U.S. Department of Justice
Executive Office for Immigration Review

http://eoir-vll/lib_index.html
Published since 2007

Immigration Law Advisor

August 2016 **A Legal Publication of the Executive Office for Immigration Review** *Vol. 10 No. 6*

In this issue...

Disparate Definitions: Uncertainty Regarding What Constitutes "Sexual Abuse of a Minor"

by Virginia L. Gordon and K. Laeticia Mukala

An aggravated felony conviction poses serious immigration consequences for both lawful permanent residents and other aliens seeking relief. For instance, an aggravated felony conviction provides a basis for removal of a lawful permanent resident from the United States and typically disqualifies an alien from discretionary relief from removal. *See* sections 237(a)(2)(A)(iii), 240A of the Immigration and Nationality Act, 8 U.S.C. §§ 1227(a)(2)(A)(iii), 1229b; *see also* 8 C.F.R. § 1240.66(a) (listing an aggravated felony as a bar to special rule cancellation of removal). The "sexual abuse of a minor" aggravated felony provision, found at section 101(a)(43)(A) of the Act, 8 U.S.C. § 1101(a)(43)(A), is undefined. The Board of Immigration Appeals has examined the statutory language, context, and purpose behind its inclusion in the Act and provided guidance regarding how the phrase should be interpreted. *See Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999). The majority of the circuit courts of appeals have considered the term "sexual abuse of a minor" following the *Rodriguez-Rodriguez* decision without reaching consensus, or delineation, as to what constitutes "sexual abuse of a minor" for removal purposes. The circuit courts are split regarding whether to accord *Chevron* deference to the Board's approach, resulting in disparate definitions of the term "sexual abuse of a minor." *See generally Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984).

This article discusses the term "sexual abuse of a minor" in the immigration removal context, reviewing the circuit courts' definitions of the term in light of the Board's *Rodriguez-Rodriguez* decision. The article first discusses the history of the term "sexual abuse of a minor" and its addition to the Act. The article then surveys the circuit courts' definitions of "sexual abuse of a minor" and the disparity in the types of offenses that constitute "sexual abuse of a minor." This article categorizes the circuit courts by those that accord *Chevron* deference to the *Rodriguez-Rodriguez* decision, those that expressly decline to accord *Chevron* deference, and those that implicitly reject *Rodriguez-Rodriguez*.

The History of the Term "Sexual Abuse of a Minor"

Before the term "sexual abuse of a minor" was added to the Act, the ground of inadmissibility at section 101(a)(43)(A) was limited to murder. *See* section 321(a)(1) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Division C of Pub. L. No. 104-208, 110 Stat. 3009-546, 3009-627. Nonetheless, the idea of "sexual abuse of a minor" was not foreign to Federal statutes. When section 101(a)(43)(A) of the Act was enacted, at least four separate Federal statutory provisions were relevant to sexual abuse offenses against children. *See Rodriguez-Rodriguez*, 22 I&N Dec. at 995; s*ee also* 18 U.S.C. §§ 2242, 2243, 2246, 3509(a)(8). Sections 2242 and 2243 define the terms "sexual abuse" and "sexual abuse of a minor or ward," respectively; section 2246 expounds on the definitions provided under sections 2242 and 2243. Section 3509(a)(8) sets forth the types of sexual acts encompassed under the offense of "sexual abuse of a minor" for purposes of criminal procedure rules concerning witnesses and evidence.

In 1996, Congress amended the aggravated felony definition to include "sexual abuse of a minor." IIRIRA § 321(a)(1); *see also Rodriguez-Rodriguez*, 22 I&N Dec. at 995. Congress did not, however, provide a definition of the term "sexual abuse of a minor" or cross-reference other provisions of Federal law for clarification. As noted by the Board in *Rodriguez-Rodriguez*, "Congress did not use the phrase 'an offense described in section' and then designate a definition found in the federal statute, as it did elsewhere in section 101(a)(43) of the Act, or name an offense and then, in parentheses, state 'as described in' or 'as defined in' a federal statute." 22 I&N Dec. at 994–95. By comparison, illicit trafficking, an aggravated felony under section 101(a)(43)(B) of the Act, cross-references 21 U.S.C. § 802, which defines controlled substances, and 18 U.S.C. § 924(c), which defines a drug-trafficking crime. *See also* section 101(a)(43)(F) of the Act (defining "a crime of violence" in reference to the same term in 18 U.S.C. § 16). Although Congress's intent to "expand the definition of an aggravated felony and to provide a comprehensive statutory scheme to cover crimes against children" is notable, *see Rodriguez-Rodriguez*, 22 I&N Dec. at 994, the legislature did not provide a singular, accepted definition of the term "sexual abuse of a minor." Consequently, some circuit courts have adopted the interpretation of the term as set forth in the *Rodriguez-Rodriguez* decision, and other circuit courts have rejected that interpretation in favor of their construction of the term.

Outside the removal context, several circuit courts of appeals have considered the term "sexual abuse of a minor" with respect to sentence enhancement in Federal criminal proceedings. Under the current U.S. Sentencing Guidelines, which are slated for amendment in November 2016, sentencing enhancements apply to the unlawful re-entry convictions of individuals who were previously deported or who remained unlawfully in the United States following a conviction for a "crime of violence" or for an "aggravated felony." *See* U.S.S.G. §§ 2L1.2(b)(1)(A), (b)(1)(C). The term "crime of violence" is defined differently under the Sentencing Guidelines than it is under the Act. In particular, a "crime of violence" under the Sentencing Guidelines explicitly includes the term "sexual abuse of a minor." *See id.* at cmt. n.1(B)(iii);[1] *see also United States v. De La Cruz-Garcia*, 590 F.3d 1157, 1160 (10th Cir. 2010) (considering the "ordinary, contemporary, and common meanings" of the words in "sexual abuse of a minor" to conclude a conviction under section 18–3–405(1) of Colorado Revised Statutes constitutes a crime of violence subjecting the defendant to a sentence enhancement). By contrast, an "aggravated felony" for sentencing enhancement purposes is defined wholly by section 101(a)(43) of the Act. *See* U.S.S.G. § 2L1.2 cmt. n.3(A); *see also United States v. Londono-Quintero*, 289 F.3d 147 (1st Cir. 2002) (relying on the "plain meaning" of the phrase "sexual abuse of a minor" in section 101(a)(43)(A) of the Act to conclude that a conviction under section 800.04 of the Florida Statutes subjected a defendant to an aggravated felony sentencing enhancement). Therefore, it is important to note that, in the sentencing enhancement context, the term "sexual abuse of a minor" may be analyzed by the circuit courts in two different ways: either as a "crime of violence" under the sentencing guidelines or as an aggravated felony under section 101(a)(43)(A) of the Act. A complete discussion of sentencing enhancement determinations is beyond the scope of this article—nonetheless, these distinctions illustrate further complications related to defining "sexual abuse of a minor" for immigration purposes.

The Board's Interpretation of "Sexual Abuse of a Minor"

In *Rodriguez-Rodriguez*, the Board considered whether a conviction for indecency with a child by exposure under section 21.11(a)(2) of the Texas Penal

Code Annotated constituted "sexual abuse of a minor" under section 101(a)(43)(A) of the Act. 22 I&N Dec. at 991–92. The Board examined Federal statutes relating to "sexual abuse of a minor" and ultimately determined the definition of sexual abuse in 18 U.S.C. § 3509(a)(8) provided "a more complete interpretation of the term 'sexual abuse of a minor' as it is commonly used" and determined it was a "reasonable interpretation" of the term. *Id.* at 996. The Board clarified that it was "not adopting this statute as a definitive standard or definition" but was invoking it as a "guide in identifying the types of crimes we would consider to be sexual abuse of a minor." *Id.* In making this determination, the Board stated it was "not obliged to adopt a federal or state statutory provision" because the Attorney General delegated to the Board her authority to administer and enforce the Act. *Id.* at 994. This left the Board to interpret the definition of an aggravated felony sexual abuse of a minor offense as it arises in removal proceedings. *Id.*

The Board sought a definition under Federal law because removal proceedings are a function of Federal law. *Id.* at 995. It considered 18 U.S.C. §§ 2242, 2243, 2246, and 3509(a). *Id.* Under sections 2242 and 2243, the crimes of "sexual abuse" and "sexual abuse of a minor or ward," respectively, require a sexual act, a component of which, under section 2246, is contact. Section 3509(a) outlines the rights of child victims and child witnesses in the context of Federal proceedings. Under section 3509(a)(8), "sexual abuse" is the "employment, use, persuasion, inducement, enticement, or coercion of a child to engage in, or assist another person to engage in, sexually explicit conduct or the rape, molestation, prostitution, or other form of sexual exploitation of children, or incest with children."

