

Under INA 237(a)(2)(E)(ii), a noncitizen who “has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury” is removable from the United States. In November, the Board of Immigration Appeals clarified its previous case law regarding this ground of removability, holding that to determine whether a violation of a protective order renders a person removable, the immigration judge “should consider the probative and relevant evidence regarding what the State court has determined” about the violation. *Matter of Obshatko*, 27 I&N Dec. 173 (BIA 2017). This decision makes it more likely that noncitizens will be found removable for violations of protective orders, and is therefore an important decision for defense attorneys to be aware of.

Determining whether a noncitizen is removable based on a criminal offense or conviction is usually governed by the categorical approach. Under this approach, the elements of the offense of conviction must match the elements of the ground of removability. Among other things, when the categorical approach applies, the immigration judge can only consider certain documents (known as the record of conviction) in determining whether the respondent is removable.

To be removable for violating a protective order, however, no conviction is required. And in *Obshatko*, the Board determined that even when a conviction or finding of contempt exists, the immigration judge is not limited to the record of conviction in determining whether a violation occurred. *Matter of Obshatko*, 27 I&N Dec. at 176-77. Obshatko’s conviction for contempt was insufficient to support a finding of removability absent additional evidence of the nature of the violation. To prove the nature of Obshatko’s violation, and thus his removability, the government submitted “a presentence report, a report regarding the respondent’s violation of probation, a letter from a prosecutor, and sworn statements from the respondent’s victims”—notably, no admissions by Obshatko or findings of fact by the court. *Id.* at 174.

When a noncitizen defendant is charged with violating a no-contact order, defense attorneys should be particularly cautious about the factual basis for any adjudication and should try to keep information or allegations about “credible threats of violence, repeated harassment, or bodily injury” out of the record to the greatest extent possible. *See* INA 237(a)(2)(E)(ii). Additionally, in any case where a no-contact order is in place, noncitizen defendants should be carefully and specifically advised of the potential consequences of violating the order, especially if language or cultural barriers exist.