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In this issue...

Discussing the Unmentionable: Analyzing Child Abuse and Rape in Immigration Law

by Elizabeth Donnelly

With the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Division C of Pub. L. No. 104-208, 110 Stat. 3009-546 ("IIRIRA"), Congress sought to "establish an interrelated statutory structure designed to put certain targeted criminal aliens on a fast track for removal." *Kwon v. Comfort*, 174 F. Supp. 2d 1141, 1143 (D. Colo. 2001). The IIRIRA significantly expanded the criminal grounds of removability, in part by adding child abuse as a new ground of removal under section 237(a)(2)(E)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(E)(i), and expanding the definition of an aggravated felony to include rape in section 101(a)(43)(A) of the Act, 8 U.S.C. § 1101(a)(43)(A). In addition Congress limited the availability of relief from removal for aliens who committed certain crimes.

In doing so, Congress did not specifically define the terms "child abuse" or "rape." Since enactment of the IIRIRA, case law has provided some insight into the definition of these terms; however, the scope of "child abuse" and "rape" remain rather underdeveloped. In their analyses, the Federal courts and Board of Immigration Appeals have drawn heavily on legislative history and historical context to divine congressional intent as to the contemporary meanings of these terms. The scope of these two provisions now falls on opposite ends of the spectrum, with child abuse taking on an expansive definition and rape confined to a relatively small subset of the sexual offenses that currently populate Federal and State criminal law.

Crime of Child Abuse

Section 237(a)(2)(E)(i) of the Act renders deportable any alien who at any time after entry is convicted of child abuse, child neglect, or child abandonment. Two precedent decisions of the Board of Immigration Appeals explicitly address the issue of child abuse, as do a handful of

circuit court cases, some of them unpublished. Generally speaking, the available case law indicates that the term is broad, covering a range of conduct that harms or even threatens harm to a child.

In *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991, 992 (BIA 1999), the alien was convicted under a Texas statute of indecency with a child by exposure and sentenced to 10 years' imprisonment. The Board held that the crime constituted sexual abuse of a minor and was therefore an aggravated felony. In its analysis of this aggravated felony, the Board noted in dicta that a "crime of child abuse" includes actions and inactions that do not require contact with the victim, citing the *Black's Law Dictionary* definition—"[a]ny form of cruelty to a child's physical, moral, or mental well-being." For a time, in the absence of a more definitive statement, the Board applied this language in unpublished orders, and at least two circuit courts found it a reasonable interpretation of the statute. *Ochieng v. Mukasey*, 520 F.3d 1110, 1114-15 (10th Cir. 2008) (holding that injury to children under section 18-1501(1) of the Idaho Code Annotated is a crime of child abuse); *Loeza-Dominguez v. Gonzales*, 428 F.3d 1156, 1159 (8th Cir. 2005) (holding that malicious punishment of a child under section 609.377 of the Minnesota Statutes is a crime of child abuse).

The Board addressed the definition of child abuse, neglect, or abandonment in 2008 with *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008). The alien pled guilty to violating a Washington fourth-degree assault statute and was sentenced to 360 days' imprisonment. Although the conviction record initially referenced a child victim, a superseding information that was filed later eliminated any reference to the victim's age. The Immigration Judge nonetheless found the offense to be child abuse within the meaning of section 237(a)(2)(E)(i) of the Act, relying on information outside the conviction record. The Board initially agreed in a brief order. However, following a remand from the United States Court of Appeals for the Ninth Circuit, the Board adopted a formal definition of child abuse and determined that a categorical approach should be applied to this ground of removal. Applying this approach, the Board held that the Government had failed to establish removability under section 237(a)(2)(E)(i) by clear and convincing evidence.

In defining child abuse, the Board observed that the term "child abuse," while left undefined in the Act, was a "well-recognized legal concept" by the time Congress made it a deportable offense in 1996. *Id.* at 508. Thus, the Board had an "established legal usage" from which to determine the "ordinary, contemporary, and common meaning" of child abuse. *Id.* Accordingly, the Board looked to establish a common, flexible definition capable of uniform application nationwide. It then assessed the legal landscape as of 1996, which included seven Federal statutes concerning child abuse. Noting that the inclusion of "child abuse" in the IIRIRA was an effort to aggressively combat crimes against children, the Board concluded that a broad definition was appropriate. Ultimately, it proposed that the term involved

> any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child or that impairs a child's physical or mental well-being, including sexual abuse or exploitation. At a minimum, this definition encompasses convictions for offenses involving the infliction on a child of physical harm, even if slight; mental or emotional harm, including acts injurious to morals; sexual abuse, including direct acts of sexual contact, but also including acts that induce (or omissions that permit) a child to engage in prostitution, pornography, or other sexually explicit conduct; as well as any act that involves the use or exploitation of a child as an object of sexual gratification or as a tool in the commission of serious crimes, such as drug trafficking.

Id. at 512. The Board further held that a "child" was an individual under 18 years of age and that the definition was not limited to offenses committed by parents or by someone acting in loco parentis.

In analyzing whether a particular State offense is a "crime of child abuse," the Board determined that courts should employ a categorical approach, confined to the elements of the offense and the admissible portions of the conviction record. Under this analysis, the assault offense in the Washington State statute at issue, which contained no element requiring proof that the conduct was committed against someone under 18, did not constitute a categorically removable offense under section 237(a)(2)(E)(i). Furthermore, because State prosecutors

had also amended the alien's conviction record to eliminate all references to a child victim, the modified categorical approach was of no help in establishing the alien's removability for the crime. The emphasis, the Board reiterated, remained on the offense of conviction, not the respondent's possible conduct.

In *Fregozo v. Holder*, 576 F.3d 1030, 1035 (9th Cir. 2009), the alien pled nolo contendere to a California misdemeanor child endangerment statute that criminalized "willfully caus[ing] or permit[ting] . . . [a] child to be placed in a situation where his or her person or health *may be* endangered." *Id.* at 1037 (quoting section 273a(b) of the California Penal Code) (internal quotation marks omitted). The Ninth Circuit deferred to the Board's definition of "child abuse" in *Matter of Velasquez-Herrera* but interpreted that definition to require "*some* form" of actual injury on a child. *Id.* at 1038. The court held that the alien's offense was not categorically a crime of child abuse because the statute of conviction "makes criminal conduct that creates only the bare *potential* for nonserious harm to a child." *Id.* (emphasis added). The court remanded to the Board to conduct an inquiry under the modified categorical approach.

The Board, in *Matter of Soram*, 25 I&N Dec. 378 (BIA 2010), responded to the Ninth Circuit's interpretation of the definition of "child abuse." The respondent stood convicted of "'knowingly or recklessly' permitting a child to be unreasonably placed in a situation that posed a threat of injury to the life or health of the child" under section 18-6-401(7)(b)(I) of the Colorado Revised Statutes. *Id.* at 383. The Board clarified that *Matter of Velasquez-Herrera* left open the question whether proof of actual injury to the child is required and concluded that, in fact, none was required.

It also addressed a second issue left open by *Velasquez-Herrera*—whether child neglect and child abandonment were subsumed into the definition of child abuse. The Board reasoned that "[t]his view ensures uniformity in the application of section 237(a)(2)(E)(i), given that endangering a child can reasonably be viewed as either abuse or neglect, and that some States include child endangerment in their definition of 'child abuse,' while a number of others consider it 'child abuse or neglect.'" *Id.* at 381.

The Board declined, however, to analyze which of "the myriad State formulations of endangerment-type child abuse offenses" meet the definition it proposed. *Id.* at 383. At the time, some 38 States and other U.S. territories included in their civil definition of child abuse acts or circumstances that threaten harm or create a substantial risk of harm to a child. Some States required a high threat of harm, though more than half of that number failed to delineate the degree of threat required for a conviction. States used various terminology to describe the threat. The Board left the task to the Immigration Courts to decide whether the risk of harm in any particular statute rose to the level of child abuse within the meaning of the Act.