The Board found the definition in section 3509(a)(8) useful in identifying the forms of sexual abuse, stating that it encompassed "those crimes that can reasonably be considered sexual abuse of a minor." *Rodriguez-Rodriguez*, 22 I&N Dec. at 995–96. The Board further considered common definitions of "sexual abuse" and "abuse." *Id.* at 996. Citing *Black's Law Dictionary*, 1375 (6th ed. 1990), the Board stated that "sexual abuse" is commonly defined as "illegal sex acts performed against a minor by a parent, guardian, relative, or acquaintance." *Id.* The Board defined "abuse" as physical or mental maltreatment, which, the Board concluded, suggests that the common usage of the term "sexual abuse" includes a "broad range of maltreatment of a sexual nature, and it does not indicate that contact is a limiting factor." *Id.* Furthermore, child abuse also constitutes a removability ground and is defined in common usage as "any form of cruelty to a child's physical, moral or mental well-being." *Id.* In addition, the states categorize sex crimes against children in "many different ways." *Id.* Consequently, the Board concluded section 3509(a) better captured the "broad spectrum of sexually abusive behavior." *Id.* Moreover, the Board found the definition in sections 2242, 2243, and 2246 "too restrictive to encompass the numerous state crimes that can be viewed as sexual abuse and the diverse types of conduct that would fit within the term as it commonly is used." *Id.* The Board also found the definitions in sections 2242, 2243, and 2246 inconsistent with congressional intent to remove aliens who sexually abuse children and to bar those aliens from relief. *Id.*

Based on this analysis, the Board concluded that the conviction for indecency with a child by exposure under section 21.11(a)(2) of the Texas Penal Code Annotated required a high degree of mental culpability to knowingly expose oneself to a child with the intent to arouse and, as such, was "clearly sexual abuse of a minor within the meaning of section 101(a)(43)(A)." *Id.*

The Board further defined a "minor," with respect to the term "sexual abuse of a minor," as a person under the age of 18. *Matter of V-F-D-*, 23 I&N Dec. 859 (BIA 2006). Referring to its rationale in *Rodriguez-Rodriguez*, the Board examined sections 2242, 2243, 2246, and 3509(a). *Id.* Under section 2243(a)(1), a minor is referred to as someone between the ages of 12 and 16, but under section 3509(a)(2), a child is defined as a person under the age of 18. *See id.* at 861–62. The Board also noted that a minor is commonly defined as "a person who is under the age of legal competence," which is the age of 18 in most states. *Id.* at 862 (citing *Black's Law Dictionary* 899 (5th ed. 1979)). The Board determined the broader age limitation provided in section 3509(a)(2) best reflects diverse state laws that punish sexually abusive behavior toward children, the common usage of the word "minor," and Congress's intent to expand the definition of aggravated felony to protect children. *Id.* As such, section 3509(a)(2) was the best guide to determine the meaning of "minor" in "sexual abuse of a minor." *Id.*

The circuit courts of appeals have considered the Board's interpretation of "sexual abuse of a minor" and reached divergent conclusions regarding its reasonableness

and applicability to various criminal convictions. In turn, this has led to disparate results regarding the types of criminal activity that may lead to ineligibility for relief and removal from the United States. The next section discusses circuit court definitions of "sexual abuse of a minor" and identifies state statutes matching those definitions.

Chevron Deference to the Board's Interpretation

Four circuits have accorded *Chevron* deference to the Board's interpretation using section 3509(a) as a guide to determine what crimes constitute "sexual abuse of a minor" under section 101(a)(43)(A) of the Act.

The Second Circuit

The Second Circuit agrees with the Board that section 3509(a)(8) is an appropriate guide to identify the types of crimes considered "sexual abuse of a minor" offenses. *See Mugalli v. Ashcroft*, 258 F.3d 52, 58 (2d Cir. 2001). The Second Circuit found the Board's interpretation reasonable because not only does the definition in section 3509(a)(8) appear in the U.S. criminal code, but it "is consonant with the generally understood broad meaning of the term 'sexual abuse' as reflected in *Black's* [*Law Dictionary*]." *Id.* at 58–59. Moreover, the definition is "supported by the [Board's] reading of Congressional intent to 'provide . . . a comprehensive scheme to cover crimes against children.'" *Id.* at 59 (quoting *Rodriguez-Rodriguez*, 22 I&N Dec. at 996).

Upon deferring to the Board's use of section 3509(a)(8) as an interpretive guide, the Second Circuit has found several state criminal offenses constitute "sexual abuse of a minor" aggravated felony convictions for immigration purposes. In *Mugalli*, the Second Circuit found that rape in the third degree, where an individual aged 21 or older engages in sexual intercourse with a person under the age of 17 (also known as "statutory rape" under New York law), constitutes "sexual abuse of a minor." *Id.* at 60–61 (N.Y. Penal Law § 130.25-2). In *Santos v. Gonzales*, the Second Circuit concluded that a conviction for an offense involving illegal sexual contact with a victim under the age of 16 constitutes "sexual abuse of a minor" because it involves sexually explicit conduct, namely contact with the intimate parts of a child under the age of 16 in a sexual and indecent manner. 436 F.3d 323, 325 (2d Cir. 2005) (Conn. Gen. Stat. Ann. § 53-21(a)(2)).[2] In addition, the Second Circuit has held that an offense involving sexual misconduct, in which an individual engages in sexual intercourse with a person incapable of providing consent due to age, constitutes "sexual abuse of a minor." *Ganzhi v. Holder*, 624 F.3d 23 (2d Cir. 2010) (N.Y. Penal Law § 130.20(1)). Finally, the Second Circuit has found that the use of a child in a sexual performance constitutes "sexual abuse of a minor" because, under section 3509(a)(8), "sexual abuse" includes the employment or use of a child in sexual conduct; thus, authorizing a child to engage in a sexual performance has "the same effect as 'employing' or 'inducing' the child to perform because the law does not view minors as autonomous actors." *Oouch v. U.S. Dep't of Homeland Sec.*, 633 F.3d 119, 124 (2d Cir. 2011) (N.Y. Penal Law § 263.05). The Second Circuit also found the act of consenting to a child's sexual performance constituted "sexual abuse of a minor" because it involved knowledge of the nature of the performance. *Id.* at 125–26.

