April 3, 2019

By USPS Priority Mail

Michael E. Gans
Clerk of Court
United States Court of Appeals for the Eighth Circuit
Thomas F. Eagleton Courthouse
111 South 10th Street, Room 24.329
St. Louis, MO 63102

Re: [redacted] ***Petitioner, v. William P. Barr, U.S. Attorney General, Respondent***

Petitioner's Opening Brief
Nos. [redacted]
Immigration File No. [redacted]

Dear Mr. Gans:

Enclosed for filing please find 10 copies of the Opening Brief for Petitioner, [redacted] in the above case.

Thank you for your attention to this matter. I can be reached at (651) 641-0440 or john@kimhunterlaw.com with any questions.

Sincerely,

John Bruning
Attorney at Law

Enclosures as listed

NOS. [redacted]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[redacted]

Petitioner,

v.

William P. BARR,
Attorney General of the United States,

Respondent.

PETITION FOR REVIEW
FROM THE UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
AGENCY CASE NUMBER: [redacted]

PETITIONER'S OPENING BRIEF

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SUMMARY OF THE CASE

The Court should reverse, vacate, and remand the decisions by the Board of Immigration Appeals ("BIA") dismissing Petitioner's appeal and denying his motion to reconsider. Petitioner's conviction for solicitation of a minor under Minn. Stat. § 609.324, subd. 1(c)(2) is not for a "sexual abuse of a minor" aggravated felony under 8 U.S.C. § 1101(a)(43)(A) because the state statute is categorically broader than the generic definition of the federal offense. In *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017), the Supreme Court held that the generic definition of the "sexual abuse of a minor" did not include state offenses of a sexual nature where the victim could have been age 16 or older. Because Petitioner's statute of conviction requires the victim to be under 18 years old but at least 16 years old, the state statute criminalizes conduct outside the scope of the federal statute, as interpreted by the Supreme Court.

Prior to *Esquivel-Quintana*, the BIA held that "minor" included victims under the age of 18. In dismissing Petitioner's appeal and denying his motion to reconsider, the BIA determined that definition of "minor" still includes victims between the ages of 16 and 18 in some cases, despite the holdings of *Esquivel-Quintana* and this Court. This conclusion constitutes reversible legal error.

Petitioner requests oral argument of 20 minutes per side to present these important issues to the Court.

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STATEMENT OF JURISDICTION

[redacted] ("[redacted] seeks review of the decision of the Board of Immigration Appeals ("BIA") issued on June 26, 2018, dismissing his appeal of the December 4, 2017, decision of the Immigration Judge ("IJ"), which dismissed his motion to reopen. [redacted] also seeks review of the decision of the BIA issued on November 14, 2018, denying his motion to reconsider. The decisions of the BIA constitute a final order of removal under 8 U.S.C. §§ 1252(a)(1) and (b)(6) and are thus subject to review by this Court.

On July 25, 2018, within 30 days of the BIA decision dismissing the appeal, [redacted] filed a timely petition for review with this Court per 8 U.S.C. § 1252(b)(1). This appeal was docketed as No. [redacted] On December 14, 2018, within 30 days of the BIA decision denying his motion to reconsider, [redacted] filed a second timely petition for review with this Court. This second appeal was docketed as No. [redacted] These two petitions were consolidated pursuant to 8 U.S.C. § 1252(b)(6).

This Court has subject matter jurisdiction over this petition under 8 U.S.C. § 1252.

STATEMENT OF ISSUES

Can Petitioner's conviction for solicitation of a minor, where the victim statutorily must be at least 16 years old, be lawfully classified as a "sexual abuse of a minor" aggravated felony following *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017)?

Most Apposite Authorities:

- 8 U.S.C. § 1101(a)(43)(A)
- *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017)
- *Clark v. Martinez*, 543 U.S. 382 (2005)
- *Garcia-Urbano v. Sessions*, 890 F.3d 726 (8th Cir. 2018)
- *Shroff v. Sessions*, 890 F.3d 542 (5th Cir. 2018)

STATEMENT OF THE FACTS AND CASE

Petitioner [redacted] ("[redacted] is an ethnic Hmong citizen of Laos who entered the United States as a refugee on June 27, 1990, at St. Paul, Minnesota. A.R. 73/Add. 6; A.R. 434, 449.[1] He adjusted his status to that of a lawful permanent resident on March 2, 1994, retroactive to June 27, 1990. A.R. 73/Add. 6; A.R. 449. [redacted] is a veteran of the Vietnam War in service of the United States in Laos, and was granted withholding of removal in 2005 under 8 U.S.C. § 1231(b)(3)(A), in significant part due to that service. A.R. 73/Add. 6; A.R. 79/Add. 10; A.R. 125, 237.

On June 21, 2002, [redacted] was convicted of Engaging in Prostitution with a Child in violation of Minn. Stat. § 609.324, subd. 1(c)(2), involving a victim who was sixteen years old.[2] A.R. 73/Add. 6; A.R. 127/Add. 17; 130. He was sentenced

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[1] All "A.R." cites to Certified Administrative Record filed in No. [redacted] which contains the entire administrative record of the case.

[2] At the time of the offense, and at all times since, the statute read:

> (c) Whoever intentionally does any of the following may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both: [. . .]
>
> (2) hires or offers or agrees to hire an individual under the age of 18 years but at least 16 years to engage in sexual penetration or sexual contact.

Minn. Stat. § 609.324, subd. 1(c)(2); *see also* 1986 Minn. Laws 794 (enacting current statutory language).

to serve three days in jail, with credit for three days. A.R. 128/Add. 18. [redacted] was subsequently placed in removal proceedings on February 4, 2005, the by former Immigration and Naturalization Service. A.R. 449/Add. 16. He was charged with removability under 8 U.S.C. § 1227(a)(2)(A)(iii) for a conviction for an aggravated felony defined in § 1101(a)(43)(A), related to sexual abuse of a minor, and under § 1227(a)(2)(E)(i) for a conviction for a crime of child abuse. *Id.* The first charge was conceded by [redacted] and sustained, and the second charge was withdrawn by the government. *Id.* At that time, under the precedent of the Board of Immigration Appeals ("BIA"), the conviction was definitively for a "sexual abuse of a minor" aggravated felony. *See Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999) (*en banc*); *see also Loeza-Dominguez v. Gonzales*, 428 F.3d 1156 (8th Cir. 2005) (applying *Rodriguez-Rodriguez*). On April 5, 2005, the Immigration Judge ("IJ") granted [redacted] withholding of removal to Laos under 8 U.S.C. § 1231(b)(3)(A) and ordered him removed to any country other than Laos who will accept him. A.R. 79/Add. 10.

On May 30, 2017, the Supreme Court issued its decision in *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017). There, the Court held that a state conviction did not satisfy the federal generic definition of the "sexual abuse of a minor" aggravated felony where the victim, under the statute of conviction, could have been age 16 or older. 137 S. Ct. at 1568. This decision overturned a prior

precedential decision of the BIA, *Matter of Esquivel-Quintana*, 26 I&N Dec. 469 (BIA 2015), and rejected the BIA's prior holdings that "minor" is defined as under the age of 18. *See Matter of V-F-D-*, 23 I&N Dec. 859 (BIA 2006); *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991. Following that decision, on August 25, 2017, [redacted] filed a Motion to Reopen his removal order before the IJ. A.R. 73/Add. 6; A.R. 83. In that motion, [redacted] asserted that the holding of *Esquivel-Quintana* extended to his conviction, and therefore the conviction was not properly for an aggravated felony; as a result, he was no longer lawfully removable as charged and his case should be reopened for further proceedings. A.R. 75/Add. 8; A.R. 84.

The IJ denied this motion on December 4, 2017. A.R. 73/Add. 6. The IJ held that *Esquivel-Quintana* applied only to "a statute of conviction that criminalizes sexual intercourse *solely* based on the age of the participants, e.g., many statutory rape statutes, [which] only include victims under the age of 16 years." A.R. 75/Add. 8. Because [redacted] statute of conviction criminalized both age and conduct, the IJ found it was still an aggravated felony under prior BIA precedent. *Id.* The IJ further held that *Esquivel-Quintana* did not constitute "a fundamental change of law affecting his removability or eligibility for relief." *Id.*

[redacted] subsequently appealed that decision to the BIA on January 2, 2018. A.R. 22/Add. 3; A.R. 25, 56. The BIA denied the appeal in a single-member decision issued June 26, 2018. A.R. 22/Add. 3. The BIA's decision largely tracks

the decision of the IJ. *Id.* The Board examined the statute of conviction in light of the Board's prior holdings in *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991, 995–96 (BIA 1999), which incorporated a federal civil statute as the generic definition of "sexual abuse of a minor," and *Matter of V-F-D-*, 23 I&N Dec. 859 (BIA 2006), which defined "minor" for purposes of 8 U.S.C. § 1101(a)(43)(A) to be under the age of 18. A.R. 23/Add. 4; *see also* 18 U.S.C. § 3509(a)(8). The Board concluded that *Matter of Rodriguez-Rodriguez* and *Matter of V-F-D-* remained in place following *Esquivel-Quintana*, stating that "the Supreme Court did not hold that the generic definition of all 'sexual abuse of a minor cases' must include only victims under the age of 16." A.R. 22/Add. 3. Therefore, because the Minnesota statute "does not criminalize sexual contact based *solely* on the age of the participants," "minor" could include a 17-year-old victim in spite of the Supreme Court's ruling. *Id.* [redacted] filed a Petition for Review of this BIA decision in a timely manner with this Court on July 25, 2018.

On July 26, 2018, [redacted] filed a motion to reconsider with the BIA, citing additional circuit court interpretation of *Esquivel-Quintana*. A.R. 3–4/Add. 1–2; A.R. 11–13; *see Bedolla-Zarate v. Sessions*, 892 F.3d 1137 (10th Cir. 2018); *Garcia-Urbano v. Sessions*, 890 F.3d 726 (8th Cir. 2018); *Shroff v. Sessions*, 890 F.3d 542 (5th Cir. 2018); *Quintero-Cisneros v. Sessions*, 891 F.3d 1197 (9th Cir. 2018); *Almanza v. Att'y Gen. U.S.*, 723 F. App'x 129 (3d Cir. 2018). In a decision

dated November 14, 2018, again from a single-member panel, the BIA denied reconsideration, finding that these cases—including "only one case arising in the United State [sic] Court of Appeals for the Eighth Circuit"—do not effect whether the conviction is for an aggravated felony. A.R. 3–4/Add. 1–2. [redacted] filed a second Petition for Review of the BIA's decision denying reconsideration in a timely manner with this Court on December 14, 2018.

The two petitions were consolidated pursuant to 8 U.S.C. § 1252(b)(6).

SUMMARY OF ARGUMENT

This Court should find that Petitioner's conviction for solicitation of a minor under Minn. Stat. § 609.324, subd. 1(c)(2), is not a "sexual abuse of a minor" aggravated felony and reverse, vacate, and remand the decision of the Board of Immigration Appeals ("BIA").

At the time of [redacted] 2005 removal order, the generic definition of "sexual abuse of a minor" as found in 8 U.S.C. § 1101(a)(43)(A) included a victim who was 16 or 17 years old. *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999) (*en banc*). However, the Supreme Court, in *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017), recently reversed the BIA and determined for the first time that "minor" requires that the victim categorically be under the age of 16. In light of this decision, [redacted] moved the Immigration Judge ("IJ") to reopen his removal order, arguing that his conviction was no longer for an aggravated felony because his offense required the victim to be age 16 or older. That motion was denied, and he appealed to the BIA. The BIA dismissed his appeal, and then denied his motion to reconsider.