Turning to the Colorado statute in question, the Board in *Matter of Soram* stated that the mens rea was consistent with that required under *Velasquez-Herrera*, the juvenile status of the victim was an element of the crime, and a study of State case law revealed that the threat to the child victim's life or health was "quite high." *Id.* at 384-85. Thus, the statute fell "squarely within" the parameters of section 237(a)(2)(E)(i) of the Act. *Id.* at 386.

Since *Velasquez-Herrera* and *Soram*, several courts have agreed that sexual offenses against minors fall within the parameters of child abuse. Based on *Velasquez-Herrera* and *Fergozo*, the Ninth Circuit held that a violation of the Washington third-degree child molestation statute, which prohibits purposeful sexual contact with a minor who is 14 or 15 years old by an individual who is at least 48 months older, is a removable offense under section 237(a)(2)(E)(i) of the Act. *Jimenez-Juarez v. Holder*, 635 F.3d 1169, 1171 (9th Cir. 2011). The Washington statute included both a mens rea and actus reus consistent with the definitions adopted in the Board's decisions. Regarding the latter, the court noted that, at a minimum, the conduct constituted maltreatment of a child and impaired a child's well-being. In an unpublished decision, the Third Circuit deferred to *Velasquez-Herrera* and *Soram* and held that knowingly exposing one's genitals to a child under 16 years old under circumstances likely to cause affront or alarm, in violation of a Delaware law, qualified categorically as child abuse. *Hackshaw v. Att'y Gen. of U.S.*, 458 F. App'x 137, 139-41 (3d Cir. 2012).

Some limitations on the scope of the definition of "child abuse" in *Velasquez-Herrera* and *Soram* may exist. For example, the Sixth Circuit strongly hinted in dicta that the crime of failing to pay child support would not fall within the definition of child abuse. *Gor v. Holder*, 607 F.3d 180, 192-93 (6th Cir. 2010). The Eleventh

continued on page 16

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CIRCUIT COURT DECISIONS FOR JUNE 2012

by John Guendelsberger

The United States courts of appeals issued 124 decisions in June 2012 in cases appealed from the Board. The courts affirmed the Board in 115 cases and reversed or remanded in 9, for an overall reversal rate of 7.3%, compared to last month's 6.0%. There were no reversals from the Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh Circuits.

The chart below shows the results from each circuit for June 2012 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	5	4	1	20.0
Second	27	24	3	11.1
Third	12	12	0	0.0
Fourth	7	7	0	0.0
Fifth	17	15	2	11.8
Sixth	16	16	0	0.0
Seventh	2	2	0	0.0
Eighth	1	1	0	0.0
Ninth	27	24	3	11.1
Tenth	4	4	0	0.0
Eleventh	6	6	0	0.0
All	124	115	9	7.3

The 124 decisions included 59 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 31 direct appeals from denials of other forms of relief from removal or from findings of removal; and 29 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	59	55	4	6.8
Other Relief	35	31	4	11.4
Motions	30	29	1	3.3

Three of the four reversals or remands in asylum cases were from the Second Circuit and involved nexus, past persecution, and pattern or practice of persecution. The First Circuit remanded a case for clarification of whether the Board's denial of relief was based on a legal or a factual determination.

The four reversals in the "other relief" category addressed adjustment of status and the section 212(h) waiver, as well as the inadmissibility provisions relating to smuggling and money laundering. The motion to reopen remand involved ineffective assistance of counsel.

The chart below shows the combined numbers for the first 6 months of calendar year 2012, arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Ninth	457	385	72	15.8
First	26	22	4	15.4
Fifth	58	51	7	12.1
Eighth	23	21	2	8.7
Sixth	59	55	4	6.8
Third	120	112	8	6.7
Fourth	64	60	4	6.3
Tenth	17	16	1	5.9
Seventh	17	16	1	5.9
Eleventh	72	68	4	5.6
Second	389	369	20	5.1
All	1302	1175	127	9.8

Last year's reversal rate at this point (January through June 2012) was 13.4% with 1970 total decisions and 264 reversals.

The numbers by type of case on appeal for the first 6 months of 2012 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	682	618	64	9.4
Other Relief	238	197	41	17.2
Motions	382	360	22	5.8

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CIRCUIT COURT DECISIONS FOR JULY 2012

by John Guendelsberger

The United States courts of appeals issued 308 decisions in July 2012 in cases appealed from the Board. The courts affirmed the Board in 268 cases and reversed or remanded in 40, for an overall reversal rate of 13.0%, compared to last month's 7.3%. There were no reversals from the First, Fourth, Fifth, Sixth, Seventh, Eighth, and Tenth Circuits.

The chart below shows the results from each circuit for July 2012 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	3	3	0	0.0
Second	67	62	5	7.5
Third	21	18	3	14.3
Fourth	16	16	0	0.0
Fifth	12	12	0	0.0
Sixth	6	6	0	0.0
Seventh	2	2	0	0.0
Eighth	4	4	0	0.0
Ninth	161	131	30	18.6
Tenth	1	1	0	0.0
Eleventh	15	13	2	13.3
All	308	268	40	13.0

The 308 decisions included 131 direct appeals from denials of asylum, withholding, or protection under the Convention Against Torture; 64 direct appeals from denials of other forms of relief from removal or from findings of removal; and 113 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	131	108	23	17.6
Other Relief	64	53	11	17.2
Motions	113	107	6	5.3

Twenty of the 23 reversals or remands in asylum cases were from the Ninth Circuit. Reversals involved credibility (seven cases); nexus (five cases); failure to apply "disfavored group" analysis in Ninth Circuit Indonesian claims (four cases); failure to place the burden on the DHS to rebut the presumption of a well-founded fear after a finding of past persecution (four cases); the 1-year asylum bar; level of harm for past persecution; and corroboration requirements.

The 11 reversals in the "other relief" category addressed the drug trafficking and crime of violence aggravated felony grounds, application of the modified categorical approach, the departure bar, good moral character, voluntary departure bond, suppression of evidence for unlawful seizure, revocation of citizenship, advisals of basic hearing rights, as well as a *Judulang* remand for section 212(c) consideration and a *Vartelas* remand to apply *Fleuti* to a returning lawful permanent resident.

Circuit	Total	Affirmed	Reversed	% Reversed
Ninth	618	516	102	16.5
First	29	25	4	13.8
Fifth	70	63	7	10.0
Third	141	130	11	7.8
Eighth	27	25	2	7.4
Eleventh	87	81	6	6.9
Sixth	65	61	4	6.2
Tenth	18	17	1	5.6
Second	456	431	25	5.5
Seventh	19	18	1	5.3
Fourth	80	76	4	5.0
All	1610	1443	167	10.4

Last year's reversal rate at this point (January through July 2011) was 13.1% with 2230 total decisions and 292 reversals.

The numbers by type of case on appeal for the first 7 months of 2012 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	813	726	87	10.7
Other Relief	302	250	52	17.2
Motions	495	467	28	5.7

John Guendelsberger is a Member of the Board of Immigration Appeals.

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RECENT COURT OPINIONS

Second Circuit:

Vartelas v. Holder, No. 09-0649-ag, 2012 WL 3156153 (2d Cir. Aug. 6, 2012): The Second Circuit's prior decision in this case was remanded pursuant to the Supreme Court's decision in *Vartelas v. Holder*, 132 S. Ct. 1479 (2012). The petitioner, a lawful permanent resident ("LPR") since 1989, pled guilty to a felony in 1994. While returning from a brief trip abroad in 2003, he was charged as an inadmissible alien under section 101(a)(13)(C)(v) of the Act (which had been enacted in 1996 as part of the Illegal Reform and Immigrant Responsibility Act ("IIRIRA")) under which returning LPRs are treated as "seeking admission" if they were convicted of designated offenses. At his removal hearing, the petitioner, though counsel, conceded removability and applied for a waiver under section 212(c) of the Act, which the Immigration Judge denied. The Board affirmed. In 2008, the petitioner filed a motion to reopen claiming ineffective assistance of prior counsel, which included the claim that the petitioner had been prejudiced by prior counsel's failure to argue that the provision of the IIRIRA that rendered him inadmissible should not have been applied to him retroactively. The Board denied the motion, concluding that even if prior counsel had been derelict in failing to raise this argument, the petitioner had failed to show prejudice to his case. The Second Circuit affirmed. On appeal, the Supreme Court held that even though the petitioner departed the U.S. after the enactment of the IIRIRA, the law that should have been applied to him on return was the law that existed at the time of his 1994 guilty plea. At that time, pursuant to the Supreme Court's decision in *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), the return of an LPR from a "brief, casual and innocent" trip abroad was not considered an entry, meaning that qualifying LPRs could not be considered "inadmissible" on their return. Because the Supreme Court's holding allowed the petitioner to establish prejudice, the Second Circuit remanded the record to the Board to consider, in the first instance, the petitioner's claim of ineffective assistance of his former counsel.