The Third Circuit

The Third Circuit agrees with the Second Circuit that the reasonableness of the Board's reliance on section 3509(a)(8) to define "sexual abuse of a minor" is "rooted in the consonance between that statutory provision and the commonly accepted definition of 'sexual abuse.'" *Restrepo v. Att'y Gen. of U.S.*, 617 F.3d 787, 796 (3d Cir. 2010). The Third Circuit has thus accorded *Chevron* deference to the Board's definition of "sexual abuse of a minor." *Id.*

The Third Circuit has found aggravated criminal sexual contact that involved intentional touching of a minor's breasts and vagina through her clothing to be "sexual abuse of a minor" because the offense under the pertinent state statute necessarily involves "sexually explicit conduct" as defined in section 3509(a)(9). *Id.* at 800 (N.J. Stat. Ann. § 2C:14-3(a)). The Third Circuit also found indecent assault under section 3126(a)(7) of the Pennsylvania Consolidated Statutes constitutes "sexual abuse of a minor" because the statute covers conduct that categorically constitutes "other forms of sexual exploitation" of a child. *See Cadapan v. Att'y Gen. of U.S.*, 749 F.3d 157, 161 (3d Cir. 2014); *see also* 18 U.S.C. § 3509(a)(8). Moreover, the Third Circuit stated that "molestation" as used in section 3509(a)(8) includes all conduct covered by "indecent contact" as used in the state statute, given the ordinary meaning of that term as provided in *Black's Law Dictionary*. *See Cadapan*, 749 F.3d at 161 (citing *Black's Law Dictionary* 1096 (9th ed. 2009)).

continued on page 9

CIRCUIT COURT DECISIONS FOR JULY 2016

by John Guendelsberger

The United States courts of appeals issued 84 decisions in July 2016 in cases appealed from the Board. The courts affirmed the Board in 73 cases and reversed or remanded in 11, for an overall reversal rate of 13.1%, compared to last month's 10.4%. There were no reversals from the First, Third, Eighth, Tenth, and Eleventh Circuits.

The chart below shows the results from each circuit for July 2016 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	3	3	0	0.0
Second	16	15	1	6.3
Third	7	7	0	0.0
Fourth	9	8	1	11.1
Fifth	13	10	3	23.1
Sixth	3	2	1	33.3
Seventh	4	2	2	50.0
Eighth	6	6	0	0.0
Ninth	17	14	3	17.6
Tenth	4	4	0	0.0
Eleventh	2	2	0	0.0
All	84	73	11	13.1

The 84 decisions included 45 direct appeals from denials of asylum, withholding or protection under the Convention Against Torture; 23 direct appeals from denials of other forms of relief from removal or from findings of removal; and 16 appeals from denials of motions to reopen or reconsider. Reversals within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	45	41	4	8.9
Other Relief	23	19	4	17.4
Motions	16	13	3	18.8

The four reversals or remands in asylum cases involved nexus (two cases), credibility, and particular social group. The four reversals or remands in the "other relief" category addressed an aggravated felony "crime of violence" under 18 U.S.C. § 16(b) (void for vagueness), a crime involving moral turpitude (divisibility), the "reason to believe" standard for a money laundering conviction, and removal of conditions of status under section 212(c)(4)(B) of the Act. The three motions cases involved equitable tolling (two cases), and a remand to further address humanitarian asylum.

The chart below shows the combined numbers for January through July 2016 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	26	18	8	30.8
Sixth	35	29	6	17.1
Ninth	634	544	90	14.2
Tenth	21	19	2	9.5
First	21	19	2	9.5
Third	57	52	5	8.8
Fifth	96	89	7	7.3
Eleventh	33	31	2	6.1
Second	214	202	12	5.6
Fourth	58	55	3	5.2
Eighth	45	44	1	2.2
All	1240	1102	138	11.1

Last year's reversal rate at this point (January through July 2015) was 14.7%, with 1,036 total decisions and 152 reversals or remands.

The numbers by type of case on appeal for the first 7 months of 2016 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	676	608	68	10.1
Other Relief	290	238	52	17.9
Motions	274	256	18	6.6

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

RECENT COURT OPINIONS

First Circuit:

Alvizures-Gomes v. Lynch, --- F.3d ---, No. 15-2181, 2016 WL 3923837 (1st Cir. July 21, 2016):

The First Circuit upheld the Board's determination that the petitioner did not establish that his fear of harm from a Guatemalan gang whose recruitment efforts he had resisted had the required nexus to a protected ground for asylum. The court found no error in the Board's determination that the gang's motivation was to swell its ranks and that the petitioner had therefore not established a nexus to a political opinion. The court additionally agreed that the petitioner's proposed group of "individuals returning to Guatemala from the United States while leaving behind family members in the United States" did not constitute a cognizable particular social group.

Fifth Circuit:

Lara v. Lynch, --- F.3d ---, No. 15-60126, 2016 WL 4394544 (5th Cir. Aug. 17, 2016): The Fifth Circuit denied a petition for review of the agency's determination that the Bolivian petitioner was not eligible for asylum because she had been firmly resettled in Mexico. *See* 8 C.F.R. § 1208.15. On review, the court found that neither the Board's firm resettlement determination, nor the framework established by the Board in *Matter of A-G-G-*, 25 I&N Dec. 486 (BIA 2011), for making such determinations, was in dispute. Rather, the issue was whether the Board erred in finding that the petitioner did not remain in Mexico for only "as long as was necessary to arrange onward travel." *See* 8 C.F.R. § 1208.15(a). The court concluded that the petitioner's receipt of a work visa in Mexico, her multiple trips in and out of the country, and her prior entry into the United States provided substantial support for the determination that the petitioner did not fall within the limited exception to the firm resettlement bar.

Gomez v. Lynch, --- F.3d ---, No. 14-60661, 2016 WL 4169123 (5th Cir. Aug. 5, 2016): The Fifth Circuit granted a petition for review of the Board's decision finding the petitioner ineligible for adjustment of status. The petitioner had arrived from El Salvador without inspection in the early 1980s and had applied for legalization. He was granted temporary resident status in 1992, which allowed him to travel to El Salvador in 1993. He was inspected and admitted upon his return to the United States. His temporary resident status later expired, but he obtained temporary protected status (TPS). This status then expired in 2009. In 2010, the petitioner sought adjustment of status in removal proceedings, but was found to be ineligible because, in the Board's opinion, the petitioner reverted back to his original status upon expiration of his temporary resident status pursuant to 8 C.F.R. § 245a.2(u)(4), thus negating the effect of his 1993 legal entry. The petitioner challenged this interpretation. The court found the regulation ambiguous, but declined to give the Board's interpretation deference under *Auer v. Robbins*, 519 U.S. 452, 461 (1997). The court did not find the interpretation in the petitioner's case to reflect the agency's fair and considered judgment given that the Board had reached inconsistent results when addressing the issue in prior decisions. Finding that an "admission" (which is an occurrence) is distinct from "status," the court concluded that the regulation did not undo the petitioner's legal admission.

Seventh Circuit:

Lozano-Zuniga v. Lynch, --- F.3d ---, No. 15-2488, 2016 WL 4254931 (7th Cir. Aug. 12, 2016): The Seventh Circuit denied the petition for review from the denial of withholding of removal and Torture Convention protection where the Mexican petitioner sought relief based on membership in a particular social group and his religious beliefs. The court was "less sure than the Board was" that the petitioner's proposed group of "young men returning to Mexico after living in the United States" was not a cognizable social group. However, the court did not make a determination on that issue upon affirming the Board's determination that the petitioner did not establish a clear probability of harm either on account of his membership in such a group or his religion since a generalized claim of unrest in Mexico did not establish that he would be singled out for harm.

Yang v. Lynch, --- F.3d ---, No. 15-3357, 2016 WL 4254386 (7th Cir. Aug. 12, 2016): The Seventh Circuit denied the petition for review from the denial of a Chinese applicant's asylum claim where the Immigration Judge made an adverse credibility determination. While the court agreed that the Immigration Judge relied on an inconsistency not supported by the record and made a flawed demeanor finding with respect to a witness, the other factors relied upon were sufficient to support the

adverse credibility finding. The court also agreed with the determination that the petitioner had not sufficiently corroborated his claim through available evidence.

Ninth Circuit:

Preap v. Johnson, --- F.3d ---, Nos. 14-16326, 14-16779, 2016 WL 4136983 (9th Cir. Aug. 4, 2016): The Ninth Circuit considered whether the provision of section 236(c)(1) of the Act, requiring detention without bond "when the alien is released," applies to aliens who were not immediately brought into immigration detention at the time of their release from criminal custody. The court concluded that the statutory language "unambiguously" requires mandatory detention without bond only "when [the alien is] released." The court further found that as the "use of the word 'when' conveys immediacy," that the immigration detention must therefore "occur promptly upon the aliens' release from criminal custody." The Ninth Circuit found no ambiguity in the statutory language and disagreed with the Board's contrary holding in *Matter of Rojas*, 23 I&N Dec. 117 (BIA 2001), based on the plain language of the statute. The court did not decide for purposes of the appeal exactly how promptly an alien must be brought into immigration custody after being released from criminal custody to satisfy the "when . . . released" requirement.