Below, the IJ and the BIA attempted to distinguish [redacted] conviction from that of *Esquivel-Quintana*, suggesting that, because the conviction was for an offense other than statutory rape, the definition of "minor" from *Esquivel-Quintana* does not apply, but rather the prior definition of "minor" controlled. This

interpretation leads to the absurd and impermissible result that a single word, used in a single context, can mean different, contradictory things—"minor" cannot simultaneously mean both "under 16" and "at least 16 but under 18." This reasoning also contravenes the Supreme Court's clear decision and the "unambiguous" language of the statute.

While *Esquivel-Quintana* arose in the context of a statutory rape offense, its reasoning cannot be so narrowly limited. First, the Courts of Appeals, and even the BIA, in applying *Esquivel-Quintana*, have found non-statutory rape offenses to be overbroad where the statute of conviction does not require the victim to be under 16. *See, e.g.*, *Shroff v. Sessions*, 890 F.3d 542 (5th Cir. 2018). This Court has not apparently reached this question yet; however, it has, in another case, found that "the [Immigration and Nationality Act] unambiguously requires the victim of sexual abuse to be younger than sixteen years old." *Garcia-Urbano v. Sessions*, 890 F.3d 726, 729 (8th Cir. 2018).

Second, the BIA's proposed framework, as described in its decisions in this case, would result in the same word, "minor," having differing definitions even within the scope of the same federal generic offense. This both goes against well-established principles of statutory interpretation and creates mischief as a matter of constitutional due process. *See Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224, 232 (2007) (holding that "identical words and phrases within the

same statute should normally be given the same meaning"); *Clark v. Martinez*, 543 U.S. 371, 380–81 (2005) ("[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail."). Under these principles, in addition to the clear directives of the Court, "minor" can only have one meaning: under age 16.

Properly analyzed, [redacted] conviction is categorically not for a "sexual abuse of a minor" aggravated felony, because the statute of conviction requires the victim to be at least 16 years old. Because of this legal error, this Court should reverse and vacate the decision of the BIA, and remand to the BIA for further proceedings.

ARGUMENT

I. Standard of Review

This Court reviews questions of law *de novo,* including whether the BIA applied the correct legal standard. *Mayorga-Rosa v. Sessions*, 888 F.3d 379, 382 (8th Cir. 2018); *Doe v. Holder*, 651 F.3d 824, 829 (8th Cir. 2011). This Court also "reviews the BIA's decision as the final agency action, but to the extent the BIA adopts the findings of the IJ, this court reviews those findings as part of the final agency action." *R.K.N. v. Holder*, 701 F.3d 535, 537 (8th Cir. 2012).

II. The Element "Minor" of the Generic Definition for the "Sexual Abuse of a Minor" Aggravated Felony Can Only Be Met Where the Statute of Conviction Requires the Victim to Be Under Age 16.

A. *Esquivel-Quintana* Held That the Generic Definition of "Sexual Abuse of a Minor" Requires the Victim to Be Under Age 16.

In *Esquivel-Quintana v. Sessions*, the Supreme Court addressed the definition of an aggravated felony for "sexual abuse of a minor" under 8 U.S.C. § 1101(a)(43)(A). 137 S. Ct. 1562 (2017). In 2009, Mr. Esquivel-Quintana pleaded no contest in California to "unlawful sexual intercourse with a minor who is more than three years younger than the perpetrator" under Cal. Penal Code §261.5(c). *Id.* at 1567. For purposes of that offense, California defines "minor" as "a person under the age of 18 years." *Id.* Notwithstanding that the California offense here involved or could have involved consensual sex with a person who was age 16 or

17, conduct which would not have constituted a crime under federal and most states' statutory rape laws, the IJ there found that the conviction qualified categorically as an aggravated felony of "sexual abuse of a minor." *Id.* Both the BIA and the Sixth Circuit Court of Appeals affirmed the IJ's deportability finding. *Esquivel-Quintana v. Lynch*, 810 F.3d 1019 (6th Cir. 2016); 26 I&N Dec. 469 (BIA 2015).

The Supreme Court reversed, concluding that the petitioner was not deportable for the aggravated felony of "sexual abuse of a minor." 137 S. Ct. at 1568. In doing so, the Court rejected the Board's conclusion that a statutory rape offense involving a 16- or 17-year-old victim could qualify as "sexual abuse of a minor" where the statute did not require a meaningful age difference between the victim and offender. *Id.* at 1569. Instead, the Court reasoned that, "[t]o qualify as sexual abuse of a minor, the statute of conviction must prohibit certain sexual acts based at least in part on the age of the victim." *Id.*

The Court looked specifically to the meaning of "sexual abuse" at the time that § 1101(a)(43)(A) was added to the Immigration and Nationality Act ("INA") in 1996, determining that the meaning of the term "included the engaging in sexual contact with a person who is below a specified age or who is incapable of giving consent because of age or mental or physical incapacity." *Id.* Further, "[b]y providing that the abuse must be 'of a minor,' the INA focuses on age, rather than

mental or physical incapacity. Accordingly, to qualify as sexual abuse of minor, the statute of conviction must prohibit certain acts based at least in part on the age of the victim." *Id.* The Court cited statutory rape laws as "one example of this category of crimes." *Id.* The Court also noted that "reliable dictionaries provide evidence that the 'generic' age—in 1996 and today—is 16." *Id.*

The Court rejected the government's proposed definition of "sexual abuse of a minor" as "conduct that is (1) illegal, (2) involves sexual activity, and (3) is directed at a person younger than 18 years old." *Id.* The Court found this proposed definition to be contradicted by the very dictionary definition the government relied on, distinguished "offenses predicated on a special relationship of trust between the victim and offender" which "frequently have a different age requirement than the general age of consent," and noted that the government's definition of "minor" referred to the age of legal competence, not the age of consent. *Id.* at 1569–70. Further, the Court explained that the government's definition was inconsistent with the categorical approach, as it eviscerated any "generic" definition and instead defined the offense as "whatever is illegal under the particular law of the State where the defendant was convicted." *Id.* at 1570 (citing *Taylor v. United States*, 495 U.S. 575, 591, 592 (1990)).[3]

[3] There is no question that the categorical approach applies to this statute. *Id.* at 1568 ("[T]o determine whether an alien's conviction qualifies as an aggravated felony . . . we 'employ a categorical approach by looking to the statute of

The Court then determined the text of the statute, the structure of the INA, and evidence from the federal and state criminal codes confirmed that the generic age of "minor" is 16. *Id.* at 1570–72. In particular, the Court examined 18 U.S.C. § 2243, the federal criminal sexual abuse of a minor statute. *See id.* at 1570; *see also id.* at 1571 ("[W]e rely on § 2243(a) for evidence of the meaning of sexual abuse of a minor, but not as providing the complete or exclusive definition."). As the Court notes, Congress amended § 2243 in the Omnibus Consolidated Appropriations Act of 1997, which also added "sexual abuse of a minor" to § 1101(a)(43)(A), suggesting that the former statute is probative of the meaning of the term for immigration purposes. *Id.* at 1570–71. The Court also looked to state criminal codes "for additional evidence about the generic meaning of sexual abuse of a minor," finding that the clear majority of jurisdictions set the age of consent at 16 or lower. *Id.* at 1571. The Court recognized that several states set a separate age of consent for offenses—including offenses titled "sexual abuse of a minor"—where there is a special relationship between the offender and the victim, such as where "the offender occupied a position of authority in relation to the victim," where the victim was a student and the offender a teacher or school employee at the same school, or otherwise where "the perpetrator and the victim are in a

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conviction . . . .") (quoting *Kawashima v. Holder*, 565 U.S. 478, 483 (2012); *see also Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013).

significant relationship of trust," given the inherent power dynamic affecting the ability to consent. *Id.* at 1571–72. But the Court did not reach this particular issue, instead finding that sexual conduct that is "abusive solely because of the ages of the participants, the victim must be younger than 16." *Id.* at 1572. The Court concluded by finding that the "Board's interpretation of sexual abuse of a minor" is not entitled to *Chevron* deference, because "the statute, read in context, unambiguously forecloses the Board's interpretation." *Id.* at 1572; *see Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984).

B. Subsequent Circuit Court and BIA Decisions Have Reaffirmed the Change in Definition of the Term "Minor."

Since the Court's decision in *Esquivel-Quintana*, several courts, including this Court, have further interpreted "sexual abuse of a minor" to require that the victim be under the age of 16.

On May 17, 2018, this Court denied the petition for review of a petitioner who was convicted of Minnesota criminal sexual conduct in the third degree, Minn. Stat. § 609.344, subd. 1(b), which criminalizes sexual contact with a victim at least 13 but less than 16 years of age with an age difference greater than 24 months. *Garcia-Urbano v. Sessions*, 890 F.3d 726, 727 (8th Cir. 2018). The petitioner was ordered removed on the basis of a conviction for a "sexual abuse of a minor" aggravated felony. *Id.* at 728. The court rejected the petitioner's arguments that the generic definition of "sexual abuse of a minor" required an age

difference of at least two years and one day, citing to *Esquivel-Quintana*'s holding that "the INA unambigiously requires the victim of sexual abuse to be younger than sixteen years old." *Id.* at 729 (citing 137 S. Ct. at 1572–73); *see also id.* at 730 (specifying that the generic offense includes an "unambiguous rule that a victim must be younger than sixteen years").

The Tenth Circuit subsequently adopted this Court's reasoning in *Garcia-Urbana* rejecting requirements of an age difference or element of seriousness. *Bedolla-Zarate v. Sessions*, 892 F.3d 1137, 1141 (10th Cir. 2018). The court there agreed with this Court's statement

> that if the sexual abuse of a minor generic offense "requires an element of seriousness beyond sexual penetration with a person too young to consent [it] would effectively remove from the INA's purview all statutory rape offenses that are based solely on the age of the participants" and that "[a]dding an age-differential requirement that is greater than two years and a day to the INA's unambiguous rule that a victim must be younger than sixteen years would eliminate from the generic offense the majority of all age-based state statutory rape offenses in effect when the federal provision was enacted."

Id. at 1141–42 (quoting *Garcia-Urbano*, 890 F.3d at 730) (alterations in original). The Tenth Circuit, like this Court, therefore strictly interprets *Esquivel-Quintana* to hold that the generic offense of "sexual abuse of a minor" requires a victim under 16 years old.

Two days before the Eighth Circuit's decision in *Garcia-Urbano*, the Fifth Circuit addressed solicitation of a minor in the context of *Esquivel-Quintana*.

Shroff v. Sessions, 890 F.3d 542 (5th Cir. 2018). There, the petitioner was convicted of online solicitation of a minor under Texas Penal Code § 33.021(c) and ordered removed on the basis of a "sexual abuse of a minor" aggravated felony. *Id.* at 543. On direct appeal, the Board upheld the charge of removal because the offense "(1) involved a minor, (2) was sexual in nature, and (3) was abusive."[4] *Id.* at 544. Before *Esquivel-Quintana*, the Fifth Circuit "defined a minor as anyone under the age of eighteen," while the Texas statute established the age of majority to be seventeen. *Id.* (citing *United States v. Rodriguez*, 711 F.3d 541, 560 (5th Cir. 2013) (*en banc*)). The circuit court rejected the petitioner's arguments that physical contact and true minority (as opposed to a police officer posing as a minor) are elements of the generic offense. *Id.* at 544–45.