Third Circuit:

Borrome v. Att'y Gen. of U.S., No. 11-1975, 2012 WL 2914111 (3d Cir. July 18, 2012): The Third Circuit granted the petition for review of the Board's decision affirming an Immigration Judge's order of removal. The petitioner, an LPR since 1996, was arrested in May 2002. He subsequently pled guilty to the unlawful distribution in interstate commerce of prescription drugs in violation of 21 U.S.C. §§ 331(t) and 335(e). In June 2010 he was placed into removal proceedings. The petitioner's indictment charged him with illegally distributing seven prescription drugs. Although six were not controlled substances, the Immigration Judge noted that the seventh, Oxycontin, contained a Schedule II controlled substance, oxycodone. The Immigration Judge held that because the crime included the distribution of a Schedule II controlled substance, under the "hypothetical federal felony test" it was analogous to a controlled substance under the Controlled Substance Act ("CSA") and thus was an aggravated felony. The Third Circuit reversed, holding that the Immigration Judge was not permitted to engage in a modified categorical inquiry because 21 U.S.C. §§ 331(t) and 353(e)(2)(A) are not "disjunctive" vis-à-vis the aggravated felony definition. Specifically, the court noted that §§ 331(t) and 353(e)(2)(A) make no mention of "controlled substances." Furthermore, while some "drugs" covered by those sections do incidentally contain "controlled substances" (e.g., Oxycontin), the court held that this was not sufficient to make the statutes disjunctive because the presence or absence of a "controlled substance" was irrelevant to the defendant's guilt. The court also held that 21 U.S.C. §§ 331(t) and 353(e)(2)(A) were not laws "relating to" controlled substances under section 237(a)(2)(B)(i) of the Act, even though some violations incidentally involved controlled substances. The Third Circuit also noted that the "hypothetical federal felony test," which the court had only previously employed in analyzing State controlled substance laws, can also be applied to Federal offenses and was thus properly employed in this case. However, the court found that the requirements of the test were not met for the above reasons.

Fifth Circuit:

Dayo v. Holder, No. 11-60524, 2012 WL 2852833 (5th Cir. July 12, 2012): The Fifth Circuit denied the petition for review of a Board decision affirming an Immigration Judge's denial of asylum and order of removal to Nigeria. The petitioner had his first application for asylum denied as untimely by the Immigration Judge, who, upon finding that the petitioner's testimony was not credible or detailed enough, denied his applications for withholding of removal and Convention Against Torture protection. The Board affirmed, as did the Fifth Circuit in an unpublished decision. The petitioner subsequently moved the Board to reopen on the grounds that the Department of Homeland Security ("DHS") had committed a breach of

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confidentiality under 8 C.F.R. § 208.16 by disclosing to the Nigerian Consulate the fact that the petitioner had applied for asylum. The purported breach (which was denied by the DHS) allegedly occurred in the course of the DHS providing paperwork to the consulate to obtain a travel document for the petitioner in preparation for his removal. The Board reopened and remanded, and the petitioner then filed for asylum with the Immigration Judge based on the breach of confidentiality. The Immigration Judge denied this second asylum claim as well, and the Board affirmed. The Fifth Circuit noted that it had not previously addressed the issue of what the appropriate relief is for a violation of 8 C.F.R. § 208.6. The court adopted the reasoning of the Second and Fourth Circuits, which determined that rather than vacating the decision, the proper remedy was to allow for the filing of a new asylum claim based on the risk arising from the breach. The court noted that not all countries persecute those who sought asylum abroad; if the breach therefore created no new danger to the asylum-seeker, then there is no reason he or she should not still be removed. Since the petitioner was afforded such an opportunity, the court reviewed the denial of his second application. The court found substantial support in the record for the Immigration Judge's adverse credibility finding, and since the evidence of record failed to establish a well-founded fear of future persecution, the petition was denied.

Eighth Circuit:

Salman v. Holder, No. 11-2416, 2012 WL 3155973 (8th Cir. Aug. 6, 2012): The Eighth Circuit denied the petition for review of an Immigration Judge's denial of asylum. The Board affirmed and denied the petitioner's motion to reopen to consider additional evidence. The petitioner witnessed the murder of his uncle in his native Israel in 2005. In spite of death threats from the murder suspects' family, the petitioner (along with his father and other relatives) testified at the murder trial, which concluded in the conviction of the two defendants. The petitioner claimed to fear harm from the convicted murderers' relatives if returned to Israel. The Immigration Judge found the petitioner credible but ruled that he had not established (1) that he suffered past persecution; (2) that the Israeli Government is unable or unwilling to provide protection; and (3) that there was a nexus between the feared harm and a protected ground. The Board affirmed the Immigration Judge's decision. The Board also denied a motion to reopen and remand, holding that the new evidence presented by the petitioner—a report on "the unique clan structure of Arab society in the Middle East"—was not previously unavailable. The court found no error by the Immigration Judge. The court concluded that the arrest and conviction of the murderers by the Israeli authorities belied the petitioner's claim that the Israeli Government was unable or unwilling to protect him. The court further upheld the Board's denial of the motion to reopen on the grounds that the new evidence was not previously unavailable. In response to the petitioner's argument that he did not become aware of the need for such evidence until after hearing the Immigration Judge's decision, the court responded that the fact "[t]hat the IJ did not inform Salman of his opinion on the case while he was presiding over a hearing does not absolve" the petitioner of his burden of establishing that his fear was objectively reasonable.

Ninth Circuit:

Flores-Lopez v. Holder, No. 08-75140, 2012 WL 2690323 (9th Cir. July 9, 2012): The Ninth Circuit granted the petition for review of a decision of the Board affirming an Immigration Judge's order of removal. The issue presented was whether resisting an executive officer in violation of section 69 of the California Penal Code ("CPC") constitutes a crime of violence and is therefore an aggravated felony under section 237(a)(2)(A)(iii) of the Act. The court noted that under California case law, the statute in question may be violated either by attempting to prevent an officer from performing his/her duties through threats or violence or by resisting by force or violence an officer performing such duties. The Board held that the petitioner's conviction under this statute was categorically for a crime of violence. The petitioner challenged this holding on the grounds that the California statute requires only de minimis force, which is insufficient to meet the standard for a crime of violence. The court agreed, noting its prior holdings that a crime of violence requires force that is "violent in nature" and cannot be established by "mere offensive touching" sufficient to constitute a battery. The note to the CPC section model jury instructions specifically references the definition of "force or violence" used to establish a battery, an offense involving force ("mere offensive touching") that does not rise to the level required for a crime of violence. Accordingly, the court granted the petition and remanded to the Board to apply the modified categorical approach in the first instance.