United States v. Benally, --- F.3d ---, No. 14-10452, 2016 WL 4073316 (9th Cir. Aug. 1, 2016): The Ninth Circuit, in a case arising in the criminal context, held that a conviction for involuntary manslaughter under 18 U.S.C. §§ 1112 and 1153 was not a crime of violence under 18 U.S.C. § 924(c). Although the court had reached the opposite conclusion in *United States v. Springfield*, 829 F.2d 860 (9th Cir. 1987), it reconsidered its holding in light of the Supreme Court's intervening decision in *Leocal v. Ashcroft*, 543 U.S. 1, (2004), and the Ninth Circuit's en banc decision in *Fernandez-Ruiz v. Gonzales*, 466 F.3d 1121 (9th Cir. 2006). In light of those decisions, the court concluded that "a 'crime of violence' requires a mental state higher than recklessness—it requires intentional conduct."

Salim v. Lynch, --- F.3d ---, No. 13-71833, 2016 WL 4073315 (9th Cir. Aug. 1, 2016): The Ninth Circuit granted the petition for review of the Board's denial of a motion to reopen to file a new asylum application based on changed country conditions in Indonesia. The petitioner's original asylum application, based on his Chinese ethnicity, had been denied in 2006. The petitioner's new claim was based on his conversion from Buddhism to Catholicism. The Board determined that the petitioner had not established the changed country conditions necessary to excuse his late filing. However, the court found that the new evidence offered was not "cumulative" of evidence previously submitted (as the Board had concluded) where the claim was based on a new ground (i.e., religion and not ethnicity). The court further found that the Board ignored evidence of a heightened individualized risk to the petitioner if he returned to Indonesia, and that the evidence sufficiently established changed conditions facing Christians since the time of his hearing.

Arellano Hernandez v. Lynch, --- F.3d ---, No. 11-72286, 2016 WL 4073313 (9th Cir. Aug. 1, 2016): The Ninth Circuit upheld the Board's determination that the petitioner's conviction for criminal threats under California Penal Code § 422 is a categorical aggravated felony crime of violence under section 101(a)(43)(F) of the Act. The court acknowledged that the petitioner's conviction was for a "wobbler" offense (i.e. an offense that could be deemed either a felony or misdemeanor). However, the court noted that such crimes are presumed to be felonies and that the conviction in the petitioner's case is deemed to be for a felony since the sentence was for 365 days and since the state court had neither declared the offense to be a misdemeanor nor reduced the crime to a misdemeanor.

BIA PRECEDENT DECISIONS

In *Matter of Richmond*, 26 I&N Dec. 779 (BIA 2016), the Board considered the question of when a false claim to United States citizenship falls within the ambit of section 212(a)(6)(C)(ii)(I) of the Act, 8 U.S.C. § 1182(a)(6)(C)(ii)(I). Parsing the statute, the Board noted that an alien is inadmissible under that statute if he or she: (1) falsely represents, or has falsely represented, that he or she is a United States citizen; (2) for any purpose or benefit; (3) under the Act or any other Federal or state law. Whether or not the false representation must be knowing was not at issue, so the Board proceeded to an examination of the "for any purpose or benefit" language in the second

element. Adopting the Supreme Court's interpretation in *Kungys v. United States*, 485 U.S. 759 (1988), the Board stated that an alien is inadmissible under section 212(a)(6)(C)(ii)(I) of the Act if he or she makes a false claim to United States citizenship with the "subjective intent" to obtain a purpose or benefit under law. The character of the intent is a question of fact to be determined by an Immigration Judge.

Next, the Board considered the "under this Act . . . or any other Federal or State law" language in element three and, pursuant to the Supreme Court's interpretation of "under" articulated in *Kucana v. Holder*, 558 U.S. 233 (2010), interpreted the phrase to mean that the false claim must be made to achieve a purpose or benefit governed by one of these areas of law. Whether or not there is a purpose or benefit under section 212(a)(6)(C)(ii)(I) of the Act requires an objective determination. The Board concluded that the scope of section 212(a)(6)(C)(ii)(I) of the Act is limited to false claims of United States citizenship that satisfy two requirements: (1) the Immigration Judge must find direct or circumstantial evidence establishing that the false claim was made with the subjective intent to achieve a purpose or obtain a benefit under the Act or any Federal or state law; and (2) the presence of a purpose or benefit must be determined objectively, meaning that the United States citizenship must actually affect or matter to the purpose or benefit sought.

Turning to the terms "purpose" and "benefit," the Board observed that relevant judicial and Board precedent provides that obtaining a passport, being admitted to the United States, and obtaining private sector employment are "benefits" contemplated by section 212(a)(6)(C)(ii)(I) of the Act. Avoiding negative legal consequences, including removal proceedings, is a "purpose." The Board previously found it to be self-evident that making a false claim to United States citizenship to border control officers in order to gain admission to the United States implicates the "benefit" of entry and the "purpose" of evading the Act's inspection requirement. Similarly, gaining admission and private sector employment are examples of "benefits" under the law, but may also represent achieving a "purpose." Observing that an alien who makes a false claim to United States citizenship avoids the negative legal consequences of inspection or removal proceedings because a citizen is not subjected to the same scrutiny as aliens, and is not subject to removal, the Board held that avoiding removal proceedings is a "purpose" as contemplated by section 212(a)(6)(C)(ii)(I) of the Act.

The Board concluded that the respondent had not satisfied his burden of proving that his false claim to United States citizenship was not made "for any purpose or benefit" under the Act and that he was not inadmissible under section 212(a)(6)(C)(ii)(I) of the Act. Additionally, the respondent had not shown that he lacked the subjective intent to avoid removal proceedings, or that United States citizenship would not impact removal proceedings under the Act. The appeal was dismissed.

In *Matter of Fatahi*, 26 I&N Dec. 791 (BIA 2016), the Board held that when determining whether an alien poses a danger to the community at large such that he or she should be detained without bond during removal proceedings, an Immigration Judge should consider direct and circumstantial evidence of dangerousness, including whether national security considerations are implicated.

The respondent first told DHS agents that he obtained the Syrian passport he used to enter the United States through his father rather than by applying at his local consulate. He later admitted that he obtained the passport by improper means through unofficial channels, allegedly because he believed the consulate would not issue him a passport because he had not completed his mandatory military service. After stating initially that he had not completed any passport application, he later stated that he had filled out a form. The DHS determined that the respondent's passport was a "stolen blank" and that his identifying information was filled in without government approval and by an unauthorized individual. Additionally, the stolen blank passport was part of a series of blank passports stolen from the government by operatives of the Islamic State in Iraq and Syria, a terrorist organization. The Immigration Judge denied the respondent's request for release from detention on bond after finding in relevant part that he was a danger to the community and ineligible for bond pursuant to section 236(a) of the Act.

Noting that national security concerns are a fundamental consideration in immigration bond proceedings, the Board pointed out that it is the

respondent's burden to establish that he is not a danger to persons or property. The Board concluded that the respondent had not met his burden since he knowingly obtained a false passport, which left his actual identity in doubt, and he gave inconsistent explanations as to how he obtained the passport. Further, the document had passed through the hands of a terrorist organization, raising the question of whether the respondent poses a national security risk. The Board concluded that the Immigration Judge's dangerousness finding was supported. The appeal was dismissed.