However, the circuit court found that *Esquivel-Quintana* "establish[es] an age requirement that renders Shroff's statute of conviction overbroad." *Id.* at 545 (citing *United States v. Galvan*, 699 F. App'x 314, 315 n.1 (5th Cir. 2017) (per

[4] This three-element definition has also been upheld by the Ninth Circuit following *Esquivel-Quintana*. *Quintero-Cisneros v. Sessions*, 891 F.3d 1197, 1200 (9th Cir. June 11, 2018) ("We have developed two definitions specifying the elements of the federal generic offense of sexual abuse of a minor. The first definition is not relevant for our purposes, as it applies mainly to statutory rape offenses. The second definition, which applies to all other offenses, is the one we are concerned with here. That definition requires proof of three elements: (1) sexual conduct, (2) with a minor, (3) that constitutes abuse."); *see also United States v. Medina-Villa*, 567 F.3d 507, 513–14 (9th Cir. 2009) (bifurcating and articulating the "sexual abuse of a minor" generic definitions for statutory rape and other offenses).

curiam) (finding the generic definition following *Esquivel-Quintana* requires "that the victim be younger than 16" but upholding separate ground of removability), *vacated on other grounds sub nom. Ramirez Galvan v. United States*, 138 S. Ct. 2676 (2018)). The court expressly rejected the government's argument that "*Esquivel-Quintana* has no impact on this case, however, because it is limited to 'statutory rape offenses that criminalize sexual intercourse based solely on the age of the participants.' Shroff was not convicted under Texas's statutory rape provision but instead under the provision for online solicitation of a minor." *Id.* (quoting *Esquivel-Quintana*, 137 S. Ct. at 1568). The court explained:

> That distinction, though colorable, is ultimately untenable. The government is correct that *Esquivel-Quintana* did not rule broadly on the generic definition of sexual abuse of a minor, but the opinion demonstrates that its holding applies to online solicitation of a minor.
>
> First, the Court found that the statute of conviction must "prohibit certain sexual acts based at least in part on the age of the victim" and that "[s]tatutory rape laws are one example of this category of crimes." *Id.* at 1569. The Court thus thought its age-specific holding would apply to a category of crimes not unlike statutory rape. Online solicitation of a minor similarly criminalizes conduct based solely on the age of the participants.
>
> Second, *Esquivel-Quintana* looked to the INA. Sexual abuse of a minor is categorized as an "'aggravated' offense" listed alongside murder and rape, 8 U.S.C. § 1101(a)(43)(A), which the Court called "among the most heinous crimes [the INA] defines as aggravated felonies." *Esquivel-Quintana*, 137 S. Ct. at 1570. Therefore, the Court concluded that "sexual abuse of a minor encompasses only especially egregious felonies." *Id.* If actual sexual intercourse with a seventeen-year-old is not "especially egregious," neither is the online solicitation of a seventeen-year-old.

Id. As a result, the court held that solicitation of a minor requires that "the minor must actually be under sixteen, or the defendant must *believe* the minor is under sixteen," and found the petitioner's offense does not qualify as a "sexual abuse of a minor" aggravated felony. *Id.* at 545–46.

Finally, two Circuit Courts have also reinforced [redacted] claim that his conviction is not a "sexual abuse of a minor" aggravated felony. The Fifth Circuit has recognized that *Esquivel-Quintana* has foreclosed sexual abuse of a minor aggravated felonies where the minor is 16 or older except in limited circumstances. *See Galvan*, 699 F. App'x at 315 n.1 (finding that a conviction for sexual assault in Texas, under a subsection criminalizing sex with a child under 17, could not support a "sexual abuse of a minor" aggravated felony charge, but did not prevent a crime of violence aggravated felony finding); *see also United States v. Montanez-Trejo*, 708 F. App'x 161, 170 (5th Cir. 2017) ("As an initial matter, the Government recognized that *Esquivel-Quintana* rejected our conclusion in *Rodriguez* that the generic offense of sexual abuse of a minor encompasses state statutes defining minor to include individuals who are younger than 18 (rather than only individuals who are younger than 16)."). Similarly, the Third Circuit noted that "the Court did not decide that the generic crime of 'sexual abuse of a minor' could never occur when the victim was at least 16 years old," but gave as a sole exception where a position of trust is implicated. *Mondragon-Gonzalez v. Att'y*

Gen. U.S., 884 F.3d 155, 160 (3d Cir. 2018) (sustaining the "crime of child abuse" ground of removal based on the petitioner's conviction for "unlawful contact with a minor" related to child pornography, but noting that the IJ had denied the charge of sexual abuse of a minor).

The BIA's own decisions after *Esquivel-Quintana*, apart from the instant case, are consistent with this view. Shortly after that decision, the BIA—in applying a different statute under that framework—characterized *Esquivel-Quintana* as holding "that the generic definition of aggravated felony sexual abuse of a minor under section 101(a)(43)(A) of the Act 'requires that the victim be younger than 16.'" *Matter of Deang*, 27 I&N Dec. 57, 63 (BIA 2017). In several unpublished decisions, the BIA has found statutes of conviction to be overbroad in relation to the generic definition of "sexual abuse of a minor" as interpreted by *Esquivel-Quintana*. *See In re Dave*, No. AXXX-XX6-579, 2018 WL 7572454 (BIA Nov. 29, 2018) (reversing IJ and granting reopening in light of *Esquivel-Quintana* because statutory rape offense included victims under 17); *In re Peralta-Colin*, No. AXXX-XX2-648, 2018 WL 3007188 (BIA Apr. 16, 2018) (finding Texas "sexual contact" statute overbroad on age). The BIA has applied the Supreme Court's definition of "minor" in several cases as well. *See In re Rodriguez-Danu*, AXXX-XX8-919 (BIA Jan. 11, 2019) (finding conviction for "traveling to meet a minor" under Florida's child pornography statute, Fla. Stat.

§ 847.0135(4)(a), to be overbroad as it included 16- and 17-year-olds) [included at Add. 27–28]; *In re Shroff*, No. AXXX-XX2-009, 2018 WL 5921041 (BIA Sept. 27, 2018) (finding Texas online solicitation statute overbroad on remand from the 5th Cir.).

No subsequent interpretation of *Esquivel-Quintana* by the Courts of Appeals, other Federal courts, or the Board, apart from [redacted] appeal, sets a separate definition of "minor" for purposes of "sexual abuse of a minor" aggravated felonies other than what was established by *Esquivel-Quintana* and the cases described above.[5]

C. A Statutory Term Must Be Defined Consistently, and May Not Carry Different Meanings Within the Same Statute.

The reasoning underlying the BIA's denial of [redacted] appeal would create an untenable and impracticable patchwork of definitions for the sexual abuse of a

[5] Indeed, there are numerous Circuit Court decisions addressing "statutory rape"-type charges and specifying in broad strokes that the age of the victim under the generic definition of "sexual abuse of a minor"—without distinguishing between "sexual abuse of a minor" offenses—must be under 16. *See, e.g., Almanza v. AG United States*, 723 F. App'x 129, 133, n.12 (3d Cir. 2018) (finding a categorical match where the statute of conviction required a victim under age 16) (citing *Equivel-Quintana*, 137 S. Ct. at 1568 ("[T]he generic federal definition of sexual abuse of a minor requires that the victim be younger than 16.")); *United States v. Sanchez-Arvizu*, 893 F.3d 312, 315 (5th Cir. 2018) (finding statute overbroad); *United States v. Hernandez-Avila*, 892 F.3d 771, 773 (5th Cir. 2018) (same); *Correa-Diaz v. Sessions*, 881 F.3d 523 (7th Cir. 2018) (upholding removal where statute required victim to be under 16); *United States v. Santos-Gabino*, 732 F. App'x 320, 321 n.1 (5th Cir. 2018).

minor aggravated felony that violate the due process and notice concerns that require the use of the categorical approach. *See Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018) ("The void-for-vagueness doctrine, as we have called it, guarantees that ordinary people have 'fair notice' of the conduct a statute proscribes."); *Johnson v. United States*, 135 S. Ct. 2551, 2556–57 (2015) ("The prohibition of vagueness in criminal statutes 'is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,' and a statute that flouts it 'violates the first essential of due process.'") (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)); *McBoyle v. United States*, 283 U.S. 25, 27 (1931). By holding that the definition of "minor" for purposes of the generic offense of sexual abuse of a minor under 8 U.S.C. § 1101(a)(43)(A) varies depending on the elements of the statute of conviction or the underlying conduct, the BIA is unnecessarily creating impermissible vagueness. *See Clark v. Martinez*, 543 U.S. 371, 382 (2005) (finding that construing the same term differently "would render every statute a chameleon, its meaning subject to change depending on the presence or absence of [other factors] in each individual case").

The Supreme Court interpreted "sexual abuse of a minor" to contain two elements: "sexual abuse"[6] and "of a minor." *Esquivel-Quintana*, 137 S. Ct. at 1569. Because "sexual abuse of a minor" was added to the INA in 1996, the Court looked to the ordinary meaning of those terms at that time:

> At that time, the ordinary meaning of "sexual abuse" included "the engaging in sexual contact with a person who is below a specified age or who is incapable of giving consent because of age or mental or physical incapacity." By providing that the abuse must be "of a minor," the INA focuses on age, rather than mental or physical incapacity. Accordingly, to qualify as sexual abuse of a minor, the statute of conviction must prohibit certain sexual acts based at least in part on the age of the victim.

Id. The Court further rejected the Government's proposed definition that "sexual abuse of a minor" generically means "conduct that (1) is illegal, (2) involves sexual activity, and (3) is directed at a person younger than 18 years old." *Id.* at 1569–70 ("[T]he Government's definition turns the categorical approach on its head by defining the generic federal offense of sexual abuse of a minor as whatever is illegal under the particular law of the State where the defendant was convicted. Under the Government's preferred approach, there is no 'generic' definition at all.").

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[6] Assuming, *arguendo*, that *Esquivel-Quintana* did *not* abrogate *Matter of Rodriguez-Rodriguez*, the definition adopted by the BIA there only defines the "sexual abuse" aspect and can easily co-exist with the definition of "minor" established by the Court in *Esquivel-Quintana* and the Fifth Circuit in *Shroff*. *See* 22 I&N Dec. 991, 995 (BIA 1999) (quoting 18 U.S.C. § 3509(a)(8)); *see also In re Rodriguez-Danu*, Add. 27.

The Court specifically reserved the issue of "whether the generic offense requires a particular age differential between the victim and the perpetrator, and whether the generic offense encompasses sexual intercourse involving victims over the age of 16 that is abusive because of the nature of the relationship between the participants." *Id.* at 1572. But this does not resolve the question here, because there is no age differential element, nor is there a relationship element, commonly understood as occupying "a position of authority in relation to the victim." *Id.*

By defining "minor" as under age 16 in some instances and under age 18 in others, where there is not a position of authority or significant age difference, the generic definition of sexual abuse of a minor devolves to the very definition the Court sought to avoid: "whatever is illegal under the particular law of the State where the defendant was convicted," or, in other words, "no generic definition at all." *Id.* at 1569–70. This approach creates unconstitutional ambiguity as to the definition of "minor" where there need not be any. Despite the holding of the Supreme Court which Federal courts have found to be clear, noncitizen defendants are nevertheless still faced with the prospect of attempting to determine whether an offense constitutes a sexual abuse of a minor aggravated felony through a matrix of alternative definitions of "minor" depending on the state and the elements of the offense, and the law of the Circuit, in addition to determining categorically whether the elements of the offense match the multiple alternative and

contradictory definitions of "sexual abuse" currently employed. This clearly results in "more unpredictability and arbitrariness than the Due Process Clause tolerates." *Dimaya*, 138 S. Ct. at 1208 (quoting *Johnson*, 135 S. Ct. at 2558).