Nijjar v. Holder, Nos. 07-74054, 08-70933, 2012 WL 3104616 (9th Cir. Aug. 1, 2012): The Ninth Circuit

vacated a decision of the Board affirming an Immigration Judge's removal order. The petitioners are a husband, who was granted asylum by the former Immigration and Naturalization Service ("INS") in 1996, and his wife, who was granted derivative asylum status the following year. In November 2003, shortly after the dissolution of the INS, the male petitioner was notified that the INS (which no longer existed) intended to terminate his asylum status based on a finding of fraud. When the petitioner failed to appear for his termination hearing, the U.S. Citizenship and Immigration Services ("USCIS") sent him a termination notice, accompanied by a notice to appear in removal proceedings. Before the Immigration Judge, the petitioner argued that the USCIS lacked authority to terminate asylum status. The Immigration Judge ruled that she lacked jurisdiction to review an asylum officer's notice of termination and entered a removal order. The Board affirmed. On appeal, the court noted that the regulations at 8 C.F.R. § 208.24 allow termination of asylum by "the Service" (defined as the INS prior to March 1, 2003, and the USCIS after that date), and that the Third and Fifth Circuits have held that neither Immigration Judges nor the Board have authority to review such decisions. However, the court further noted that although Congress amended section 208(b)(1)(A) of the Act to allow both the Secretary of Homeland Security and the Attorney General to grant asylum, section 208(c)(2) states that asylum may be terminated by the Attorney General, with no mention of the DHS. The court ruled that *Chevron* deference is not appropriate here, because Congress clearly stated in the statutory language who may terminate asylum: the Attorney General. The court thus concluded that although the regulation clearly authorizes DHS asylum officers to terminate asylum, the Government offered no reading of the statute that would allow the DHS to issue such a regulation. The court addressed two additional arguments offered by the Government. It termed the first of these—what DHS can grant, it implicitly can take away—as "euphonious, but not logical" (a point the court illustrated by quoting lyrics from the Beatles' *All You Need is Love*). The court also found the second argument—that the failure to amend the statute was an "oversight"—unpersuasive, stating that there could be a logical reason for Congress to authorize two different departments the power to grant asylum but to restrict the right to revoke asylum to only one of these. Accordingly, the petition was granted, and the record was remanded for further proceedings.

Aguilar-Turcios v. Holder, No. 06-73451, 2012 WL 3326618 (9th Cir. Aug. 15, 2012): The petitioner, a citizen and native of Honduras who came to the U.S. as a lawful permanent resident in 1996, was convicted under Article 92 of the Uniform Code of Military Justice for using a Government computer to access pornographic internet sites and to download pornographic images of female minors. The petitioner also pleaded guilty to and was convicted of bringing discredit upon the armed forces under UCMJ Article 134 by "wrongfully and knowingly possess[ing] visual depictions of minors engaging in sexually explicit conduct, which conduct was prejudicial to good order and discipline of the armed forces." The military judge sentenced him to 10 months of confinement, a pay-grade reduction, and a bad conduct discharge from the Marine Corps. In 2005, the Federal Government initiated removal proceedings against Aguilar-Turcios, charging him as removable under section 237(a)(2)(A)(iii) of the Act for having been convicted of an aggravated felony.

An Immigration Judge determined that neither the Article 92 nor the Article 134 violation categorically qualified as an aggravated felony under section 101(a)(43)(I). Turning to the modified categorical approach, the Immigration Judge first held that the Article 134 conviction was not for an aggravated felony because Article 134 does not refer to child pornography. The Immigration Judge concluded that the Article 92 offense qualified as an aggravated felony because "child pornography is a subset of pornography" and Aguilar-Turcios pleaded guilty to a charge containing the phrase "minor engaging in sexually explicit conduct" — the same language that appears in 18 U.S.C. § 2252(a)(2) and (a)(4). Aguilar-Turcios appealed the Immigration Judge's Article 92 decision to the Board and the Board affirmed the Immigration Judge's decision in a per curiam order.

Under the modified categorical approach under *United States v. Aguila-Monte*s, 655 F.3d 915 (9th Cir. 2011), the Article 92 conviction must satisfy the following elements: (1) knowingly receiving, distributing, reproducing for distribution, or possessing visual depictions of (2) a minor (3) engaging in sexually explicit conduct. The court concluded that Aguilar-Turcios did not distribute or reproduce any visual depictions; the facts necessary to the Article 92 conviction do not mention minors; and the Article 92 conviction does not mention

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"engaging in sexually explicit conduct" or even incorporate the concept. The court held that the petitioner's UCMJ Article 92 conviction is not for an aggravated felony, granted the petition for review, and remanded to the

BIA PRECEDENT DECISIONS

In *Matter of Valenzuela Gallardo*, 25 I&N Dec. 838 (BIA 2012), upon sua sponte reopening following the Ninth Circuit's publication of *Trung Thanh Hoang v. Holder*, 641 F.3d 1157 (9th Cir. 2011), the Board determined that the respondent's conviction for accessory to a felony in violation of section 32 of the California Penal Code was for "an offense relating to obstruction of justice" within the aggravated felony definition under section 101(a)(43)(S) of the Act. The Board noted that the phrase "an offense relating to obstruction of justice" is ambiguous and its interpretation was entitled to deference under *Chevron, U.S.A., Inc. v. National Res. Def. Council, Inc.*, 467 U.S. 837 (1984), if based on a permissible construction of the statute. Invoking its authority under *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005), the Board clarified its jurisprudence on the scope of "relat[ing] to obstruction of justice" to specify that the existence of an ongoing criminal investigation or trial is not an essential element of such an offense.

The Board pointed out that in *Matter of Batista-Hernandez*, 21 I&N Dec. 955 (BIA 1997), it held that 18 U.S.C. § 3, the Federal statute prohibiting the crime of accessory after the fact, relates to obstruction of justice, because being an accessory after the fact inherently prevents the arrest of the offender and obstructs justice. In *Matter of Espinoza*, 22 I&N Dec. 889 (1999), the Board addressed the Federal misprision of a felony statute at 18 U.S.C. § 4, reasoning that Congress' use of the term of art "obstruction of justice" in section 101(a)(43)(S) reflected an intent that the phrase be interpreted in consonance with its use in the Federal criminal code. In that context, the Board distinguished misprision of a felony, defined in 18 U.S.C. § 4, from "accessory after the fact" under 18 U.S.C. § 3, holding that misprision of a felony was not an aggravated felony under the Act because, unlike "accessory after the fact," the misprision offense did not include the elements of "an affirmative action knowingly undertaken" to interfere with the perpetrator's apprehension, trial, or punishment.

With this background in mind, the Board concluded that "the affirmative and intentional attempt, with specific intent, to interfere with the process of justice" demarcates the category of crimes constituting obstruction of justice. It clarified that while many such crimes will involve interference with ongoing criminal proceedings, the existence of such proceedings is not an essential element of "an offense relating to obstruction of justice." Applying that rule, the Board held that the respondent's offense of accessory after the fact is an offense "relating to obstruction of justice," because section 32 of the California Penal Code is closely analogous to the Federal accessory after the fact definition in 18 U.S.C. § 3.

Next, the Board examined *Trung Thanh Hoang v. Holder*. In that case, the Ninth Circuit held that a Washington State conviction for rendering criminal assistance was not a conviction for an offense relating to obstruction of justice because the court interpreted *Matter of Espinoza* to limit obstruction of justice aggravated felonies to those interfering with an ongoing criminal proceeding or investigation. Noting that the Ninth Circuit's interpretation was understandable, the Board explained that its point in *Matter of Espinoza* was to emphasize that obstruction of justice is not an open-ended term, and such an offense must include "the critical element of an affirmative and intentional attempt, motivated by a specific intent, to interfere with the process of justice."

While the discussion in *Matter of Espinoza* focused on the Supreme Court's practice of narrowly construing the open-ended or catchall offenses included in the Federal "Obstruction of Justice" chapter, that chapter also includes offenses more inchoate than those involving an intent to hinder a perpetrator's arrest, trial, conviction, or punishment. The Board noted that the aggravated felony provision defined in section 101(a)(43)(S) of the Act is described in broad terms of "relating to" obstruction of justice and concluded that accessory after the fact offenses under 18 U.S.C. § 3 and section 32 of the California Penal Code are categorical aggravated felonies under the Act.