Defining "Sexual Abuse of Minor" *continued*

The Sixth Circuit

The Sixth Circuit has held that the Board "permissibly interpreted 'sexual abuse of a minor,'" observing that "[n]othing forbids the Board's interpretation" of the phrase. *Esquivel-Quintana v. Lynch*, 810 F.3d 1019, 1021, 1025 (6th Cir. 2016). The Sixth Circuit noted that Congress could have included a cross-reference to 18 U.S.C. § 2243(a) had it wanted to incorporate that definition of statutory rape into the Act, but Congress's refusal to do so indicated its intent for "sexual abuse of a minor" to "sweep in a broad array of state-law convictions." *Id.* at 1026. In finding the Board's interpretation reasonable, the Sixth Circuit upheld the Board's finding that a conviction for unlawful sexual intercourse with a minor in violation of California Penal Code section 261.5(c) constituted an aggravated felony "sexual abuse of a minor" offense under the Act. *Id.* at 1026–27.[3]

The Seventh Circuit

The Seventh Circuit has accorded *Chevron* deference to the Board's interpretation of "sexual abuse of a minor" in *Rodriguez-Rodriguez*. *See Gattem v. Gonzales*, 412 F.3d 758 (7th Cir. 2005); *see also Espinoza-Franco v. Ashcroft*, 394 F.3d 461, 464–65 (7th Cir. 2005) (per curiam). Generally, the Seventh Circuit approves of the Board's broad view of "sexual abuse of a minor" in the immigration context. *Gaiskov v. Holder*, 567 F.3d 832, 835–36 (7th Cir. 2009).

Examining a conviction for solicitation of a sexual act in violation of chapter 720 of the Illinois Compiled Statutes, section 5/11-14.1(a), the Seventh Circuit noted that the statute reaches conduct aimed at adults as well as minors; however, the respondent never contested the fact that his offense involved a minor. *Gattem*, 412 F.3d at 761 n.4, 765. The Seventh Circuit agreed with the Board that the conviction was properly classified as "sexual abuse of a minor" because solicitation poses "an inherent risk of exploitation, if not coercion, when an adult solicits a minor to engage in sexual activity." *Id.* The Seventh Circuit found that "[b]ecause minors are . . . more susceptible to corrupt influences, it is reasonable to think of an adult's solicitation of a minor to be abusive in the sense of exploiting the minor's vulnerabilities." *Id.* at 766. The Seventh Circuit stated, "Construing sexual abuse of a minor broadly to include the crime of soliciting a minor is reasonable notwithstanding the absence of any physical contact with or threat against the minor, given the inherent risk of exploitation that soliciting a minor presents." *Id.* at 767. The Seventh Circuit also rejected the notion that the Board was "obliged to define sexual abuse [under section 101(a)(43)(A)] with reference to the more narrow standards found elsewhere in the Criminal Code, including in particular 18 U.S.C. § 2243(a), which establishes the federal offense of sexually abusing a minor." *Id.* at 764; *see also Sharashidze v. Gonzales*, 480 F.3d 566 (7th Cir. 2007) (720 Ill. Comp. Stat. Ann. 5/11-14.1).[4]

Having considered the Board's approach several times, the Seventh Circuit has continued to apply *Rodriguez-Rodriguez* and conclude that various state offenses constitute "sexual abuse of a minor." *See Velasco-Giron v. Holder*, 773 F.3d 774, 776 (7th Cir. 2014). For example, the Seventh Circuit has found that sexual misconduct with a minor, which requires that the adult perpetrator touch the child victim with the intent to arouse or satisfy sexual desire, is "sexual abuse of a minor." *Gaiskov*, 567 F.3d at 836 (Ind. Code Ann. § 35-42-4-9(b)). In addition, the Seventh Circuit concluded that its decision in *Gattem* compelled the conclusion that indecent solicitation of a child, where the alien engaged in internet communications with a person he believed to be a 15-year-old girl but was in fact an undercover investigator, qualified as "sexual abuse of a minor." *Hernandez-Alvarez v. Gonzales*, 432 F.3d 763, 764, 766 (7th Cir. 2005) (720 Ill. Comp. Stat. Ann. 5/11-6(a)). In *Hernandez-Alvarez*, the fact that the victim was not actually a minor did not preclude the "sexual abuse of a minor" analysis because the Seventh Circuit reasoned that "the impossibility of completing the offense attempted is not a defense." *Id.* at 766.

The Ninth and Seventh Circuits
Split on Statutory Rape

Interestingly, unlawful intercourse with a person under 18, where the defendant is at least 3 years older than the victim, constitutes "sexual abuse of a minor" in the Seventh Circuit, but the Ninth Circuit has held otherwise. *Compare Velasco-Giron*, 773 F.3d at 775 (addressing Cal. Penal Code § 261.5(c)), *with Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (en banc) (addressing the same statute and reaching the opposite conclusion). California's statutory rape law criminalizes sexual intercourse with someone under 18, and 3 years younger than the defendant, who is not the defendant's spouse. *Estrada-Espinoza*, 546 F.3d at 1151. The Seventh Circuit rejected the argument that it should define "sexual abuse of a minor" more narrowly in reference to a Federal statute such as 18 U.S.C. § 2243(a), which states "sexual abuse of a minor" involves engaging in a sexual act with a person between the ages of 12 and 15, if the offender is at least 4 years older. *Velasco-Giron*, 773 F.3d at 775. The Seventh Circuit noted that the illogical result of adopting section 2243(a) as an exclusive definition would be that only those aliens convicted of sexual abuse offenses involving victims of a certain age range could be removable for "sexual abuse of a minor." *Id.* at 776.

By contrast, the Ninth Circuit explicitly rejected the Board's *Rodriguez-Rodriguez* approach and formulated two definitions of "sexual abuse of a minor." One definition applies to statutory rape offenses. *See Estrada-Espinoza*, 546 F.3d at 1147. In *Estrada-Espinoza*, the respondent was convicted of statutory rape, stemming from his relationship with his young girlfriend. *Id.* at 1150. Thus, the Ninth Circuit considered whether a conviction under California Penal Code sections 261.5(c), criminalizing intercourse with a minor more than 3 years younger than the perpetrator; 286(b)(1), criminalizing sodomy of a person under 18; 288a(b)(1), criminalizing oral copulation with a person under 18; or 289(h), criminalizing sexual penetration by a foreign object of a person under 18, constituted "sexual abuse of a minor" within the meaning of section 101(a)(43)(A) of the Act. *Id.* at 1151–52 (*overruled on other grounds by United States v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011)).

To define "sexual abuse of a minor" with regard to statutory rape, the Ninth Circuit relied on 18 U.S.C. § 2243. *Id.* at 1152. The Ninth Circuit offered four elements of the generic offense: "(1) a mens rea level of knowingly; (2) a sexual act; (3) with a minor between the ages of 12 and 16; and (4) an age difference of at least 4 years between the defendant and the minor." *Id.* at 1158. The Ninth Circuit believed Congress intended the term "sexual abuse of a minor" to carry its standard criminal definition, "on par with 'murder' or 'rape,'" stating the definition of "sexual abuse of a minor" as provided in section 2243 accorded with the "contemporary meaning attached to the crime." *Id.* at 1156. Comparing the aforementioned elements against the elements of the statutes at issue, the Ninth Circuit concluded that convictions under sections 261.5(c), 286(b)(1), 288a(b)(1), or 289(h) did not categorically constitute "sexual abuse of a minor" because each statute defined conduct that was broader than the definition of the term "sexual abuse of a minor." *Id.* at 1158–60.

Rejecting the notion that Congress's failure to provide a cross-reference to a Federal statute meant it did not intend to define "sexual abuse of a minor" by Federal law, the Ninth Circuit said the statute did not need a cross-reference where terms "refer to a specific crime which is already clearly defined in criminal law." *Id.* at 1155. Consequently, the Ninth Circuit determined "sexual abuse of a minor" needs no cross-reference to a Federal statute because it refers to a specific crime, and thus it found no need to "survey criminal law to ascertain a federal definition" because Congress enumerated the elements of the offense of "sexual abuse of a minor" in 18 U.S.C. § 2243. *Id.* at 1152, 1155.

Declining to Afford Chevron Deference

In contrast with circuits that have accorded *Chevron* deference to the Board's *Rodriguez-Rodriguez* approach, a number of circuits have rejected the *Rodriguez-Rodriguez* decision in different ways.