The Fifth Circuit has offered a straightforward and reasonable solution. By maintaining a consistent definition for "minor" as under age 16, except in the limited and particular cases identified by the Supreme Court, the notice, predictability, and fairness requirements of due process are met. No court since *Esquivel-Quintana* was issued has disagreed with this approach, and the cases interpreting *Esquivel-Quintana* all suggest this is the proper interpretation. Moreover, this approach is necessary under the canon of constitutional avoidance to dispense with the serious due process issues involved. *See Jennings v. Rodriguez*, 138 S. Ct. 830, 842 (2018); *Clark v. Martinez*, 543 U.S. at 380–81 ("[W]hen deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail."); *Rust v. Sullivan*, 500 U.S. 173, 190–91 (1991) (applying canon to agency regulations); *Crowell v. Benson*, 285 U.S. 22, 62 (1932) ("[I]t is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided."); *see also Warger v. Shauers*, 135 S. Ct. 521, 529 (2014) ("The canon 'is a tool for choosing between competing plausible

interpretations' of a provision. It 'has no application in the absence of . . . ambiguity.'") (quoting *Clark v. Martinez*, 543 U.S. at 381; *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 (2001)) (alterations in original).

Still, even under ordinary statutory interpretation, the same word may not be defined two separate, contradictory ways at once, such that "minor" alternately means under 16 years or under 18 years. *See Powerex Corp. v. Reliant Energy Services, Inc.*, 551 U.S. 224, 232 (2007) (holding that "identical words and phrases within the same statute should normally be given the same meaning"); *Clark v. Martinez*, 543 U.S. at 378 ("To give these same words a different meaning for each category would be to invent a statute rather than interpret one. . . . [The statute] cannot, however, be interpreted to do both at the same time."); *Federal Communications Com'n v. American Broadcasting Co.*, 347 U.S. 284, 294 (1954) ("There cannot be one construction for the Federal Communications Commission and another for the Department of Justice."); *Matter of Deang*, 27 I&N Dec. at 59–63 (resolving the mens rea requirement for the receipt of stolen property aggravated felony offense following *Esquivel-Quintana*'s framework); *see also Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) ("Because we must interpret the statute consistently, whether we encounter its application in a criminal or noncriminal context, the rule of lenity applies."). Further, the BIA provided "no

sound reason in the statutory text or context to disregard the ordinary meaning" of the term "minor" as determined by the Supreme Court. *See Federal Communications Commission v. AT & T Inc.*, 562 U.S. 397, 407 (2011) ("[C]onstruing statutory language is not merely an exercise in ascertaining 'the outer limits of [a word's] definitional possibilities." (quoting *Dolan v. Postal Service*, 546 U.S. 481, 486 (2006)). This is evident from the necessary application of the categorical approach, which requires a "uniform definition" for federal offenses. *Taylor v. United States*, 495 U.S. 575, 592 (1990).

D. After *Esquivel-Quintana*, Matter of Rodriguez-Rodriguez Is No Longer Good Law.

At the time of [redacted] conviction and removal order, *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991 (BIA 1999) (*en banc*), governed. There, the Board relied on language from the federal civil law definition of "sexual abuse of a minor" codified at 18 U.S.C. § 3509(a)(8),[7] which covered "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

[7] Notably, 18 U.S.C. § 3509 is a criminal procedure statute, under Chapter 223 of Title 18, "Witnesses and Evidence," and the title of § 3509 is "Child victims' and child witnesses' rights." § 3509. Thus, the generic definition adopted by the BIA is not a criminal statute, but a statute governing accommodations for live testimony by child witnesses in federal criminal cases.

children." 22 I&N Dec. at 996. The definition set forth in the federal criminal "sexual abuse of a minor" statute, 18 U.S.C. § 2243, was rejected by the Board as "too restrictive to encompass the numerous state crimes that can be viewed as sexual abuse." *Id.*

Thereafter, the Board in *Matter of V-F-D-* applied *Matter of Rodriguez-Rodriguez* and additionally decided to adopt the age of 18 as the age of majority from the civil statute, rather than the age of 16 found in the federal criminal statute. 23 I&N Dec. 859, 861–62 (BIA 2006). There was some debate within the Board panel as to whether the formalization of an age requirement was a modification of *Matter of Rodriguez-Rodriguez*, but the majority made explicit that they were merely "following the rationale stated there." *Id.* at 862 n.7; *see id.* at 864–85 (Cole, J., concurring).

Matter of Esquivel-Quintana further reinforced the *Matter of Rodriguez-Rodriguez* and *Matter of V-F-D-* standards to include "sexual abuse statutes that may include 16- or 17-year-olds as victims and do not make lack of consent an element of the offense," including statutory rape. 26 I&N Dec. 469, 475 ("[W]e have deemed any relevant offense to be 'sexual abuse of a minor' if it meets the definition of 'sexual abuse' in *Matter of Rodriguez-Rodriguez* and the victim is under 18 years old, as required by *Matter of V-F-D-*.").

The Court in *Esquivel-Quintana* explicitly rejected this precedent in its approach and reasoning, even though it did not reference *Matter of Rodriguez-Rodriguez* or *Matter of V-F-D-* by name. Primary evidence of this fact comes from the Court's focus on 18 U.S.C. § 2243—the federal criminal statute disregarded by the Board in the above cases in favor of the significantly broader civil statute pertaining to the testimony of child witnesses—while outright ignoring the civil statute in its analysis. *Esquivel-Quintana*, 137 S. Ct. at 1570–71. Further, Sixth Circuit's decision in *Esquivel-Quintana v. Lynch*, 810 F.3d 1019 (6th Cir. 2016), relied on deference to those two cases to reach its decision regarding the age limit that the Court rejected. *See In re Che*, AXXX-XX8 293, 2017 Immig. Rptr. LEXIS 10281, n.1 (BIA Mar. 10, 2017) (noting that the 6th Circuit gave deference to *Matter of Rodriguez-Rodriguez*). As a result, the Court could not have possibly held that that part of the decision was invalid but still upheld the agency decisions the Circuit Court adopted wholesale.

Given that *Rodriguez-Rodriguez, V-F-D-*, and § 3509 are referenced repeatedly by both parties and several amici in nearly all of the ten total briefs submitted to the Court in this case, silence seems to speak louder than words regarding the weight the Court gave to the Board's decisions on this subject.[8] *See*

[8] It is not altogether clear what the current generic definition of "sexual abuse of a minor" is, apart from the age element. However, the generic definition used by the Fifth and Ninth Circuits appears workable. *See* note 4, *supra*. This would involve

Petition for Writ of Certiorari, *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017) (No. 16-54), 2016 WL 3681106 (citing § 3509 in passim); Brief for Respondent, *id.*, 2016 WL 4987326 (citing *Rodriguez-Rodriguez* and § 3509); Reply Brief for Petitioner, *id.*, 2016 WL 5462551 (citing § 3509); Brief for Petitioner, *id.*, 2016 WL 7384847 (citing *Rodriguez-Rodriguez*, *V-F-D-*, and § 3509); Brief for Immigrant Defense Project, Immigrant Legal Resource Center, and National Immigration Project of the National Lawyers Guild as Amici Curiae in Support of Petitioner at 19–23, *id.*, 2016 WL 7449180 (discussing at length *Rodriguez-Rodriguez*, *V-F-D-*, and § 3509); Brief for Respondent, *id.*, 2017 WL 345128 (discussing *Rodriguez-Rodriguez* and *V-F-D-*, and citing § 3509); Reply Brief for Petitioner, *id.*, 2017 WL 632460 (discussing *Rodriguez-Rodriguez*).

Moreover, even the government's briefing before the Court abandoned the Board's definition[9] in favor of "conduct that (1) is illegal, (2) involves sexual activity, and (3) is directed at a person younger than 18 years old." Brief for

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separate age and conduct elements, but it would be up to the BIA to reestablish the conduct elements.

[9] Mr. Esquivel-Quintana, in his reply brief on writ of certiorari, points out that "[t]he Government never references Section 3509 in its analysis of Section 1101(a)(43)(A), nor does it defend the BIA's determination that Section 3509 is more instructive than Section 2243." Reply Brief for Petitioner at 22, *Esquivel-Quintana v. Sessions*, 2017 WL 632460. Indeed, where the government did cite § 3509, it never went into detail. *See, e.g.*, Brief for Respondent at 8, 38, 39, 55, *id.*, 2017 WL 345128.

Respondent at 17, *id.*, 2017 WL 345128; 137 S. Ct. at 1569. The Court thoroughly rejected the Government's proposed definition, stating, "the Government's definition turns the categorical approach on its head by defining the generic federal offense of sexual abuse of a minor as whatever is illegal under the particular law of the State where the defendant was convicted."[10] 137 S. Ct. at 1570.

III. Petitioner's Conviction Under Minn. Stat. § 609.324, subd. 1(c)(2) Is Categorically Not For a "Sexual Abuse of a Minor" Aggravated Felony Following *Esquivel-Quintana*.

A. The Statute of Conviction is Overbroad Because it Requires That the Victim Was At Least 16 Years Old.

Like the petitioner in *Esquivel-Quintana*, [redacted] was charged with and found deportable for the aggravated felony of "sexual abuse of a minor" under 8 U.S.C. § 1101(a)(43)(A). *See* A.R. 449/Add. 16. [redacted] was convicted under a Minnesota statute which criminalizes "hir[ing] or offer[ing] or agree[ing] to hire an individual under the age of 18 years *but at least 16 years* to engage in sexual penetration or sexual contact." Minn. Stat. § 609.324, subd. 1(c)(2) (emphasis added).

[10] In his reply brief in support of his petition for writ of certiorari to the Supreme Court, Mr. Esquivel-Quintana aptly noted that "according to the Government, conduct that is *not even criminal* under federal law, the Model Penal Code, the laws of forty-three states, or District of Columbia law—and that is characterized as 'abuse' in *only one state*—falls within the generic definition of 'sexual abuse of a minor.'" Reply Brief for Petitioner at 1, *Esquivel-Quintana v. Sessions*, 2016 WL 5462551.

Following the Court's clear and unambiguous holding in *Esquivel-Quintana*, "sexual abuse of a minor" for purposes of the INA's aggravated felony definition cannot be met where the statute of conviction indivisibly criminalizes sexual activity directed at a victim 16 years of age or older. 137 S. Ct. at 1572 ("Absent some special relationship of trust, consensual sexual conduct involving a younger partner who is at least 16 years of age does not qualify as sexual abuse of a minor under the INA, regardless of the age differential between the two participants."). As a result, where the least of the acts criminalized by the statute falls outside the generic definition of the offense, the conviction is not an aggravated felony. *Id.* at 1568; *Johnson v. United States*, 559 U.S. 133, 137 (2010). Here, the indivisible statute of conviction requires that the victim be at least 16 years of age; a separate statutory provision criminalizes the same conduct with someone under the age of 16. *See* Minn. Stat. § 609.324, subd. 1(a)(2), (b)(2). Therefore, the statute of conviction does not categorically fit within the new generic definition, and, in fact, lies wholly outside it. Pursuant to *Esquivel-Quintana*, then, [redacted] conviction is not for a "sexual abuse of a minor" aggravated felony.

In [redacted] case, the BIA and the IJ held that *Esquivel-Quintana* applies only to statutes of conviction that "criminalize[] sexual intercourse solely based on the age of the participants," whereas [redacted] statute of conviction "also criminalizes the conduct as prostitution." A.R. 75/Add. 8; *see also* A.R. 4/Add. 2; A.R. 23/Add. 4.

That is certainly true, but were the age of the participants not in issue, he would have been convicted under a different statute and would not have been removable as an aggravated felon. Instead, the age of the participants is centrally relevant, as that is what would make the offense an aggravated felony. To conclude here that *Esquivel-Quintana* does not apply because of another element to the offense would require multiple generic definitions of sexual abuse of a minor and would also open the door to a circumstance-specific approach. Under the categorical approach, which governs application of the sexual abuse of a minor aggravated felony statute, *Esquivel-Quintana* clarifies that a statute is overbroad if an age element does not require the participant or victim to be under 16 years of age. It does not permit a court to look at the underlying sexual act and then, at that point, determine which age should be considered. Again, the only exceptions the *Esquivel-Quintana* court allowed space for are where there is a relationship of authority and where there is a significant age difference. [redacted] case does not fit into either exception, nor does the IJ claim so.