The Board observed that the Ninth Circuit was the only court of appeals to disagree with its conclusion in *Matter of Batista-Hernandez* that accessory after the fact crimes necessarily relate to obstruction of justice as contemplated by section 101(a)(43)(S) of the Act. The Third Circuit had declined to accord deference to its interpretation of the phrase "relating to obstruction

of justice" because the court concluded that the phrase was unambiguous. The Board also pointed out that the Second Circuit, in a case presenting the issue of an "offense relating to obstruction of justice," found it unnecessary to consider whether the Board's interpretation was entitled to deference. Consequently, the Board concluded that its holding that accessory after the fact offenses necessarily relate to obstruction of justice within the meaning of section 101(a)(43)(S) of the Act should apply uniformly across all circuits. Since the respondent's offense relates to obstruction of justice and he was sentenced to more than 1 year of imprisonment, the Board concluded that he was convicted of an aggravated felony and was removable as charged. The appeal was dismissed.

In *Matter of Guzman Martinez*, 25 I&N Dec. 845 (BIA 2012), the Board held that a returning lawful permanent resident ("LPR") who is shown by clear and convincing evidence to have engaged in illegal activity at the port of entry is similarly situated to an LPR who engaged in illegal activity on foreign soil or the high seas and thus is subject to charges of inadmissibility upon return. The LPR respondent had presented himself for inspection upon returning to the United States, at which time immigration officers determined that he was attempting to bring an undocumented alien into the country. The respondent was paroled into the United States and was charged with inadmissibility under section 212(a)(2)(6)(E) of the Act as an alien smuggler. The Immigration Judge terminated his removal proceedings after finding that the respondent was not inadmissible, because pursuant to section 101(a)(13)(C), he was presumed not to be seeking admission.

Reviewing section 101(a)(13)(C) of the Act, the Board noted that it creates a rebuttable presumption that a returning LPR is not an applicant for admission, which the DHS may rebut by establishing with clear and convincing evidence that one or more of six exceptions applied. Here the DHS identified as applicable the exception articulated in section 101(a)(13)(C)(iii), authorizing a returning LPR to be treated as an applicant for admission if he "has engaged in illegal activity after having departed the United States."

Concluding that knowingly attempting to bring an undocumented alien into the United States indisputably constituted "illegal activity" under the Act, the Board considered the definition of "after having departed the United States," as contemplated by section 101(a)(13)(C)(iii). Pointing out that an LPR who committed illegal activity after a lawful reentry into the United States would be exempt from the application of section 101(a)(13)(C)(iii) because the offending conduct would have occurred while the LPR was "in and admitted" to the United States, the Board observed that such an LPR would be deportable under section 237(a) of the Act. In contrast, the Board noted that an LPR who engaged in illegal activity while undergoing inspection is differently situated, since an LPR who voluntarily leaves the United States remains outside the country for immigration purposes until completing the inspection process on return. Moreover, the Board pointed out that the illegal activity of alien smuggling may have been engaged in on both sides of the border, even if discovered at the port of entry.

The Board reasoned that the most natural reading of section 101(a)(13)(C)(iii) is that it covers any alien who engages in illegal activity after departing from the United States but before reentering after inspection. It therefore held that an LPR who the DHS establishes has engaged in illegal activity like alien smuggling at the port of entry is subject to charges of inadmissibility on return. Since the Immigration Judge had not determined whether the DHS made such a showing in this case, the record was remanded.

In *Matter of Cuellar*, 25 I&N Dec. 850 (BIA 2012), the Board determined that a formal judgment of guilt by a municipal court is a "conviction," as contemplated by section 101(a)(48)(A) of the Act. It further found that a Kansas municipal ordinance that recapitulates a Kansas State statute criminalizing marijuana possession constitutes a "law or regulation of a State . . . relating to a controlled substance" under section 237(a)(2)(B)(i). Additionally, the Board concluded that possession of marijuana after a prior municipal ordinance conviction for marijuana possession in Kansas is an aggravated felony under the Act because it corresponds to "recidivist possession" under the Controlled Substances Act ("CSA"), so long as the prior conviction was final when the second offense was committed.

The respondent was found removable under sections 237(a)(2)(A)(iii) and (B)(i) of the Act following a conviction for marijuana possession in violation of a Wichita, Kansas, municipal ordinance, and a subsequent State conviction and sentence of imprisonment for possessing marijuana after a prior municipal ordinance

conviction. On appeal, the Board rejected the respondent's argument that the municipal court judgment is not a conviction within the meaning of the Act. Noting that Board jurisprudence deems a formal judgment of guilt entered by a court to be a "conviction" under the Act so long as it was entered in a "genuine criminal proceeding" under the governing laws of the prosecuting jurisdiction, the Board found that under Kansas law, the respondent's municipal judgment satisfied that standard.

Rejecting the respondent's argument that the proceeding violated his constitutional rights by not affording him an "absolute right" to counsel, the Board explained that the Kansas municipal court practice of providing counsel only to indigent defendants who face possible incarceration is both constitutional and consistent with general criminal practice in the Kansas district courts. Additionally, the Board reasoned that the Kansas two-tier system for municipal ordinance violations satisfied his right to a jury trial. Addressing the respondent's argument that his municipal conviction was unconstitutional because he was not provided with counsel or advised of the immigration consequences of his guilty plea, the Board pointed out that collateral attacks on State court judgments are outside its purview and must be pursued via Kansas post-conviction relief procedures. The Board concluded that the municipal court proceedings were "genuine criminal proceedings" so that the judgment of guilt constitutes a "conviction" under the Act.

Next, the Board found that the municipal judgment was a valid predicate for both removal charges. Reasoning that the municipality is a political subdivision of the State of Kansas, delegated authority under the State constitution to administer the State's local affairs, the Board concluded that the municipal ordinance under which the respondent was convicted is a "law or regulation of a State" under section 237(a)(2)(B)(i) of the Act. The Board was not persuaded by the respondent's contention that Kansas' constitutional "Home Rule" Amendment renders local ordinances independent from State law, just as a Kansas statute is independent from a United States law. Rather, the Board pointed out that the "Home Rule" Amendment limited the power of municipalities to pass ordinances to those that are not preempted by uniformly applicable State criminal laws. Thus, a municipal ordinance that supplements or complements a law passed by the Kansas State Legislature, such as the marijuana possession ordinance underpinning the respondent's conviction, is ultimately an expression of State sovereignty and a "law . . . of a State."

The respondent also argued that since Congress drafted section 237(a)(2)(B)(i) of the Act to require that a controlled substance conviction be one that violated "any law or regulation of a State . . .," without expressly referencing local laws or ordinances as it did under sections 237(a)(2)(E)(i) (defining a domestic violence offense) and 237(a)(6)(A) (defining a voting violation offense), interpreting section 237(a)(2)(B)(i) to include municipal ordinances violates the principle that Congress acts deliberately in including particular language in one section of the Act but omitting it in another section. The Board noted first that section 237(a)(2)(B)(i) is markedly different in subject matter, grammar, and syntax from the two sections referencing local laws or ordinances. Therefore the language of sections 237(a)(2)(E)(i) and (6)(A) is not a reliable index of the legislative intent underlying section 237(a)(2)(B)(i) of the Act. Additionally, the Board pointed out that section 237(a)(2)(B)(i) predated the enactment of the other provisions by 10 years, so the later-enacted laws do not inform the meaning of the earlier law. Since sections 237(a)(2)(E)(i) and (6)(A) were enacted as part of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Div. C of Pub. L. No. 104-208, 110 Stat. 3009-546 ("IIRIRA"), the Board expressed its belief that specific references to local laws were included in those statutes to convey certainty as to the broad scope of Congress' intention.

For those reasons, the Board concluded that the respondent's municipal marijuana possession conviction rendered him deportable under section 237(a)(2)(B)(i) of the Act as an alien convicted of a violation of any State law or regulation relating to a controlled substance. Since the respondent incurred a subsequent marijuana possession conviction, the Board also found that he was not covered by the single offense exception to that ground of removability.

