N]either the categorical approach nor the circumstance-specific approach is applicable.” (400)

Quotes:

- “We must therefore decide if this reference to a conviction triggers the application of the categorical approach in assessing whether the respondent is barred from relief because he has been ‘convicted’ of an offense under section 237(a)(2)(E)(ii) of the Act.” (401)
- “The use of the term ‘convicted’ in section 240A(b)(1)(C) of the Act does not mean that the categorical approach must be applied. That section refers to offenses in various provisions of the Act that require a conviction, but here we are concerned with an offense that is alleged to be ‘under’ section 237(a)(2)(E)(ii) of the Act, **for which a conviction is not essential.**”

Commentary:

- **Categorical Approach** to convictions: if the original judgment is not called a “conviction,” then it isn’t a conviction. – “looks to the statutory definition of the offense of conviction” (401 n.1) – elements-based approach.
- So basically the judgment call here is that you can’t weasel out of removal just because an offense wasn’t labeled a “conviction” in a court’s judgment, if that offense is a violation of a protection order. The language of “conviction” may not be used by some state courts in this area of the law, but being found guilty of such a violation and receiving a punitive sentence of some sort meets the Immigration Act’s threshold of “conviction.” This is relevant to PFA court, because an ICC violation by a removable immigrant may preclude his/her chance for cancellation of removal.