Explicit Rejection of Rodriguez-Rodriguez

The Ninth Circuit

As discussed in the prior section, the Ninth Circuit has explicitly rejected the Board's *Rodriguez-Rodriguez* approach and has formulated two definitions of "sexual abuse of a minor." One definition applies to statutory rape offenses, *see Estrada-Espinoza*, 546 F.3d at 1147,[5] and another definition applies to all other sexual abuse offenses involving minors, *see United States v. Baron-Medina*, 187 F.3d 1144 (9th Cir. 1999).

With a focus on the word "abuse" in the term "sexual abuse of a minor," the Ninth Circuit drew a distinction between sexual relations with younger children under the age of 16 and sexual relations with older children between the ages of 16 and 18. *United States v. Medina-Villa*, 567 F.3d 507, 514–15 (9th Cir. 2009). Accordingly, in the Ninth Circuit, *Baron-Medina* applies to non-statutory rape sexual abuse offenses involving minors. *Id.* at 515–16.

In *Baron-Medina*, the Ninth Circuit analyzed the term "sexual abuse of a minor" in the sentencing context. 187 F.3d at 1145.[6] The respondent was convicted of committing a lewd or lascivious act on a child under the age of 14 years in violation of section 288(a) of the California Penal Code. *Id.* To formulate a definition for "sexual abuse of a minor," the Ninth Circuit considered the fact that "sexual abuse of a minor" was placed in the company of crimes such as murder and rape, crimes traditionally proscribed by state law; it therefore declined to restrict its definition to provisions in Federal statutes. *Id.* at 1146. Instead, the Ninth Circuit employed the "ordinary, contemporary, and common meaning of the words that Congress used" and defined the term using dictionary definitions. *Id.* 1146–47. The Ninth Circuit compared that contemporary meaning against the elements of the statutes governing the respondent's conviction: "(1) the touching of an underage child's body; (2) with a sexual intent." *Id.* at 1147 (citing *People v. Martinez*, 903 P.2d 1037, 1042–43 (Cal. 1995)). It concluded that the conduct described under section 288(a) "indisputably [fell] within the common, everyday meanings of the words 'sexual' and 'minor.'" *Baron-Medina*, 187 F.3d at 1147. It further concluded that "[t]he use of young children for the gratification of sexual desires" constitutes abuse. *Id.* Moreover, it stated this definition comports with the "ordinary, contemporary, and common meaning" of the word "abuse" as found in *Black's Law Dictionary* and *Webster's Third New International Dictionary*: "maltreatment, no matter its form." *Id.* (quoting *Black's Law Dictionary* 10).

The Ninth Circuit clarified the distinction between *Estrada-Espinoza* and *Baron-Medina* when examining whether a conviction under California Penal Code section 288(a) for lewd and lascivious acts on a child under 14 constituted "sexual abuse of a minor." *See Medina-Villa*, 567 F.3d at 509–10, 512. Under *Medina-Villa*, a crime that is not statutory rape under *Estrada–Espinoza* may still constitute "sexual abuse of a minor" if the following elements are satisfied: (1) the conduct prohibited by the criminal statute is sexual, (2) the statute protects a minor, and (3) the statute requires abuse. *See id.* at 513. The element of abuse is satisfied if the criminal statute expressly prohibits conduct that causes "'physical or psychological harm' in light of the age of the victim in question." *Id.* For conduct to be *per se* abusive, it must encompass sexual conduct targeting younger children. *See Pelayo-Garcia v. Holder*, 589 F.3d 1010, 1014 (9th Cir. 2009) (internal citation omitted).

The Ninth Circuit revisited and affirmed the frameworks presented in *Estrada-Espinoza* and *Medina-Villa* in finding a conviction for performing oral sex on a 16-year-old boy, in violation of Arizona Revised Statutes section 13-1405, did not constitute "sexual abuse of a minor." *See Rivera-Cuartas v. Holder*, 605 F.3d 699 (9th Cir. 2010). Because Arizona Revised Statutes section 13-1405 punishes a person who "commits sexual conduct with a minor by intentionally or knowingly engaging in sexual intercourse or oral sexual contact with any person who is under eighteen years of age," it lacked the age difference requirement under the *Estrada-Espinoza* definition of "sexual abuse of a minor." *Id.* at 702. Thus, the Ninth Circuit found the Arizona statute was broader than the generic offense because the statute applies to persons under 18 years of age. *Id.* Moreover, the statute failed to meet the *Medina-Villa* definition because it lacked the "abuse" element. *Id.* Consequently, Arizona Revised Statutes section 13-1405 does not constitute "sexual abuse of a minor" in the Ninth Circuit because it "'does not expressly include physical or psychological abuse of a minor as an element of the crime,' nor does it 'criminalize[ ] only conduct that is per se abusive, because it is not limited to conduct targeting younger children.'" *Id.* at 702 (quoting *Pelayo-Garcia*, 589 F.3d at 1015).

The Fifth Circuit

The Fifth Circuit has explicitly rejected the Board's *Rodriguez-Rodriguez* approach in favor of a plain meaning approach to define "sexual abuse of a minor." *See Contreras v. Holder*, 754 F.3d 286 (5th Cir. 2014). The Fifth Circuit considered a conviction for carnal knowledge of a child between 13 and 15 years of age, in violation of section 18.2-63 of the Code of Virginia. *Id.* at 288–89. Finding the *Rodriguez-Rodriguez* approach contrary to Fifth Circuit precedent, the Fifth Circuit adopted a plain-meaning approach in accordance with the circuit's definitional methodology. *Id.* at 293. The Fifth

Circuit's approach derives the "generic, contemporary meaning" of the term sexual abuse of a minor from its "common usage as stated in legal and other well-accepted dictionaries." *Id.* at 294. The Fifth Circuit simplified the phrase "sexual abuse of a minor" into three elements: "(1) the conduct must involve a 'child'; (2) the conduct must be 'sexual' in nature; and (3) the sexual conduct must be 'abusive.'" *Id.* at 293. Next, the Fifth Circuit used legal and other well-accepted dictionaries to define the words "minor," "abuse," "sexual," and "sexual abuse." *Id.* at 294–96. It defined "minor" as the age below that of majority, 18 years old; it defined "sexual" as "'[o]f pertaining to, affecting, or characteristic of sex, the sexes, or the sex organs and their functions;'" it defined "abuse" as "'[t]o use wrongly or improperly' or '[t]o hurt or injure by maltreatment;'" and it defined "sexual abuse" as "'[a]n illegal or wrongful sex act, esp[ecially] one performed against a minor by an adult.'" *Id.* at 294–95 (citing *The American Heritage Dictionary* and *Black's Law Dictionary*).

The Fifth Circuit compared the dictionary definitions of abuse and sexual abuse against the elements of the Virginia statute and concluded the conviction for carnal knowledge by an adult necessarily constituted "sexual abuse of a minor" within the meaning of section 101(a)(43)(A) of the Act because sexual abuse means "[a]n illegal or wrongful sex act, esp[ecially] one performed against a minor by an adult." *Id.* (quoting *Black's Law Dictionary*).

In using the plain-meaning approach to define "sexual abuse of a minor," the Fifth Circuit concluded that although a physical act is implicit in *Black's Law Dictionary*'s definition, a "sexual act does not require physical contact with a minor to be abusive, since psychological harm may occur even without such contact and can be equally abusive." *Contreras*, 754 F.3d at 294. The Fifth Circuit further established "a per se rule that gratifying or arousing one's sexual desires in the presence of a child is abusive because it involves taking undue or unfair advantage of the minor." *Id.* at 294–95.