Turning to the aggravated felony charge, the Board noted that a recidivist drug possession State conviction does not qualify as an aggravated felony conviction by corresponding to "recidivist possession" under the CSA unless the alien's recidivist status was either admitted by the alien or was determined by a judge or jury during the State criminal proceedings. Based on the conviction

documents, the Board determined that the respondent pled guilty to and was convicted of "Possession of Marijuana after a Previous Conviction," an offense corresponding to the elements of "recidivist possession" under the CSA. Additionally, since the respondent received pretrial notice that the prosecution would seek a recidivist enhancement based on the specified prior conviction, and because under the Kansas statutory scheme the respondent could avail himself of a meaningful opportunity to challenge the imposition of an enhancement, the Board concluded that his conviction satisfied the requirements imposed by the CSA for a charge of recidivism.

The Board rejected the respondent's argument that his municipal conviction was not a valid predicate for recidivist enhancement because the CSA requires a prior conviction to be for an offense "chargeable under the law of any State." Noting a lack of precedent interpreting that phrase, the Board looked to the commonly accepted definition and determined the question to be whether the respondent's offense of conviction was "capable of being charged" under a particular State law. The Board concluded that the respondent's offense was chargeable under a State law because Kansas has concurrent jurisdiction by municipal and State courts over offenses like the respondent's and police discretion over whether to file charges in a municipal or a State court. Thus, the respondent's offense was a valid predicate for recidivist enhancement. The Board rejected the respondent's contention that a "could have been charged" inquiry is impermissibly hypothetical, pointing out that it only considered the facts proven or admitted in his criminal proceedings. Since the respondent was charged, convicted, and sentenced as a recidivist, the question whether his offense was chargeable under Kansas law is a factual and legal one, rather than a hypothetical question. Consequently, the Board concluded that since the respondent was convicted of an offense that categorically corresponds to the elements of recidivist possession under the CSA, he was convicted of an aggravated felony. The appeal was dismissed.

In *Matter of Valenzuela*, 25 I&N Dec. 867 (BIA 2012), the Board considered whether a K-4 nonimmigrant visa holder can adjust status based on her subsequent marriage to a United States citizen. Determining that section 245(d) proscribes adjustment of status on any basis other than through an approved I-130 petition filed on the K-4's behalf by the original K petitioner, the Board answered the question in the negative.

The respondent had been admitted to the United States on a K-4 nonimmigrant visa as a derivative beneficiary of her K-3 mother after her mother's marriage to a United States citizen K petitioner. The respondent subsequently applied for adjustment of status under section 245(a) of the Act, based on the K petitioner's approved I-130 petition. When she failed to appear for her interview, her adjustment application was denied. After her K-4 status expired, the respondent married a lawful permanent resident, and the I-130 petition the husband filed on her behalf was approved after he naturalized. The respondent again applied for section 245(a) adjustment of status, this time based on the approved I-130 petition filed by her husband. The Immigration Judge denied the application, finding that the respondent was only eligible to adjust her status based on the original I-130 petition filed by the K petitioner.

Section 245(d) of the Act states that a K visa holder can only adjust status "as a result of the marriage" of the principal K beneficiary to the United States citizen petitioner. Finding this language to be unambiguous, the Board concluded that the statutory provision applies to all K visa holders, whether principals or derivatives. It rejected the respondent's argument that once the principal K beneficiary adjusts status based on a marriage to the K petitioner, the derivative K beneficiary is no longer restricted to adjusting solely through the K petitioner. The Board observed that if a K visa derivative was eligible for adjustment through a different petitioner, the derivative would be better situated than the K principal. Additionally, the Board pointed out that the respondent's proposed substitution of petitioners was not expressly authorized under the Act, as is required.

Next, the Board examined the respondent's argument that the policy goal underpinning the Immigration Marriage Fraud Amendments Act of 1986, Pub. L. No. 99-639, 100 Stat. 3537, namely, combating marriage fraud, was served once the K-3 principal visa holder married the K petitioner and adjusted status, thereby eliminating the necessity for the K-4 derivative's subsequent adjustment to stem from the K petitioner. It noted that Congress opted to address marriage fraud by creating a broad prohibition on adjustment of status by K visa holders on any basis other than the marriage between the K visa petitioner and the principal K beneficiary. Thus, the Board observed that the statutory scheme provides for no exceptions and concluded that the respondent's

proposed exemption cannot be presumed without express authorization.

Finally, even assuming that section 245(d) was ambiguous, the Board pointed out that the regulations at 8 C.F.R. § 1245.1(c)(6)(ii) and (i) make clear that a derivative K-4 visa holder may only adjust status based on the marriage between the K visa petitioner and the principal K visa beneficiary. The appeal was dismissed.

In *Matter of Akram*, 25 I&N Dec. 874 (BIA 2012), the Board held that a K-4 nonimmigrant visa holder is ineligible to adjust status without establishing immigrant visa eligibility and availability as the beneficiary of an approved immigrant visa petition filed by the United States citizen K visa petitioner. The respondent is a K-4 nonimmigrant who was 18 when her K-3 mother married the K visa petitioner and thus cannot qualify as the petitioner's stepchild. Consequently, the Board found that she is ineligible for section 245(a) adjustment of status.

The respondent was 18 when her K-3 mother married a United States citizen, who subsequently filed a Form I-130 Petition for Alien Relative and a Form I-129F Petition for Alien Fiancée on the mother's behalf, which allowed the mother to await approval of the I-130 petition in the United States. The United States citizen also filed an I-130 visa petition for the respondent, which the United States Citizenship and Immigration Services ("USCIS") denied after finding that the respondent did not qualify as a "stepchild" of the petitioner under section 101(b)(1)(B) of the Act. Notwithstanding, a consular officer issued the respondent a K-4 nonimmigrant visa, and she was admitted to the United States when she was 19. After her authorization to remain in the United States expired, the respondent was placed in removal proceedings and was charged as being removable under section 237(a)(1)(B) of the Act.

Reviewing the genesis of the K-3 and K-4 nonimmigrant classifications, which were created under the Legal Immigration Family Act ("LIFE Act") and codified at sections 101(a)(15)(K)(ii) and (iii), the Board observed that the purpose of the statute was to allow spouses of United States citizens and their children to come to the United States while awaiting visa petition approval. To obtain a K-3 or K-4 visa, an alien must apply at a consular post abroad. A K-3 applicant must establish that he or she is the beneficiary of an approved I-129F petition and a pending I-130 filed by the United States citizen spouse. A K-4 applicant must establish that he or she is a K-3 visa holder's "child," as defined under section 101(b)(1) of the Act, and is accompanying or following to join the K-3 parent. The K-4 visa applicant derives status from the K-3 parent and need not show a parent-child relationship with the K-3's United States citizen spouse to obtain the K visa.

However, the Board explained that the same is not true for a K-4 nonimmigrant seeking to adjust status under sections 245(a) and (d) of the Act. Pursuant to section 245(a), a K-4 must establish that he or she is eligible for an immigrant visa and that a visa is immediately available. According to the regulatory scheme, the K-4 must be the beneficiary of an approved I-130 visa petition filed by the K-3 parent's United States citizen spouse to be classified as the petitioner's stepchild, which allows the K-4 to meet the section 245(a) statutory requirements of visa eligibility and availability. Significantly, the Board pointed out that section 245(d) of the Act provides that a K-4 may only adjust based on the K-3 parent's marriage to the United States citizen who filed the I-129F and I-130 petitions. Since the respondent's mother married the visa petitioner after the respondent turned 18, she does not qualify as a "stepchild" of the petitioner under section 101(b)(1)(B) of the Act. The Board therefore concluded that she cannot establish a parent-child relationship to the petitioner, as required under section 245(a) to adjust her status.