[redacted] argument is further underscored by the BIA's decision in *Matter of Deang*, 27 I&N Dec. 57 (BIA 2017). While that case does not involve sexual abuse of a minor, the Board nonetheless referenced the *Esquivel-Quintana* decision in resolving a related issue, stating, "the Court held that the generic definition of aggravated felony sexual abuse of a minor under section 101(a)(43)(A) of the Act

'requires that the victim be younger than 16.'" *Id.* at 63 (quoting *Esquivel-Quintana*, 137 S. Ct. at 1568). This description by the BIA leaves no room for any exception to the age requirement, and the BIA's decision in [redacted] case is inconsistent with its own published decisions.

B. The Characterization of the Statute as a "Sex Crime Law" Instead of a "Statutory Rape Law" Is Irrelevant and Incorrect.

In denying [redacted] motion to reopen, the IJ stated that [redacted] case is distinguishable from *Esquivel-Quintana* because he "was not charged under a Minnesota statutory rape law. [redacted] was instead charged under Minnesota's sex crime law." A.R. 75/Add. 8. This distinction is irrelevant, on the one hand, because courts have long held in applying the categorical approach that the statutory language—not the name given to the offense by the legislature—is the only relevant factor in the analysis. *See Taylor v. United States*, 495 U.S. 575, 599 (1990) (stating that not all state offenses called "burglary" meet the generic definition, while some offenses *not* called "burglary" could qualify under the generic definition). On the other hand, the California statute in issue in *Esquivel-Quintana*, Cal. Penal Code § 261.5(c), could certainly be described as a "sex crime law," as it falls under Chapter 1, "Rape, Abduction, Carnal Abuse of Children, and Seduction," of Title 9, "Crimes Against the Person Involving Sexual Assault, and Crimes Against Public Decency and Good Morals." Other subdivisions of § 261 include rape and solicitation of prostitutes. Similarly, there is no "statutory rape

law" in Minnesota; age-based offenses constitute subsections of the five degrees of "criminal sexual conduct," along with forcible rape. *See* Minn. Stat. §§ 609.342 through 609.3451. "Criminal sexual conduct" and the statute of [redacted] conviction fall under the statutory heading of "sex crimes." Moreover, the prior definition of sexual abuse of a minor—adopted by the Board in *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991, 995 (1999), from a civil statute concerning the rights of child victims and child witnesses in federal proceedings, 18 U.S.C. § 3509(a), and expressly rejected by the Supreme Court in *Esquivel-Quintana*—lists statutory rape and prostitution offenses alongside one another. Thus, this distinction made by the IJ, to the extent that it could be dispositive, is not supported by the statutes being compared.

As a result, following *Esquivel-Quintana*, [redacted] conviction is not categorically a sexual abuse of a minor aggravated felony.

CONCLUSION

The BIA erred as a matter of law by finding that [redacted] conviction is for a "sexual abuse of a minor" aggravated felony. Following the Supreme Court's decision in *Esquivel-Quintana*, [redacted] conviction is categorically overbroad compared to the generic definition of the federal offense. For these reasons, the

Court should grant his petition for review, reverse, and vacate the BIA decision, and remand to the agency.

Dated: March 28, 2019

Respectfully submitted,

s/ John Bruning

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[redacted] **Petitioner,** **v.** **William Barr,** **U.S. Attorney General,** **Respondent.**	**Nos.** [redacted] Immigration File No. [redacted] Petition for Review from the Decision of the Board of Immigration Appeals

CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2019, I electronically filed the foregoing PETITIONER'S OPENING BRIEF with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

Dated: March 28, 2019

s/ John Bruning

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UNITED STATES COURT OF APPEALS
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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I hereby certify that the foregoing PETITIONER'S OPENING BRIEF has been prepared in a proportionally spaced typeface of 14-point or more, and contains 8,468 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

Pursuant to Eighth Cir. R. 28A(h), I certify that the foregoing Petitioner's Opening Brief has been scanned for viruses and is virus-free.

Dated: March 28, 2019

s/ John Bruning

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NOS. [redacted]

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[redacted]

Petitioner,

v.

William P. BARR,
Attorney General of the United States,

Respondent.

PETITION FOR REVIEW
FROM THE UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
BOARD OF IMMIGRATION APPEALS
AGENCY CASE NUMBER: [redacted]

PETITIONER'S ADDENDUM

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File: [redacted] – Fort Snelling, MN

Date: NOV 14 2018

In re: [redacted]

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: John R. Bruning, Esquire

ON BEHALF OF DHS: Colin P. Johnson
Assistant Chief Counsel

APPLICATION: Termination of proceedings

This matter was last before the Board on June 26, 2018, when we dismissed the respondent's appeal of the Immigration Judge's denial of his motion to reopen. The Department of Homeland Security has not responded to the motion. The motion will be denied.

We review findings of fact determined by an Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in appeals from decisions of Immigration Judges, de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

A party seeking reconsideration requests that the original decision be re-examined in light of alleged legal or factual errors, a change of law, or an argument or aspect of the case that was overlooked. *See Matter of O-S-G-*, 24 I&N Dec. 56, 57-58 (BIA 2006); *Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991). Here, the respondent largely raises the same or similar arguments in the motion to reconsider as were raised in his prior appeal brief. We considered those arguments and found them unpersuasive when viewed within the record as a whole before we dismissed his appeal. *See Matter of O-S-G-*, 24 I&N Dec. at 58 (stating that "a motion to reconsider is not a process by which a party may submit, in essence, the same brief presented on appeal . . ."). Disagreement with the result is not sufficient. Therefore, the motion to reconsider will be denied.

The respondent continues to argue that his conviction for the offense of engaging in, hiring, or agreeing to hire a minor to engage in prostitution, in violation of Minnesota Statutes section 609.324(c)(2) is not an aggravated felony under section 237(a)(2)(A)(iii) of the Act, as defined at section 101(a)(43)(A) of the Act ("sexual abuse of a minor") (Exh. 1). In particular, the respondent contends that his conviction is no longer a categorical aggravated felony in light of the United States Supreme Court's recent decision in *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017).

The respondent continues to argue that the generic definition of aggravated felony sexual abuse of a minor under section 101(a)(43)(A) of the Act requires, in all cases, that the victim be younger than 16 (Respondent's Motion at 3-8). For support, the respondent cites to only one case arising in the United State Court of Appeals for the Eighth Circuit, which is the controlling jurisdiction

for his case. *Garcia-Urbano v. Sessions*, 890 F.3d 726 (8th Cir. 2018) (holding that a conviction under Minnesota Sat. Ann. § 609.344, subd. 1(b) for criminal sexual conduct in the third degree, where an 18 year old had sex with his 15-year-old girlfriend, is an aggravated felony). The court in *Garcia-Urbano* held that the generic offense of "sexual abuse of a minor" cannot require an age differential of more than two years and one day in order to constitute an "aggravated felony" under the Act. *Garcia-Urbano v. Sessions*, 890 F.3d at 729. The respondent has not shown how his case is affected by the decision in *Garcia-Urbano v. Sessions*, given that his offense is not a statutory rape type offense and does not criminalize conduct based solely on the age of the participants. *Esquivel-Quintana v. Sessions*, 137 S. Ct. at 1565, 1568; section 609.324(c)(2) of the Minnesota Statutes.

The respondent also cites to a case from another circuit, to wit, *Bedolla-Zarate v. Sessions*, 892 F.3d 1137 (10th Cir. 2018) (holding that third-degree sexual abuse of a minor under Wyoming Stat. Ann. § 6-2-316(a)(i) is an aggravated felony). In *Bedolla-Zarate v. Sessions*, the court rejected the alien's argument that the Wyoming statute is broader than the generic offense of sexual abuse of a minor because it does not include (1) a knowledge *mens rea* regarding the age of the victim or (2) an "actual abuse" element. *Id.* The respondent has not shown how his case is affected by the decision in *Bedolla-Zarate v. Sessions*, which also relied on the reasoning in *Garcia-Urbano v. Sessions* and *Esquivel-Quintana v. Sessions* in statutory rape type offenses. *Bedolla-Zarate v. Sessions*, 892 F.3d at 1141-42. As noted above, and in our prior decision, the respondent's offense is not a statutory rape type offense and does not criminalize conduct based solely on the age of the participants.

Similarly, the respondent cites to a case from another circuit holding that a Texas conviction for online solicitation of a minor is similar to a statutory rape offense in that the offense "similarly criminalizes conduct based solely on the age of the participants." *Shroff v. Sessions*, 890 F.3d 542, 545 (5th Cir. 2018). The court held that the offense of online solicitation of a minor is not an "aggravated felony" because the Texas statute of conviction criminalized conduct based solely on the participants' age and defined "minor" as someone younger than 17, as opposed to someone under 16. *Id.* at 545-46. As noted above, the respondent's offense does not criminalize conduct based solely on the age of the participants. Thus, the respondent has not established any legal or factual errors, a change of law, or an argument or aspect of the case that was overlooked. *See Matter of O-S-G-*, 24 I&N Dec. at 57-58.

Accordingly, the following order will be entered.

ORDER: The respondent's motion is denied.

FOR THE BOARD

File: [redacted] – Fort Snelling, MN

Date: JUN 26 2018

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: John R. Bruning, Esquire

ON BEHALF OF DHS: Colin P. Johnson
Assistant Chief Counsel

APPLICATION: Termination of proceedings

The respondent appeals an Immigration Judge's decision, dated December 4, 2017, denying his motion to reopen. The Department of Homeland Security (DHS) opposes the appeal. The appeal will be dismissed.

We review findings of fact determined by an Immigration Judge, including credibility findings, under a "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, and judgment, and all other issues in appeals from decisions of Immigration Judges, de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent was convicted on June 21, 2002, for the offense of engaging in, hiring, or agreeing to hire a minor to engage in prostitution, in violation of Minnesota Statutes section 609.324(c)(2) (Exh. 1; Exh. 12, tab B). Based on this conviction, the respondent was charged with removability for having been convicted of an aggravated felony under section 237(a)(2)(A)(iii) of the Act, as defined at section 101(a)(43)(A) of the Act ("sexual abuse of a minor") (Exh. 1). On April 5, 2005, the Immigration Judge found the respondent removable as charged, granted his application for withholding of removal to Laos, and ordered him removed to any country other than Laos that would accept him (Exh. 11).

On August 25, 2017, the respondent filed a motion to reopen, which the Immigration Judge properly found to be untimely (IJ at 2). Section 240(c)(7)(C)(i) of the Act (motions to reopen must be filed within 90 days of the final administrative order); 8 C.F.R. § 1003.23(b)(1). The respondent argues that sua sponte reopening is warranted due to a change in the law (Respondent's Br. at 3-4). *See Matter of G-D-*, 22 I&N Dec. 1132, 1133-34 (BIA 1999) (holding that a fundamental change in the law may constitute an exceptional situation that merits sua sponte reopening in the exercise of discretion); 8 C.F.R. §§ 1003.2(a) and 1003.23(b)(1). In particular, the respondent contends that his conviction is no longer a categorical aggravated felony in light of the United States Supreme Court's recent decision in *Esquivel-Quintana v. Sessions*, 137 S.Ct. 1532 (2017). The Immigration Judge denied the motion, concluding that *Esquivel-Quintana v. Sessions* did not change the result in the respondent's case.

