UNITED STATES STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
901 NORTH STUART ST., STE.1300
ARLINGTON, VA 22203

WANG, CHARLESTON C. K.
6924 PLAINFIELD RD
CINCINNATI, OH 45236

IN THE MATTER OF
*S-YOU, KOEUN
455-488

FILE A 27-819-377

DATE:

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO: BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
P.O. BOX 8530
FALLS CHURCH, VA 22041

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

IMMIGRATION COURT
901 NORTH STUART ST., STE.1300
ARLINGTON, VA 22203

X_ OTHER: **TERMINATION ORDER**

COURT CLERK
IMMIGRATION COURT

FF

CC:

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
United States Immigration Court
901 North Stuart Street, Suite 1300
Arlington, Virginia 22203

IN THE MATTER OF:	)	**In Removal Proceedings**
	)	**Cincinnati, Ohio Video Docket**
KOEUN, You	)	
	)	**File No.:** A27-819-377
	)	
Respondent	)	
	)	

CHARGE: Section 237(a)(2)(A)(iii) of the Act, as amended, as an alien who at any time after admission has been convicted of an aggravated felony as defined in Section 101(a)(43)(F) of the Act, a crime of violence (as defined 18 U.S.C. Section 16) for which a term of imprisonment ordered is at least one year.

APPLICATION: Motion to Terminate

APPEARANCES

FOR THE RESPONDENT:
Charleston C. K. Wang, Esquire
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6924 Plainfield Road
Cincinnati, Ohio 45236

FOR THE DHS:
Wayne Benos, Assistant District Counsel
Department of Homeland Security
901 N. Stuart Street, Suite 1307
Arlington, Virginia 22203

DECISION AND ORDER

The Respondent is a native and citizen of Thailand who entered the United States at San Francisco, California on July 14, 1986 as a legal permanent resident. The Respondent was convicted of one count of aggravated vehicular homicide in violation of Ohio Revised Code § 2903.06(A) and two counts of aggravated vehicular assault in violation of Ohio Revised Code § 2903.08(A)(2). All three counts require the *mens rea* of "reckless." This Court must determined whether recklessness in the context of these statutes constitute a crime of violence under 18 U.S.C. § 16 in the case at hand.

In *Leocal v. Ashcroft*, 125 S.Ct. 377 (2005), the Supreme Court held that DUI offenses that either do not have a *mens rea* component or require only a showing of negligence in the operation of a

vehicle are not crimes of violence under 18 U.S.C. § 16. The court reasoned that "[i]n no 'ordinary or natural' sense can it be said that a person risks having to 'use' physical force against another person in the course of operating a vehicle while intoxicated and causing injury." *Id.* at 383.

While the statutes at issue here involve recklessness rather than simply negligence, this distinction is not sufficient for the statute at issue to be defined as a crime of violence under *Leocal*. It is true that *Leocal* states that it left open whether an "offense that requires proof of the reckless use of force against a person or property of another qualifies as a crime of violence under 18 U.S.C. § 16." *Leocal* at 384. However, while this Court believes that whether the reckless use of force constitutes an aggravated felony is an open question under 18 U.S.C. § 16 for most statutes, this Court must conclude based on the wording of *Leocal* that the Supreme Court for all practical purposes did not include the DUI context in this reference.

Leocal repeatedly referenced how DUI crimes did not fit as a crime of violence. The same paragraph that includes the quote above warns against "shoehorning [drunk driving] into statutory sections where it does not fit." *Id.* at 384. The use of physical force for recklessness in the course of operating a vehicle while intoxicated is not sufficiently different from negligence to reach a different result. The ordinary meaning of this term, combined with § 16's emphasis on the use of physical force against another person (or the risk of having to use such force in committing a crime), suggests a category of violent, active crimes that cannot be said naturally to include DUI offenses. *Id* at 383.

Moreover, *Leocal* noted that a DUI-causing-injury provision that Congress expressly included at Section 101(h) would be "practically devoid of significance" if negligent DUI conduct were an aggravated felony. Similarly, that section would have little significance if reckless DUI were defined as an aggravated felony.

All of the circuits that have considered whether recklessness can constitute a crime of violence in the context of the case at hand subsequent to the *Leocal* decision have found that it does not. *Bejarno-Urrutia v. Gonzales*, 2005 WL 1554805 (4th Cir. 2005); *Lara-Cazares v. Gonzales*, 408 F.3d 1217 (9th Cir. 2005); *Oyebanji v. Gonzales*, 2005 WL 1903812 (3rd Cir. Aug 11, 2005). Cases decided prior to *Leocal* are also informative. *See, e.g., Jobson v. Ashcroft*, 326 F.3d 367 (2nd Cir. 2003) (New York involuntary manslaughter not a crime of violence); *U.S. v Vargas-Duran*, 356 F.3d 598 (5th Cir. 2004) (Texas intoxication assault not a crime of violence); *U.S. v. Lucio-Lucio*, 347 F.3d 1202 (10th Cir. 2003) (Texas DUI statute not a crime of violence).

The Government argues that since the Sixth Circuit has not ruled on this question, the Ohio Immigration Court must find that the Respondent's conviction constitutes a crime of violence and therefore an aggravated felony under the BIA precedent in *Matter of Brieva-Perez*, 23 I&N Dec. 766 (BIA 2004) and *Matter of Ramos*, 23 I&N Dec. 336 (BIA 2002). This Court cannot agree. *Matter of Brieva-Perez* interpreted a statute that involved intentional conduct, *i.e.*, unauthorized use of a motor vehicle in violation of Texas Penal Code § 31.07(a), not recklessness. The BIA explained in that case how that offense by its nature involves a substantial risk that physical force may be used. Additionally, *Matter of Ramos* was issued prior to the *Leocal* decision. In any event, the Immigration Court has a general obligation to follow the majority of circuits on issues where a circuit has not ruled on a question. *Matter of Yanez-Garcia*, 23 I&N Dec. 390 (BIA 2002).

This Court's decision today only concludes that under the facts of this case, the specific statutes

to which the Respondent was convicted do not rise to the level of a crime of violence for purposes of 18 U.S.C. § 16, and therefore these proceedings must be terminated. This Court believes this decision is mandated by *Leocal* and is consistent with all subsequent BIA and circuit authority on this specific issue. This Court's conclusion here does not intend to opine that "reckless" conduct would not rise to the level of a crime of violence for purposes of 18 U.S.C. § 16 in any context. The Third Circuit seems to have reached such a conclusion for that circuit when it held in *Tran v. Gonzales*, 2005 WL 1620320 (3rd Cir. 2005), that reckless burning or exploding in violation of 18 Pa.Cons.Stat. § 3301 does not constitutes a crime of violence under 18 U.S.C. § 16. This result appears to go beyond what the *Leocal* court held. Apart from the significant fact that the statute at issue there was not a DUI statute, one could reasonably conclude that burning or exploding by its nature certainly is a crime of violence. In any event, the Respondent does not need to rely on *Tran* to support his position.

Accordingly, the Court enters the following order:

ORDER

It is Ordered that: The Respondent's motion to terminate proceedings is **GRANTED**.

August 22, 2005
Date

Garry D. Malphrus
United States Immigration Judge