Turning to the respondent's appellate arguments, the Board rejected her contention that she should be able to adjust her status without satisfying the section 245(a) requirement of visa eligibility and availability. First, it observed that section 245(d) did not provide an alternative mechanism to visa eligibility and availability for adjustment requirements. Next, it noted that the LIFE Act's legislative history reflected that K-3 and K-4 visas were created to address the hardships of visa petition beneficiaries remaining overseas pending adjudication of the petition. The Board concluded that nothing in the legislative history supports a conclusion that an alien should be permitted to enter the United States to await approval of an I-130 petition and then be able to adjust status when the visa petition is denied.

Addressing the governing regulations, the Board reasoned that 8 C.F.R. §§ 245.(1)(i) and 1245.(1)(i) clearly require that a K-4's adjustment be predicated on the approval of an immigrant visa petition filed by the

United States citizen K petitioner. Additionally, it found unpersuasive the respondent's argument that 8 C.F.R. § 214.2(k)(9), which permits K-4s to request employment authorization, implies that they are eligible to adjust without an immediately available immigrant visa.

Finally, the Board rejected the respondent's argument that the DHS should be equitably estopped from removing her after admitting her as a K-4 and then denying her a means to adjust status. Assuming that equitable estoppel is available against the Government, the Board found that the respondent had not demonstrated the requisite "affirmative misconduct" on the Government's part.

Turning to the respondent's motions to remand, the Board denied the motion based on the USCIS's approval of an I-130 petition filed on her behalf by her now lawful permanent resident mother, since section 245(d) of the Act and the implementing regulations preclude a K-4 from adjusting on any basis other than the K-3 parent's marriage to the petitioning United States citizen. The motion to remand in light of *Matter of Sesay*, 25 I&N Dec. 431 (BIA 2011), was denied because the decision in that case, which held that K-1 and K-2 visa holders need not demonstrate immigrant visa eligibility and availability, was based on a different statutory and regulatory scheme, to which the LIFE Act legislative history and K-3/K-4 regulations are inapplicable.

Finding that the respondent did not establish the required visa eligibility and availability, the Board concluded that she was ineligible for adjustment of status. The appeal was dismissed and the remand motions were denied.

In *Matter of Calderon-Hernandez*, 25 I&N Dec. 885 (BIA 2012), the Board held that an applicant for section 240A(b) cancellation of removal seeking to establish the requisite hardship to his United States citizen child need not submit an affidavit and other documentary evidence regarding the care and support of a child who will remain in the United States with the other parent, irrespective of that parent's immigration status. The Board noted that in *Matter of Ige*, 20 I&N Dec. 880, 885 (BIA 1994), it determined that a claim of hardship to a deportable alien's United States citizen child who would remain in the United States would be given minimal weight absent an affidavit and supporting evidence. In that case, where both parents were in removal proceedings, the Board reasoned that they must submit an affidavit stating their intent for the child to remain here without either parent, along with evidence showing how and by whom the child would be cared for and supported following their removal. Here, in contrast, the Board pointed out that the mother of the respondent's children was not in proceedings, and it declined to speculate what would occur if the mother was placed in proceedings. When only one parent is in removal proceedings, the Board found it reasonable to assume that the remaining parent will care for and support the child. The Board concluded that in such circumstances an affidavit reflecting the parents' intent that the child will remain and evidence of the provisions for the child are not required. The record was remanded so the Immigration Judge could further consider the respondent's cancellation of removal application.

In *Matter of C-B-*, 25 I&N Dec. 888 (BIA 2012), the Board held that a respondent who has not expressly waived his right to obtain counsel must be granted a reasonable and realistic period of time to seek, speak with, and retain counsel. The Board found that the respondent had not waived his right to counsel, where he had initially declined a continuance to obtain counsel during a master calendar hearing but later expressed a desire to find representation. Noting that respondents have a statutory and regulatory privilege of legal representation pursuant to sections 240(b)(4)(A) and 292 of the Act and 8 C.F.R. §§ 1003.16(b), 1240.3, and 1240.11(c)(1)(iii), the Board found that the Immigration Judge should have asked the respondent to clarify whether he wanted to obtain counsel. If so, the Immigration Judge should have expressly ruled on the respondent's request for a continuance. While acknowledging the critical importance of efficiently moving a detained docket, the Board concluded that absent a knowing and voluntary waiver of the privilege of legal counsel, the denial of a continuance to seek representation results in the denial of a respondent's statutory and regulatory privileges.

During his hearing the respondent had expressed a fear of returning to Guatemala. The Board therefore determined that the Immigration Judge was required by the regulations to advise him of the availability of asylum, withholding of removal, and protection under the Convention Against Torture as possible forms of relief and to provide the appropriate application forms.

Next, the Board addressed the respondent's eligibility for voluntary departure. After the Immigration

Judge granted the respondent voluntary departure prior to the conclusion of the proceedings under section 240B(a)(1) of the Act, the respondent expressed an intent to appeal, so the voluntary departure grant was withdrawn. The Board observed that a respondent who is ineligible for section 240B(a)(1) voluntary departure may be eligible for a grant of voluntary departure after the completion of the removal proceedings pursuant to section 240B(b)(1). Since an Immigration Judge is obliged to inform a respondent of the forms of relief for which he or she is apparently eligible, the Board determined that the Immigration Judge should have considered the respondent's apparent eligibility for section 240B(b)(1) voluntary departure. The appeal was sustained and the record was remanded for further proceedings.

REGULATORY UPDATE

77 Fed. Reg. 41,795 (July 16, 2012)
DEPARTMENT OF HOMELAND SECURITY
Office of the Secretary

Exercise of Authority Under Section 212(d)(3)(B)(i) of the Immigration and Nationality Act
ACTION: Notice of determination.
Authority: 8 U.S.C. 1182(d)(3)(B)(i).
For full text of this notice, see http://www.justice.gov/eoir/vll/fedreg/2012_2013/fr16jul12.pdf

77 Fed. Reg. 42,546 (July 19, 2012)
DEPARTMENT OF STATE

[Public Notice 7957]

In the Matter of the Designation of Ahmed Abdulrahman Sihab Ahmed Sihab as a Specially Designated Global Terrorist Pursuant to Section 1(b) of Executive Order 13224, as Amended

Acting under the authority of and in accordance with section 1(b) of Executive Order 13224 of September 23,2001, as amended by Executive Order 13268 of July 2, 2002, and Executive Order 13284 of January 23, 2003, Ihereby determine that the individual known as Ahmed Abdulrahman Sihab Ahmed Sihab, committed, or poses a significant risk of committing, acts of terrorism that threaten the security of U.S. nationals or the national security, foreign policy, or economy of the United States.

Consistent with the determination in Section 10 of Executive Order 13224 that "prior notice to persons determined to be subject to the Order who might have a constitutional presence in the United States would render ineffectual the blocking and other measures authorized in the Order because of the ability to transfer funds instantaneously," I determine that no prior notice needs to be provided to any person subject to this determination who might have a constitutional presence in the United States, because to do so would render ineffectual the measures authorized in the Order.

This notice shall be published in the **Federal Register.**

Dated: April 18, 2012.

William J. Burns,
Deputy Secretary of State.

77 Fed. Reg. 44,307 (July 27, 2012)
DEPARTMENT OF STATE

[Public Notice 7965]

In the Matter of the Review of the Designation of the Islamic Resistance Movement (Hamas and Other Aliases)

As a Foreign Terrorist Organization pursuant to Section 219 of the Immigration and Nationality Act, as Amended

Based upon a review of the Administrative Record assembled pursuant to Section 219(a)(4)(C) of the Immigration and Nationality Act, as amended (8 U.S.C. 1189(a)(4)(C)) ("INA"), and in consultation with the Attorney General and the Secretary of the Treasury, I conclude that the circumstances that were the basis for the 2008 determination to maintain the designation of the aforementioned organization as a foreign terrorist organization have not changed in such a manner as to warrant revocation of the designation and that the national security of the United States does not warrant a revocation of the designation.

Therefore, I hereby determine that the designation of the aforementioned organization as a foreign terrorist organization, pursuant to Section 219 of the INA (8 U.S.C. 1189), shall be maintained.

This determination shall be published in the **Federal Register.**

Dated: July 18, 2012.