The Tenth Circuit

The Tenth Circuit has also declined to accord *Chevron* deference to the Board's interpretation of "sexual abuse of a minor." *See Rangel-Perez v. Lynch*, 816 F.3d 591 (10th Cir. 2016). In considering whether a Utah conviction for unlawful sexual activity with a minor, a violation of Utah Code section 76-5-401, constitutes "sexual abuse of a minor," the Tenth Circuit discussed whether the Federal definition included a mens rea element. *Id.* at 596. In contrast to those circuit courts of appeals that accorded *Chevron* deference to *Rodriguez-Rodriguez*, the Tenth Circuit took a narrow approach, only according deference if the Board decision addressed the *same* question before the circuit court. *Id.*

In *Rodriguez-Rodriguez*, the Board did not address whether the Federal "sexual abuse of a minor" definition included a mens rea element of at least knowingly. *Id.* at 598. Moreover, the Board "did not purport to set forth all of the elements of "sexual abuse of a minor" and did not establish section 3509(a)(8) as "the exclusive touchstone for defining the elements of the [Act's] 'sexual abuse of a minor' category of 'aggravated' felonies.'" *Id.* at 598–99. Consequently, the Tenth Circuit found no reason to defer to the Board's decision in *Rodriguez-Rodriguez*.[7] *Id.* at 601. Furthermore, the Tenth Circuit said it would not defer to the Board even if it had established section 3509(a)(8) as the exclusive touchstone for defining all the elements of "sexual abuse of a minor." *Id.* The Tenth Circuit rejected the notion that Congress "intended that every sex offense involving a minor—even sex offenses not requiring mens rea—should qualify as an 'aggravated felony' under the [Act]." *Id.* at 602. Because "sexual abuse of a minor" is listed with murder and rape, which have mens rea requirements, the Tenth Circuit stated "sexual abuse of a minor" must have intended a mens rea requirement as well. *Id.*

The Tenth Circuit examined analogous Federal law and considered two statutes setting forth substantive sexual abuse crimes involving minors: 18 U.S.C. §§ 2241(c) and 2243. *Id.* at 603–04. The Tenth Circuit found both require proof that the defendant act either knowingly or with a specific intent. *Id.* at 604. The Tenth Circuit concluded that, because these two analogous crimes required the defendant to act at least knowingly, the Act's generic "sexual abuse of a minor" offense "also has as an element proof that the defendant 'knowingly' committed the proscribed sex acts." *Id.* at 604–05.

Applying this reasoning, the Tenth Circuit found a conviction under Utah Code section 76-5-401, where a 19-year-old male engaged in sexual intercourse with his 15-year-old long-time girlfriend, who later became the mother of his child, not to be sexual abuse of a minor. *Id.* at 606–07. The Utah statute is a strict liability statute that does not require a mens rea element. The Tenth Circuit

therefore concluded that it punishes a broader range of conduct than the conduct falling within the Act's "sexual abuse of a minor" offense and is not an aggravated felony for removal purposes. *Id.*

Before *Rangel-Perez*, the Tenth Circuit had relied on section 3509(a) to find a conviction for contributing to the delinquency of a minor, in violation of section 18-6-701 of the Colorado Revised Statutes, constituted "sexual abuse of a minor" where the petitioner did not challenge the Board's definition. *Vargas v. Dep't of Homeland Sec.*, 451 F.3d 1105, 1107 (10th Cir. 2006).[8]

Implicit Rejection of Rodriguez-Rodriguez

The First and Eleventh Circuits have not explicitly rejected the Board's definition in *Rodriguez-Rodriguez*; instead, they have considered the plain meaning of the phrase and developed definitions by which to compare state convictions for particular crimes involving sexual misconduct and minors.

The First Circuit

The First Circuit has applied both a plain meaning approach and deference to the Board when considering whether a conviction constitutes "sexual abuse of a minor." The First Circuit accorded deference, not to *Rodriguez-Rodriguez*, but rather to an underlying Board decision that used 18 U.S.C. § 2244, which describes "abusive sexual contact," to find a conviction for indecent assault and battery on a child under 14 constituted "sexual abuse of a minor." *Emile v. INS*, 244 F.3d 183, 185–86 (1st Cir. 2001).[9] Section 2244 defines sexual contact as "intentional touching, 'either directly or through the clothing,' of another person's genitals or other specified body parts 'with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.'" *Id*. at 186; 18 U.S.C. § 2246(3). The First Circuit found this definition was reasonable and was "well within the Board's discretion" to regard the alien's conduct, by an adult against a minor, as presumptively within the scope of the term "sexual abuse of a minor." *Emile*, 244 F.3d at 186.

Relying on a plain meaning approach, the First Circuit has also found lewd and lascivious assault on a child, in violation of Florida Statutes section 800.04, to constitute "sexual abuse of a minor." *See United States v. Londono-Quintero*, 289 F.3d 147 (1st Cir. 2002). This sentencing enhancement case illustrates the First Circuit's approach to determining the meaning of "sexual abuse of a minor" as used in section 101(a)(43)(A) of the Act. The First Circuit used *Random House Webster's Unabridged Dictionary*, 1755 (2d ed. 1987), to define "sexual" as "of, pertaining to, or for sex;" "abuse" as "to use wrongly or improperly," or "misuse;" and "sexual abuse" as "rape, sexual assault, or sexual molestation." *Id.* at 153–54. The First Circuit did not settle on any particular definition, but read the plain meaning of "sexual abuse of a minor" in 101(a)(43)(A) "to encompass easily the physical contact provisions of [section] 800.04 of the Florida statute." *Id.* at 154. The First Circuit noted that the Florida statute "criminalizes, *inter alia*, sexual offenses that do not rise to the level of rape or sexual battery and which are committed against children under the age of sixteen." *Id.* at 152.

The Eleventh Circuit

The Eleventh Circuit defines "sexual abuse of a minor" as used in section 101(a)(43)(A) of the Act as "a perpetrator's physical or nonphysical misuse or maltreatment of a minor for a purpose associated with sexual gratification." *See United States v. Padilla-Reyes*, 247 F.3d 1158, 1163 (11th Cir. 2001). The Eleventh Circuit derived this definition by considering the "plain meaning" of the phrase. *Id.* The Eleventh Circuit concluded the plain meaning of "sexual abuse of a minor" is unambiguous and Congress's lack of an explicit statutory cross-reference in the subsection indicates its intent to rely on the plain meaning of the terms. *Id.* at 1164. To determine the "ordinary and everyday meaning" of the phrase, the Eleventh Circuit considered the relevant definitions of "abuse," "sexual," and "sexual abuse" as provided in *Webster's Third New International Dictionary* and *Black's Law Dictionary*. *Id.* at 1163. The Eleventh Circuit stated "of a minor" had a "fairly self-evident" definition, and it did not explicitly define the term further. *Id.* The Eleventh Circuit also stated that by not limiting "sexual abuse of a minor" to physical abuse, it recognizes "an invidious aspect of the offense: that the act, which may or may not involve physical contact by the perpetrator, usually results in psychological injury for the victim, regardless of whether any physical injury was incurred." *Id.* Based on its definition, the Eleventh Circuit concluded a conviction under Florida Statutes section 800.04 constitutes "sexual abuse of a minor" in the sentencing enhancement context. *Id.*

The Eleventh Circuit has also found a conviction under the General Statutes of North Carolina

section 14-202.1 to constitute "sexual abuse of a minor." *Bahar v. Ashcroft*, 264 F.3d 1309 (11th Cir. 2001); *see also United States v. Ramirez-Garcia*, 646 F.3d 778, 784 (11th Cir. 2011) (stating that the *Padilla-Reyes* definition of "sexual abuse of a minor" does not "limit 'sexual abuse of a minor' to instances where the perpetrator is present in front of the minor, where the minor is aware of the abuse, or where the perpetrator makes contact with the minor," making that definition "no narrower" than the North Carolina statute). In *Bahar*, the Eleventh Circuit considered the North Carolina conviction under the Board's interpretation as discussed in *Rodriguez-Rodriguez*. *Bahar*, 264 F.3d at 1312. The Eleventh Circuit did not accord *Chevron* deference to the Board, but stated, "We cannot say that the Board's interpretation of section 1101(a)(43)(A) was unreasonable" where the Board determined the North Carolina offense of taking indecent liberties with children constituted "sexual abuse of a minor." *Id.* Comparing its definition and the Board's reasoning, the Eleventh Circuit said its findings in *Padilla-Reyes* support the Board's view. *Id.* In addition, the Eleventh Circuit compared the Florida statute from *Padilla-Reyes* with the North Carolina statute and found they did not require "materially different elements." *Id.*

In the removal context, the Eleventh Circuit again considered Florida Statutes section 800.04, restated its definition of "sexual abuse of a minor" from *Padilla-Reyes* and concluded that all conduct proscribed by the statute met that definition and involved "a purpose associated with sexual gratification." *See Chuang v. U.S. Att'y Gen.*, 382 F.3d 1299, 1301–02 (11th Cir. 2004). The Eleventh Circuit did not address the Board's interpretation of "sexual abuse of a minor."