To determine whether the respondent's state conviction renders him removable under section 237(a)(2)(A)(iii) of the Act, we employ the categorical approach, which focuses on the elements of the crime, rather than the particular facts of the case. *See Mathis v. United States*, 136 S. Ct. 2243, 2248 (2016). "Under this categorical approach, if 'the elements of the state crime are the same as or narrower than the elements of the federal offense, then the state crime is a categorical match and every conviction under that statute qualifies as an aggravated felony.'" *Matter of Rosa*, 27 I&N Dec. 228, 229-30 (BIA 2018) (citation omitted). Thus, we must compare the elements of section 609.324(c)(2) of the Minnesota Statutes to those of the federal generic definition of the crime of "sexual abuse of a minor" in section 101(a)(43)(A) of the Act.

The statute under which the respondent was convicted provides, in relevant part, as follows:

> Engaging in, hiring, or agreeing to hire a minor to engage in prostitution; penalties ....
>
> (c) Whoever intentionally does any of the following may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both:
>
> (2) hires or offers or agrees to hire an individual under the age of 18 years but at least 16 years to engage in sexual penetration or sexual contact.

Minn. Stat. Ann. § 609.324(c)(2).

In *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. 991, 995-96 (BIA 1999), the Board found the definition of "sexual abuse" at 18 U.S.C. § 3509(a)(8) to be a useful guide in identifying the types of crimes that we would consider to constitute sexual abuse of a minor. That federal statute defines "sexual abuse" as "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." 18 U.S.C. § 3509(a)(8). Subsequently, in *Matter of V-F-D-*, 23 I&N Dec. 859 (BIA 2006), the Board held that a victim of sexual abuse who is under the age of 18 is a "minor" for purposes of section 101(a)(43)(A) of the Act.

The respondent argues that the United States Supreme Court's decision in *Esquivel-Quintana v. Sessions* overturned *Matter of Rodriguez-Rodriguez* and *Matter of V-F-D-* and held that the generic definition of aggravated felony sexual abuse of a minor under section 101(a)(43)(A) of the Act requires, in all cases, that the victim be younger than 16 (Respondent's Br. at 5-6, 8, 11-14).

We disagree. First, the Supreme Court did not reference the Board's decisions in *Matter of Rodriguez-Rodriguez* and *Matter of V-F-D-*. Furthermore, the Supreme Court did not hold that the generic definition of all "sexual abuse of a minor cases" must include only victims under the age of 16. Rather, it held that statutory rape offenses "are one example of this category of crimes," and that "in the context of statutory rape offenses that criminalize sexual intercourse *based solely on the age of the participants*, the generic federal definition of sexual abuse of a minor requires that the victim be younger than 16." *Esquivel-Quintana v. Sessions*, 137 S. Ct. at 1565, 1568 (emphasis added).

[redacted]

As noted by the Immigration Judge, section 609.324(c)(2) of the Minnesota Statutes is not a statutory rape statute, but rather a statute which punishes "engaging in, hiring, or agreeing to hire minor to engage in prostitution" (IJ at 3). Moreover, section 609.324(c)(2) of the Minnesota Statutes does not criminalize sexual contact based *solely* on the age of the participants, but also on the particular type of sexual conduct (i.e., prostitution) (IJ at 3).

Therefore, the Supreme Court did not decide that the generic crime of "sexual abuse of a minor" could never occur when the victim was at least 16 years old. Rather, it limited its holding to a subset of "sexual abuse of a minor" offenses, namely certain statutory rape offenses that criminalize sexual intercourse based solely on the age of the participants.[1] Thus, we agree with the Immigration Judge that *Esquivel-Quintana v. Sessions* does not change the result in the respondent's case.

The respondent further argues that the Supreme Court's "heavy reliance" on 18 U.S.C. § 2243 for the definition of sexual abuse of a minor implicitly overturns *Matter of Rodriguez*, in which the Board relied on the broader definition set forth at 18 U.S.C. § 3509(a)(8) (Respondent's Br. at 8-9). *Matter of Rodriguez-Rodriguez*, 22 I&N Dec. at 995. However, the Supreme Court in *Esquivel-Quintana v. Sessions* specified that "18 U.S.C. § 2243 provides further evidence that the generic federal definition of sexual abuse of a minor incorporates an age of consent of 16, *at least in the context of statutory rape offenses predicated solely on the age of the participants*." *Esquivel-Quintana v. Sessions*, 137 S. Ct. at 1570 (emphasis added). It further stated that "we rely on § 2243(a) for evidence of the meaning of sexual abuse of a minor, *but not as providing the complete or exclusive definition*," and that the definition in 18 U.S.C. § 2243 should not be "imported wholesale" into the Act. *Id.* at 1570, 1571 (emphasis added).

Therefore, we agree with the Immigration Judge that sua sponte reopening is not warranted, as the respondent has not demonstrated a fundamental change in law which would affect the outcome of his case (IJ at 3). *See Matter of G-D-*, 22 I&N Dec. at 1133-34. As the respondent is not asserting any other grounds for termination or eligibility for any other form of relief, we need not address the respondent's argument that the motions deadline should be equitably tolled.[2]

Accordingly, the following order will be entered.

ORDER: The respondent's appeal is dismissed.

FOR THE BOARD

[1] The Supreme Court also left open the question of "whether the generic crime of sexual abuse of a minor requires a particular age differential between the victim and the perpetrator or whether it encompasses sexual intercourse involving victims over 16 that is abusive because of the nature of the relationship between the participants." *Esquivel-Quintana v. Sessions*, 137 S. Ct. at 1572.

[2] To the extent that the respondent argues that section 609.324(c)(2) of the Minnesota Statutes is an inchoate offense and lacks the requisite mens rea to constitute a sexual abuse of a minor aggravated felony (Respondent's Br. at 9-10), those arguments are not based on an asserted change in the law and thus do not support sua sponte reopening.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
FORT SNELLING, MINNESOTA

File Number: [redacted]66	**Date:** DEC 4 - 2017
In the Matter of:	**In Removal Proceedings**
[redacted] **Respondent.**	

Charges: INA § 237(a)(2)(A)(iii) – an alien convicted of an aggravated felony as defined in section 101(a)(43)(A) – a law relating to murder, rape, or sexual abuse of a minor

Re: Motion to Reopen

RESPONDENT:
Kim Hunter, Esq.
Kim Hunter Law, P.L.L.C.
656 Selby Avenue, Suite 100
St. Paul, MN 55104

ON BEHALF OF THE DHS:
Jim Stolley, Esq.
Chief Counsel/ICE
1 Federal Dr., Suite 1800
Fort Snelling, MN 55111

MEMORANDUM AND ORDER OF THE IMMIGRATION JUDGE

I. Background

[redacted] Respondent, is a 54-year-old man and a native and citizen of Laos. (Ex. 1; Ex. 2). Respondent was admitted to the United States at St. Paul, Minnesota on or about June 27, 1990 as a refugee. (Ex. 1). Respondent adjusted status to that of a lawful permanent resident on March 2, 1994. Id. On June 21, 2002 Respondent was convicted under Minn. Stat. § 609.324.1(c)(2) for the offense of engaging in, hiring, or agreeing to hire a minor to engage in prostitution. (Ex. 1; Ex. 13 at 25[1]). On February 18, 2005, the Department of Homeland Security (DHS) commenced removal proceedings against Respondent by filing the Notice to Appear (NTA), charging Respondent as removable pursuant to the above-captioned charge of the Immigration and Nationality Act (INA or the Act). (Ex. 1). On April 5, 2005, an Immigration Judge (IJ) granted Respondent's application for withholding of removal to Laos, and ordered Respondent removed to any country other than Laos that would accept him. (Ex. 11). On August 25, 2017, Respondent filed a Motion to Reopen. (Ex. 12). For the reasons set forth below, the Court denies Respondent's motion to reopen.

[1] Through this order the Court marks and enters the following exhibits: Ex. 11 – Decision of the Immigration Judge granting Respondent's application for withholding of removal to Laos and ordering Respondent removed to any country other than Laos that will accept him, dated April 5, 2005; Ex. 12 – Respondent's documents in support of motion to reopen, filed August 25, 2017; Ex. 13 – Respondent's Motion to Reopen, filed August 25, 2017.

II. Legal Standard

An IJ may upon her own motion at any time or upon motion of either party, reopen or reconsider any case in which she has made a decision. 8 C.F.R. § 1003.23(b)(1). An alien may file one motion to reopen proceedings within ninety (90) days of the date of entry of a final administrative order of removal. INA § 240(c)(7)(A); 8 C.F.R. § 1003.23(b)(1). The time and numerical limits do not apply if the basis of the motion is to apply for asylum, withholding of removal, or relief under the Convention Against Torture (CAT), and the motion is based on changed conditions arising in the country of removal. INA § 240(c)(7)(C)(ii); 8 C.F.R. §§ 1003.23(b)(4), 1208.4(b)(3)(ii). Matter of S-Y-G-, 24 I&N Dec. 247, 253 (BIA 2007) (explaining "in determining whether evidence accompanying a motion to reopen demonstrates a material change in country conditions that would justify reopening, we compare the evidence of country conditions submitted with the motion to those that existed at the time of the merits hearing below"). A motion to reopen "will not be granted if" the right to apply for relief "was fully explained to him or her by the Immigration Judge and an opportunity to apply therefore was afforded at the hearing, unless the relief is sought on the basis of circumstances that have arisen subsequent to the hearing." 8 C.F.R. § 1003.23(b)(3). Moreover, personal circumstances are not sufficient for an untimely motion to reopen. Matter of C-W-L-, 24 I&N Dec. 346, 352-53 (BIA 2007).

The moving party "bears a heavy burden" to demonstrate why the case should be reopened. Hernandez-Moran v. Gonzales, 408 F.3d 496, 499 (8th Cir. 2005). Even if the moving party has established a prima facie case for relief, an IJ has discretion to deny a motion to reopen. 8 C.F.R. § 1003.23(b)(3). However, an IJ also has discretion to reopen a respondent's case *sua sponte* at any time, unless jurisdiction has vested with the Board of Immigration Appeals (BIA). 8 C.F.R. § 1003.23(b)(1). *Sua sponte* authority to reopen is to be used "sparingly" as it is an "extraordinary remedy reserved for truly exceptional situations," such as where an applicant demonstrates that there has been a fundamental change of law that affects his eligibility for relief. Matter of G-D-, 22 I&N Dec. 1132, 1133-34 (BIA 1999). An applicant must also show "a substantial likelihood that the result in his case would be changed if reopening is granted." Matter of Beckford, 22 I&N Dec. 1216, 1219 (BIA 2000).

III. Analysis

First, Respondent's motion to reopen is untimely because it was filed on August 25, 2017, which is more than 90 days after he was ordered removed on May 5, 2005. (Ex. 11). See INA § 240(c)(7)(A); 8 C.F.R. § 1003.23(b)(1). Respondent has not asserted any changed country conditions such that the time limit would not apply. INA § 240(c)(7)(C)(ii); 8 C.F.R. §§ 1003.23(b)(4), 1208.4(b)(3)(ii). Matter of S-Y-G-, 24 I&N Dec. 247, 253 (BIA 2007).

Respondent requests that the Court reopen his case following the Supreme Court's recent ruling in Esquivel-Quintana v. Sessions, 137 S. Ct. 1562 (2017). Respondent claims that, pursuant to this new ruling, his criminal conviction under Minn. Stat. § 609.324(c)(2) is no longer a categorical match with the generic definition of sexual abuse of a minor, and thus is not an aggravated felony under INA § 101(a)(43)(A). (Ex. 12). In Esquivel-Quintana, the Supreme Court held that, in the context of statutory rape offenses that criminalize consensual intercourse based solely on the age of the participants, the generic federal definition of "sexual abuse of a minor" under

INA §101(a)(43)(A) "requires the age of the victim to be less than 16." Esquivel-Quintana, 137 S. Ct. at 1572-3.