Hillary Rodham Clinton,
Secretary of State, Department of State.

77 Fed. Reg. 49,821 (Aug 17, 2012)
DEPARTMENT OF HOMELAND SECURITY
Office of the Secretary

Exercise of Authority Under the Immigration and Nationality Act

ACTION: Notice of determination.
Authority: 8 U.S.C. 1182(d)(3)(B)(i).
For full text of this notice, see http://www.justice.gov/eoir/vll/fedreg/2012_2013/fr17aug12.pdf

Discussing the Unmentionable *continued*

Circuit in *Martinez v. U.S. Attorney General*, 413 F. App'x 163, 169 (11th Cir. 2011), cautioned that prosecutorial restraint may be appropriate in the wake of *Velasquez-Herrera* and *Soram*. In *Martinez*, the alien pled no contest to a Florida neglect statute in an effort to regain custody of her children after her husband had sexually molested her daughter. The alien had forced her husband out of the family home when she learned of the abuse but subsequently permitted him to return for about 3 weeks because her pastor had counseled her to do so. There were no allegations that abuse occurred during that period, and when the alien sought additional advice from her church, the counselor with whom she conferred called the police with her consent. The alien's husband was arrested and the children were removed from the home. The alien pled no contest to a Florida neglect statute, believing this to be the easiest way to have her children returned to her custody. An Immigration Judge found her removable for child abuse, and the Board affirmed. On petition to the Eleventh Circuit, neither party challenged the reasonableness of Board precedent, and the court agreed that the conviction was for child abuse under the Board's definition. Clearly disturbed by the particular facts of the case, however, the Eleventh Circuit urged the Attorney General to review the decision and consider leniency.

The Aggravated Felony of Rape

Section 101(a)(43)(A) of the Act lists rape as an aggravated felony. This provision has produced even less legal commentary than section 237(a)(2)(E)(i). No precedent decision from the Board addresses it, and only a few circuits have weighed in on its meaning. What is clear, however, from these limited discussions is that this ground of removal is considerably narrower in application than the crime of child abuse.

The Ninth Circuit has what is perhaps the most developed body of case law among the Federal courts on rape as a ground of removal. The court has rejected the argument that the definition is limited exclusively to the elements of the Federal sexual abuse laws codified at chapter 109A of the U.S. Code.[1] *Castro-Baez v. Reno*, 217 F.3d 1057, 1058-59 (9th Cir. 2000); *see also United States v. Yanez-Saucedo*, 295 F.3d 991, 994 (9th Cir. 2002). According to the Ninth Circuit, this is argument is "'directly at odds with the plain language' of [section 101(a)(43)(A) of the Act], which states that 'the term [aggravated felony] applies to an offense described in this paragraph whether in violation of Federal or State law.'" *Yanez-Saucedo*, 295 F.3d at 994 (quoting *Castro-Baez*, 217 F.3d at 1058-59. Congress did not cross-reference to any Federal statute, and therefore whether a State crime constitutes an aggravated felony does not depend on the elements of any particular Federal offense. *Castro-Baez*, 217 F.3d at 1059.

In terms of conduct, at a minimum, the aggravated felony ground encompasses some form of nonconsensual penetration. *See Yanez-Saucedo*, 295 F.3d at 996; *United States v. Navarro-Elizondo*, 216 F.3d 1085 (9th Cir. 2000); *see also Perez-Gonzales v. Holder*, 667 F.3d 622, 626 (5th Cir. 2012) (discussing the common law definition of rape). However, proof of an actual lack of consent and proof of physical compulsion under a "classic" definition of rape are not necessary. *Yanez-Saucedo*, 295 F.3d at 995-96. To that end, under the ordinary, contemporary, and common definition of rape, penetration alone satisfies the physical force requirement. *Id.* The Board has employed this general approach in unpublished decisions. Under this theory, the Ninth Circuit also has held, for example, that engaging in sexual intercourse with a victim who was too intoxicated to resist fell within section 101(a)(43)(A). *Castro-Baez*, 217 F.3d at 1059. Similarly, the First Circuit has indicated that statutory rape may qualify as a "rape" aggravated felony if the victim cannot consent because of his or her status as a minor. *Silva v. Gonzales*, 455 F.3d 26, 28 (1st Cir. 2006) ("Under the explicit language of the INA, all rape—including statutory rape—comes within the aggravated felony taxonomy.").

Yet some fundamental limitations inhere in this analysis, as recently highlighted by the Fifth Circuit in *Perez-Gonzales v. Holder*, 667 F.3d 622 (5th Cir. 2012). In 1986, the respondent pled guilty in Montana State court to knowingly having sexual intercourse without consent with a person of the opposite sex, not his spouse.

"Sexual intercourse" was defined in a way that prohibited "three different non-consensual acts: penile penetration, penetration using any other body part, and mechanical penetration." *Id.* at 625. In removal proceedings, the respondent argued that nonconsensual digital penetration could be and was punished under that statute but that such conduct did not fall within the aggravated felony ground.

The Fifth Circuit looked, as did its sister courts, to a modern definition of the term rape, relying on such sources as the Model Penal Code, LaFave and Scott's treatise on criminal law, and dictionaries. It cited *Black's Law Dictionary* for the proposition that common law rape entailed "at least a slight penetration of the penis into the vagina;" the common law definition meant only penetration of the female sex organ by the male sex organ. *Id.* at 626. As the Fifth Circuit observed, this was the definition Congress understood when it passed the Federal rape law. When that law was repealed in 1986, it was replaced by the crime of sexual abuse, which criminalized a broader range of sexual acts than did the traditional concept of rape.

It was against this historical backdrop that Congress added the rape aggravated felony ground in 1996. In the court's view, Congress had its pick of more generous terms such as "sexual abuse" or "sexual assault" but chose rape instead. Congress further demonstrated that it understood the difference between such offenses by including "sexual abuse of a minor" in the same aggravated felony provision, section 101(a)(43)(A) of the Act. The court noted that only 23 States still used the term rape in their criminal codes by that point, 11 of which "remained anchored to the common law's meaning." *Id.* at 627. The remaining States were split, with only six defining rape broadly to include such conduct as digital penetration. The Fifth Circuit therefore concluded that the legal landscape counseled "against holding that digital penetration was commonly considered rape in 1996" and concluded that the Montana offense was not categorically an aggravated felony. *Id.* Notably, in unpublished decisions, the Board had made similar observations about the evolution of the term rape, both within the criminal context and the Act, and came to the same conclusion.

Other grounds of removal may still fill the gaps left by a narrow interpretation of the rape aggravated felony ground. For example, statutory rape under some statutes, while not within the definition of "rape," might constitute child abuse or the aggravated felony of sexual abuse of a minor. *See Silva*, 455 F.3d at 27 (involving sexual abuse of a minor under chapter 265, section 23 of the Massachusetts General Laws). Likewise, there can be overlap with the crime of violence aggravated felony provision in section 101(a)(43)(F) or with crimes involving moral turpitude in sections 212(a)(2) and 237(a)(2). *See, e.g.*, *Prakash v. Holder*, 579 F.3d 1033 (9th Cir. 2009) (holding that solicitation to commit rape by force under California law constitutes a crime of violence); *Zaidi v. Holder*, 374 F.3d 357 (5th Cir. 2004) (holding that an Oklahoma sexual battery conviction was for a crime of violence).

The courts have a way to go before the contours of these removal grounds are fully drawn. For section 237(a)(2)(E) of the Act, the question becomes its outer limits and what constraints may develop on its breadth. This is particularly true in light of the wide variety of State abuse, neglect, and endangerment offenses. As for the rape aggravated felony ground, litigants may continue to push the boundaries of its restrictive definition. Viewed together, these grounds underscore Congress' intent in enacting the IIRIRA to protect the public from types of criminal behavior deemed some of the most objectionable by society.

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1. Chapter 109A of the United States Code covers several offenses, including aggravated sexual abuse and sexual abuse of a minor or ward.

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