Declining to Adopt a Definition

The Fourth Circuit

The Fourth Circuit interpreted the term "sexual abuse of a minor" in the immigration context when it considered a conviction for causing abuse to a child under former Maryland Code article 27, section 35A. *Amos v. Lynch*, 790 F.3d 512 (4th Cir. 2015). The Fourth Circuit found the conviction was not an aggravated felony under section 101(a)(43)(A) of the Act. *Id.* at 522. The Fourth Circuit cited *Rodriguez-Rodriguez*, and similarly used section 3509(a)(8) as a guide. *Id.* Nonetheless, the Fourth Circuit disapproved of the Board's failure to adopt a particular definition and "provide direction regarding the elements of the generic federal crime of 'sexual abuse of a minor.'" *Id.* at 520. Ultimately, the Fourth Circuit determined the former Maryland statute was broader than section 3509(a)(8) in that the Maryland statute included an omission or failure to act whereas section 3509(a)(8) only involved affirmative acts. *Id.* at 521–22. Thus, the least culpable conduct contemplated by the Maryland statute was not encompassed by section 3509(a)(8). *Id.*

Before *Amos*, the Fourth Circuit interpreted a conviction under Maryland's child abuse statute, Maryland Code article 27, section 35C, in the sentencing enhancement context. *See United States v. Cabrera-Umanzor*, 728 F.3d 347 (4th Cir. 2013). A conviction under section 35C required the following elements: "(1) that the defendant is a parent, family or household member, or had care, custody, or responsibility for the victim's supervision; (2) that the victim was a minor at the time; and (3) that the defendant sexually molested or exploited the victim by means of a specific act." *Id.* at 351 (internal citations omitted). Comparing these elements against the definition of "sexual abuse of a minor" derived from *United States v. Diaz-Ibarra*, 522 F.3d 343, 352 (4th Cir. 2008)[10]—"physical or nonphysical misuse or maltreatment of a minor for a purpose associated with sexual gratification"—the Fourth Circuit concluded sexual abuse under section 35C did not amount to generic "sexual abuse of a minor" because section 35C did not require intent to gratify sexual urges as an element. *Id.* at 351–52 (internal citations omitted); *see also Diaz-Ibarra*, 522 F.3d at 352. *Cabrera-Umanzor* does not address "sexual abuse of a minor" in the context of the Act and, presumably, for this reason the Fourth Circuit did not draw on its analysis in that decision when it decided *Amos*.

Conclusion

As revealed by this overview of the disparate treatment of the term "sexual abuse of a minor" in the circuit courts of appeals, this issue is ripe for further adjudication and clarification as the different definitions lead to inconsistent results. For example, an adult who performs a sexual act on a 15- or 16-year-old will not have committed "sexual abuse of a minor" in the Ninth Circuit or Tenth Circuit if no age differential or mens rea is specified in the statute of conviction, but the same adult will suffer immigration consequences in several other circuits, possibly even based on a violation of the same state statute, thus leading to disparate immigration consequences for the same conduct. Perhaps "a national

definition of the elements of a crime is required so as to permit uniform application of federal law in determining the federal effect of prior convictions." *Estrada-Espinoza*, 546 F.3d at 1157.

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1. The current definition of a "crime of violence" under the Sentencing Guidelines includes the term "sexual abuse of a minor," but it does not further define that term. *See* U.S.S.G. §§ 2L1.2(b)(1)(A) cmt. n.1(B)(iii). However, effective November 1, 2016, an amendment to the definition of a "crime of violence" in the Sentencing Guidelines will clarify that a sexual abuse of a minor offense constitutes a "crime of violence" only if the offense qualifies as one described in 18 U.S.C. § 2241(c) or an equivalent offense under state law. *See* Amendments to the Sentencing Guidelines for United States Courts, 81 Fed. Reg. 27,262, 27,270 (May 5, 2016) (notice of submission to Congress of amendments to the sentencing guidelines effective Nov. 1, 2016); *see also* United States Sentencing Commission, "Reader-Friendly" Version of Amendments (Effective November 1, 2016) at 37, *available at* http://www.ussc.gov/guidelines/amendments/reader-friendly-version-amendments-effective-november-1-2016. This amendment is notable because it addresses the need to clarify which "sexual abuse of a minor" offenses will have sentence enhancement consequences under the Guidelines.

2. Sexually explicit conduct is defined in section 3509(a)(9)(A) in relevant part as "the intentional touching, either directly or through clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify sexual desire of any person."

3. The Sixth Circuit first addressed the definition of "sexual abuse of a minor" in the sentencing enhancement context with respect to section 101(a)(43)(A) of the Act. *See United States v. Gonzales-Vela*, 276 F.3d 763 (6th Cir. 2001).

4. In *Lara-Ruiz v. INS*, the Seventh Circuit analyzed "sexual abuse of a minor" for the first time and found the Board's definition of the term reasonable, but in that case the Board had defined "sexual abuse of a minor" in reference to 18 U.S.C. §§ 2241(c) and 2246(2)(A). 241 F.3d 934, 940 (7th Cir. 2001). It appears that the underlying unpublished Board decision in *Lara-Ruiz* was issued prior to the Board's precedential decision in *Rodriguez-Rodriguez*. *See id.* at 940 n.4.

5. The "construction of the generic § 2243 definition of 'sexual abuse of a minor' [in *Estrada-Espinoza*] encompassed statutory rape crimes only—that is, sexual offenses involving older as well as younger adolescents, not crimes prohibiting conduct harmful to younger children specifically." *United States v. Medina-Villa*, 567 F.3d 507, 514 (9th Cir. 2009).

6. *Baron-Medina* bears mention because "decisional law defining the term 'sexual abuse of a minor' in the sentencing context . . . is informed by the definition of the same term in the immigration context . . . and vice versa." *Medina-Villa*, 567 F.3d at 511–12.

7. The Tenth Circuit also found the use of section 3509(a) unreasonable because it is a procedural statute that does not define a substantive crime and accordingly does not address a crime's elements. *Id.* at 605–06. The Tenth Circuit found it unreasonable to contemplate a procedural statute to determine whether a mens rea element is included in "sexual abuse of a minor," particularly where substantive Federal crimes address the mens rea element. *Id.* at 606.

8. The Tenth Circuit previously addressed the meaning of "sexual abuse of a minor" in the sentencing enhancement context and used the "ordinary, contemporary, and common" meanings of the words in the phrase to formulate the term's definition. *See, e.g.*, *United States v. De La Cruz-Garcia*, 590 F.3d 1157, 1160 (10th Cir. 2010) (using definitions from *Black's Law Dictionary* and *Webster's Third International Dictionary Unabridged*) (internal citations omitted).

9. This case was decided after *Rodriguez-Rodriguez*. The First Circuit suggested a rejection of *Rodriguez-Rodriguez*, citing to the dissent in that case and stating "it is debatable how relevant [section 3509(a)(8)] may be." *Id.* at 186 n.2.

10. In *United States v. Diaz-Ibarra*, the Fourth Circuit determined whether the respondent's crime of child molestation constituted sexual abuse of a minor for sentencing enhancement purposes. 522 F.3d at 352–53.