In the instant case, Respondent was not charged under a Minnesota statutory rape law. Respondent was instead charged under Minnesota's sex crime law, Minn. Stat. § 609.324(c)(2), a law relating to engaging in, hiring, or agreeing to hire a minor to engage in prostitution. See Ex. 12 at 25. Respondent argues that because the Supreme Court in Esquivel-Quintana relied on 18 USC §2243 to inform its interpretation of "sexual abuse of a minor" in the context of statutory rape statutes, this definition should hold as the official "generic definition" of sexual abuse of a minor under INA § 101(a)(43(A). However, the Supreme Court explicitly states "[p]etitioner does not contend that the definition in §2243(a) must be imported wholesale into the INA [citation omitted] and we do not do so. . . . Accordingly, we rely on §2243(a) for evidence of the meaning of sexual abuse of a minor, but not as providing the complete or exclusive definition." Esquivel-Quintana, 137 S. Ct. 1571. Additionally, the Supreme Court made no mention of Matter of Rodriguez-Rodriguez or Matter of V-F-D- in its decision, and did not state that its ruling in Esquivel-Quintana overruled standing precedent regarding the generic definition of "sexual abuse of a minor" beyond the scope of statutes that criminalize sexual activity solely based on the age of the participants. Thus, Respondent has not demonstrated that the Supreme Court intended to reject the definition of "sexual abuse of a minor" established in Matter of Rodriguez-Rodriguez and Matter of V-F-D-, which governed at the time of Respondent's removal order.

Additionally, Respondent's statute of conviction is not within the scope of the decision in Esquivel-Quintana. The Supreme Court notes that in order to categorically match the general definition of sexual abuse of a minor, a statute of conviction that criminalizes sexual intercourse *solely* based on the age of the participants, e.g. many statutory rape statutes, must only include victims under the age of 16 years. Esquivel-Quintana, 137 S. Ct. at 1571. Respondent's statute of conviction does prohibit sexual acts based in part on the age of the victim, but also criminalizes the conduct as prostitution. As Respondent's statute of conviction does not criminalize sexual intercourse solely based on the age of the participants, the Supreme Court's decision in Esquivel-Quintana does not reach his statute of conviction.

Thus, Respondent has not demonstrated that the Supreme Court's holding in Esquivel-Quintana constitutes a fundamental change of law affecting his removability or eligibility for relief. Therefore, the Court declines to exercise its *sua sponte* authority to reopen Respondent's case. See Matter of J-J-, 21 I&N Dec. 976, 984 (BIA 1997). For the same reasons, the Court finds Respondent has not demonstrated an extraordinary circumstance such that the filing deadline should be equitably tolled. See Ruiz-Turcios v. U.S. Att'y Gen., 717 F.3d 847, 851 (11th Cir. 2013) (holding that an alien is entitled to equitable tolling generally where he shows "(1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way") (internal citation omitted); see also Avila-Santoyo v. U.S. Att'y. Gen., 713 F.3d 1357, 1363 (11th Cir. 2013). Additionally, Respondent did not present evidence of changed country conditions such that the time limit for submitting a motion to reopen should not apply. INA § 240(c)(7)(C)(ii). As such, Respondent's motion is untimely and does not fall within an exception to the filing deadline.

As Respondent has failed to establish a case for ineffective assistance of counsel or to identify any specific defects in his prior removal proceedings, present previously unavailable information, changed country conditions, or establish a prima facie case for relief, the Court finds reopening improper in this case.

Accordingly, the Court enters the following order:

ORDER

IT IS HEREBY ORDERED that Respondent's Motion to Reopen be **DENIED.**

Kristin W. Olmanson

Kristin W. Olmanson
Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
7850 Metro Parkway, Suite 320
Bloomington, MN 55425

In the Matter of
[redacted]
Respondent

Case A [redacted]

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on April 5, 2005 (KWO).
This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[X] The respondent was ordered removed from the United States to any country other than Laos who will accept him.
[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to _____ alternative to _____.
[ ] Respondent's application for voluntary departure was granted until _____ upon posting a bond in the amount of $ _____ with an alternative order of removal to _____.
[ ] Respondent's application for asylum was ( ) granted ( ) denied ( ) withdrawn.
[X] Respondent's application for withholding of removal was (X) granted ( ) denied ( ) withdrawn. to Laos
[X] Respondent's application for (withholding)(deferral) of removal under Article III of the Convention Against Torture is ( ) granted ( ) denied ( ) withdrawn or (X) other. - not reached
[ ] Respondent's application for cancellation of removal under section 240A(a) was ( ) granted ( ) denied ( ) withdrawn.
[ ] Respondent's application for cancellation of removal under section 240A(b) was ( ) granted ( ) denied ( ) withdrawn. If granted, it was ordered that the respondent be issued all appropriate documents necessary to give effect to this order.
[ ] Respondent's application for a waiver under section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn or ( ) other.
[ ] Respondent's application for adjustment of status under section _____ of the INA was ( ) granted ( ) denied ( ) withdrawn. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.
[ ] Respondent is admitted to the United States as a _____ until _____.
[ ] As a condition of admission, respondent is to post a $ _____ bond.
[ ] Respondent knowingly filed a frivolous asylum application after proper notice.
[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.
[ ] Proceedings were terminated.
[X] Other: The Court incorporates by reference a 3-page law attachment.

Date: April 5, 2005
Appeal: ( ) Applicant (X) DHS ( ) Both ( ) Waived
Appeal Due By: May 5, 2005

Kristin W. Olmanson
Kristin W. Olmanson, Immigration Judge

CERTIFICATE OF SERVICE
THIS DOCUMENT WAS SERVED BY: MAIL (M) PERSONAL SERVICE (P)
TO: [ ] ALIEN [ ] ALIEN c/o Custodial Officer [P] ALIEN's ATT/REP [P] DHS
DATE: 4/5/05 BY: COURT STAFF KWO

EXHIBIT: 11
DATE:
IJ CODE: KWO

Applicable Law

Asylum

Under § 208 of the Act, the Attorney General may grant asylum, as a matter of discretion, to an individual who is a "refugee" within the meaning of § 101(a)(42) of the Act. A refugee is defined as an individual who is unwilling or unable to return to his country of nationality because of past persecution or because of a "well-founded fear" of future persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. INA §§ 208 and 101(a)(42); 8 C.F.R. § 1208.13. In order to establish a "well-founded fear" of persecution, the applicant must show that it is both subjectively genuine and objectively reasonable through credible, direct, and specific evidence which demonstrates that he possesses a belief or characteristic that a persecutor seeks to overcome in others by means of punishment of some sort, the persecutor is aware or could become aware that he possesses this belief or characteristic, the persecutor has the capability of punishing him, and the persecutor has the inclination to punish him. INS v. Cardoza-Fonseca, 480 U.S. 421 (1987); Matter of Mogharrabi, 19 I&N Dec. 439 (BIA 1987).

Withholding of Removal

To be eligible for withholding of removal pursuant to Section 241(b)(3) of the Act, an alien must establish it is "more likely than not" that the alien's life or freedom would be threatened in the country designated for removal on account of one of the five grounds enumerated in the Act. INA § 241(b)(3); 8 C.F.R. § 1208.16; Mogharrabi, supra. An applicant for asylum or withholding bears the evidentiary burdens of proof and persuasion to establish his/her claim. The requisite burden of proof to establish eligibility for asylum is lower than that required for withholding of removal.

Relief under Article 3 of the Convention Against Torture

The eligibility for withholding of removal under the Convention against Torture is primarily set forth in 8 C.F.R. §§ 1208.16 and 1208.18. The burden of proof is on the applicant to establish that it is "more likely than not" that he/she would be tortured if removed to the proposed country of removal. The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.

The regulations, at 8 C.F.R. § 1208.18(a)(1)-(8), set forth the following:

(1) "Torture" is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or her or a third person information or a confession, punishing him or her for an act he or she or a third person has committed or is suspected of having committed, or intimidating or coercing him or her or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity."

(2) Torture is an extreme form of cruel and inhuman treatment and does not include lesser forms of cruel, inhuman, or degrading treatment or punishment that do not amount to torture.

(3) Torture does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions. Lawful sanctions include judicially imposed sanctions and other enforcement actions authorized by law, including the death penalty, but do not include sanctions that defeat the object and purpose of the Convention Against Torture to prohibit torture.

(4) In order to constitute torture, mental pain or suffering must be prolonged mental harm caused by or resulting from:
(i) The intentional infliction or threatened infliction of severe physical pain or suffering;
(ii) The administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
(iii) The threat of imminent death; or
(iv) The threat that another person will imminently be subjected to death, severe physical pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the sense or personality.

(5) In order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering. An act that results in unanticipated or unintended severity of pain and suffering is not torture.

(6) In order to constitute torture the act must be directed against a person in the offender's custody or physical control.

(7) Acquiescence of a public official requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity.

(8) Noncompliance with applicable legal procedural standards does not *per se* constitute torture. *See* 8 C.F.R. § 1208.18(a).

In assessing whether it is more likely than not that an applicant would be tortured in the proposed country of removal, all evidence relevant to the possibility of future torture shall be considered, including, but not limited to:

(i) evidence of past torture inflicted upon the applicant;
(ii) evidence that the applicant could relocate to a part of the country of removal where he or she is not likely to be tortured;
(iii) evidence of gross, flagrant or mass violations of human rights within the country of removal, where applicable; and
(iv) other relevant information regarding the conditions in the country of removal. *See* 8 C.F.R. § 1208.16(c)(3)

Particularly Serious Crime Law

This court will need to determine whether the respondent has been convicted of a particularly serious crime which would bar his eligibility for withholding of removal under § 241(b)(3) of the Act and under Article 3 of the Convention Against Torture. Since the respondent was sentenced to less than 5 years for his felony, this court is bound to examine the particular circumstances of his case in deciding whether his prior conviction constitutes a crime that is "particularly serious" and which precludes him from applying for withholding of removal. See Matter of S-S-, Interim Decision 3374 (BIA 1999).

When judging the seriousness of a crime, one looks to factors such as the nature of the conviction, the circumstances and underlying facts of the conviction, the type of sentence imposed, and most important, whether the type and circumstances of the crime indicate that the respondent is a danger to the community. Matter of S-S-, supra; Matter of Frentescu, 18 I&N Dec. 244 (BIA 1982), modified, Matter of C-, 20 I&N Dec. 529 (BIA 1992); Matter of Gonzalez, 19 I&N Dec. 682 (BIA 1988). The Board has held that once an alien is found to have committed a particularly serious crime, there is no need for a separate determination of whether the alien is a danger to the community. See Matter of K-, 20 I&N Dec. 418 (BIA 1991), aff'd Kofa v. INS, 60 F.3d 1084 (4th Cir. 1995); see also Matter of Q-T-M-T-, Interim Decision 3300, at 11 (BIA 1996).

Voluntary Departure

In order to be eligible for voluntary departure at the conclusion of removal proceedings under § 240B(b) of the Act, an alien must show that: (1) the alien has been physically present in the United States for a period of at least one year immediately preceding the date the Notice to Appear was served under § 239(a); (2) the alien is, and has been, a person of good moral character for at least 5 years immediately preceding the alien's application for voluntary departure; (3) the alien is not deportable under § 237(a)(2)(A)(iii) (aggravated felon) or § 237(a)(4) (security and related grounds); and (4) the alien has established by clear and convincing evidence that the alien has the means to depart the United States and intends to do so. INA § 240B(b); 8 C.F.R. § 1240.26(c)(1). In order to establish that the alien has the means to depart, the alien must present a passport or other travel documentation sufficient to assure lawful entry into the country to which the alien is departing. 8 C.F.R. § 1240.26(c)(2).

U. S. Department of Justice
Immigration and Naturalization Service

Notice to Appear

In removal proceedings under section 240 of the Immigration and Nationality Act

File No: [redacted]1 [redacted]4 [redacted]5
Case No: VSP0406000018

In the Matter of:

Respondent: [redacted] currently residing at:

C/O US IMMIGRATION & CUSTOMS ENFORCEMENT 2901 METRO DR SUITE 100
BLOOMINGTON MINNESOTA 55425 (952)853-2960
(Number, street, city state and ZIP code) (Area code and phone number)

☐ 1. You are an arriving alien.
☐ 2. You are an alien present in the United States who has not been admitted or paroled.
☒ 3. You have been admitted to the United States, but are deportable for the reasons stated below.

The Service alleges that you:

See Continuation Page Made a Part Hereof

US DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
05 FEB 10 AM 11:03
IMMIGRATION COURT
BLOOMINGTON, MN

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

See Continuation Page Made a Part Hereof

☐ This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture.

☐ Section 235(b)(1) order was vacated pursuant to: ☐ 8 CFR 208.30(f)(2) ☐ 8 CFR 235.3(b)(5)(iv)

YOU ARE ORDERED to appear before an immigration judge of the United States Department of Justice at:
7850 Metro Parkway Suite 320 Bloomington MINNESOTA US 55425
(Complete Address of Immigration Court, Including Room Number, if any)

on a date to be set (Date) at a time to be set (Time) to show why you should not be removed from the United States based on the charge(s) set forth above.

MARY L. HERNANDEZ
ASSISTANT SPECIAL AGENT IN CHARGE
(Signature and Title of Issuing Officer)

Date: February 4, 2005

Bloomington, MN
(City and State)

EXHIBIT: 1
DATE: FEB 22 2005
IJ CODE: Juno

See reverse for important information

Form I-862 (Rev. 3/22/99)N

Notice to Respondent

Warning: Any statement you make may be used against you in removal proceedings.

Alien Registration: This copy of the Notice to Appear served upon you is evidence of your alien registration while you are under removal proceedings. You are required to carry it with you at all times.

Representation: If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Executive Office for Immigration Review, pursuant to 8 CFR 3.16. Unless you so request, no hearing will be scheduled earlier than ten days from the date of this notice to allow you sufficient time to secure counsel. A list of qualified attorneys and organizations who may be available to represent you at no cost will be provided with this Notice.

Conduct of the hearing: At the time of your hearing, you should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you must bring the original and a certified English translation of the document. If you wish to have the testimony of any witnesses considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Notice to Appear and that you are inadmissible or deportable on the charges contained in the Notice to Appear. You will have an opportunity to present evidence on your own behalf, to examine any evidence presented by the Government, to object, on proper legal grounds, to the receipt of evidence and to cross examine any witnesses presented by the Government. At the conclusion of your hearing, you have a right to appeal an adverse decision by the immigration judge.

You will be advised by the immigration judge before whom you appear, of any relief from removal for which you may appear eligible including the privilege of departing voluntarily. You will be given a reasonable opportunity to make any such application to the immigration judge.

Failure to appear: You are required to provide the INS, in writing, with your full mailing address and telephone number. You must notify the Immigration Court immediately by using Form EOIR-33 whenever you change your address or telephone number during the course of this proceeding. You will be provided with a copy of this form. Notices of hearing will be mailed to this address. If you do not submit Form EOIR-33 and do not otherwise provide an address at which you may be reached during proceedings, then the Government shall not be required to provide you with written notice of your hearing. If you fail to attend the hearing at the time and place designated on this notice, or any date and time later directed by the Immigration Court, a removal order may be made by the immigration judge in your absence, and you may be arrested and detained by the INS.

Request for Prompt Hearing

To expedite a determination in my case, I request an immediate hearing. I waive my right to have a 10-day period prior to appearing before an immigration judge.

x [signature] (Signature of Respondent)

Before: [signature] S/A (Signature and Title of INS Officer)

Date: 2/14/05

Certificate of Service

This Notice to Appear was served on the respondent by me on 2/14/05 (Date), in the following manner and in compliance with section 239(a)(1)(F) of the Act:

☒ in person ☐ by certified mail, return receipt requested ☐ by regular mail

☐ Attached is a credible fear worksheet.

☒ Attached is a list of organizations and attorneys which provide free legal services.

The alien was provided oral notice in the English language of the time and place of his or her hearing and of the consequences of failure to appear as provided in section 240(b)(7) of the Act.

X [redacted] (Signature of Respondent if Personally Served)

PAUL NICHOLS
SPECIAL AGENT [signature] (Signature and Title of Officer)

Form I-862 (Rev. 3/22/99)N

Alien's Name	File Number	Date
[redacted]	Case No: VSP0406000018 [redacted]	February 4, 2005

The Service alleges that you:

1) You are not a citizen or national of the United States;

2) You are a native of LAOS and a citizen of LAOS;

3) You were admitted to the United States at ST. PAUL, MINNESOTA on or about June 27, 1990 as a Refugee;

4) You adjusted status to that of a Lawful Permanent Resident on March 2, 1994, retroactive as of June 27, 1990, pursuant to Section 209(a) of the INA;

5) You were, on June 21, 2002 , convicted in the County of Ramsey District Court [at] St. Paul, Minnesota for the offense of Other Prohibited Act in violation of Minnesota Criminal Statute 609.324.1(c), to wit Engaging in Prostitution with a Child;

6) At the time of the offense, the victim was sixteen years of age.

FEB 22 2005

On the basis of the foregoing, it is charged that you are subject to removal from the United States pursuant to the following provision(s) of law:

(1) Section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (Act), as amended, in that, at any time after admission, you have been convicted of an aggravated felony as defined in section 101(a)(43)(A) of the Act, a law relating to murder, rape, or sexual abuse of a minor.

(2) ~~Section 237(a)(2)(E)(i) of the Immigration and Nationality Act, as amended, in that you are an alien who at any time after entry has been convicted of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment.~~

withdrawn by DHS 2/22/05

Signature	Title
MARY L. HERNANDEZ	ASSISTANT SPECIAL AGENT IN CHARGE

REGISTER OF ACTIONS

CASE NO. [redacted]07

THE STATE OF MINNESOTA vs. [redacted]
[2/080101 & 110101]

Case Type: **Misdemeanor**
Date Filed: **03/13/2002**
Location: **Ramsey Criminal/Traffic/Petty Downtown**

PARTY INFORMATION

Defendant [redacted]
ST. PAUL, MN 55106

Male
DOB: 09/12/1963

Lead Attorneys
JOHN A RIEMER
Public Defender
651-757-1600(W)

JurisdictioState of Minnesota

CHRISTIAN SEAN WILTON

CASE INFORMATION

Charges: [redacted]te	Level	Date	Disposition
1. PROHIB ACTS-PROST<18>=16Y (Facilitation of - GOC)	609.324.1C1 Converted: Offense Level Not Available	08/01/2001	06/21/2002 Dismisse
2. PROHIB ACTS-HIRE<18>=16SX (Facilitation of - GOC)	609.324.1C2 Converted: Offense Level Not Available	08/01/2001	06/21/2002 Convicte

EVENTS & ORDERS OF THE COURT

DISPOSITIONS

04/03/2002 **Plea** (Judicial Officer: Judge, Presiding)
1. PROHIB ACTS-PROST<18>=16Y (Facilitation of - GOC)
Not guilty

04/25/2002 **Plea** (Judicial Officer: Judge, Presiding)
2. PROHIB ACTS-HIRE<18>=16SX (Facilitation of - GOC)
Guilty

06/21/2002 **Disposition** (Judicial Officer: Judge, Presiding)
1. PROHIB ACTS-PROST<18>=16Y (Facilitation of - GOC)
Dismissed

06/21/2002 **Disposition** (Judicial Officer: Judge, Presiding)
2. PROHIB ACTS-HIRE<18>=16SX (Facilitation of - GOC)
Convicted

06/21/2002 **Converted TCIS Criminal Sentence: Stay of Imposition** (Judicial Officer: Bastian, Gary W.)
2. PROHIB ACTS-HIRE<18>=16SX (Facilitation of - GOC)
08/01/2001 (CNVLEVEL) 609.324.1C2 (CNVOFFENSE)

Converted Disposition:

0000025

Stay of Impositic
Converted Disposition:
Confinement NCIC: MN062023C - Ramsey County Workhouse Probation: 5 Years Probation NCI(
Probation Office Conditional: 3 Days Length of Stay: 5 Years Probation Type: Supervised
Converted Disposition:
Fined: $150.00 Surcharge: $40.00
Converted Disposition:
Other Court Provisions: 575: Convict. deemed Misd 543: No Contact w Victim/Fmily 548: Abstain t
Converted Disposition:
Comments: SV 3D/CR 3D;$150/FS/SVE;160 HRS CM SVS;UTC PB/LA;ABSTN;UA/BT REG AS S
TX/CNSLG;$500 ASMT;NC W/MINORS; PM

OTHER EVENTS AND HEARINGS

03/13/2002	**FLD-Case Filed** (Judicial Officer: Judge, Presiding)
03/13/2002	**WAR-Warrant Issued** (Judicial Officer: Petersen, George O.)
03/20/2002	**DOC-Document Filed** (Judicial Officer: Judge, Presiding)
03/20/2002	**DOC-Document Filed** (Judicial Officer: Judge, Presiding)
03/20/2002	**ORD-Order** (Judicial Officer: Judge, Presiding)
03/20/2002	**WRD-Warrant Returned** (Judicial Officer: Administrative, Calendar)
03/20/2002	**1st Appearance District Court** (1:20 PM) (Judicial Officer Fetsch, Michael F.)
	Result: Converted Activity Status Flag Occurred
03/21/2002	**ORD-Order** (Judicial Officer: Fetsch, Michael F.)
04/03/2002	**DOC-Document Filed** (Judicial Officer: Judge, Presiding)
04/03/2002	**ORD-Order** (Judicial Officer: Judge, Presiding)
04/03/2002	**Omnibus Hearing** (1:15 PM) (Judicial Officer Stephenson, George)
	Result: Converted Activity Status Flag Occurred
04/25/2002	**DOC-Document Filed** (Judicial Officer: Judge, Presiding)
04/25/2002	**PSO-Pre-Sentence Investigation Ordered** (Judicial Officer: Judge, Presiding)
04/25/2002	*CANCELED* **Disposition Conference** (9:00 AM) (Judicial Officer Bastian, Gary W.)
	Other
04/25/2002	**Plea Hearing** (10:15 AM) (Judicial Officer Bastian, Gary W.)
	Result: Converted Activity Status Flag Occurred
05/09/2002	**TSC-Transcript Filed** (Judicial Officer: Judge, Presiding)
06/21/2002	**AUD-Pass to Auditor** (Judicial Officer: Judge, Presiding)
06/21/2002	**CLO-Closed** (Judicial Officer: Judge, Presiding)
06/21/2002	**CLO-Closed** (Judicial Officer: Judge, Presiding)
06/21/2002	**CLO-Closed** (Judicial Officer: Judge, Presiding)
06/21/2002	**PIF-Paid in Full** (Judicial Officer: Judge, Presiding)
06/21/2002	**Sentencing** (9:00 AM) (Judicial Officer Bastian, Gary W.)
	Result: Converted Activity Status Flag Occurred
03/15/2005	**ORD-Order** (Judicial Officer: Johnson, Gregg E.)
03/22/2005	**ORD-Order** (Judicial Officer: Bastian, Gary W.)
10/31/2005	**AUD-Pass to Auditor** (Judicial Officer: Judge, Presiding)
10/31/2005	**DOC-Document Filed** (Judicial Officer: Judge, Presiding)
12/21/2007	**Converted Pending Activity** (Judicial Officer: Judge, Presiding)
12/11/2012	**Other Document**

FINANCIAL INFORMATION

Defendant [redacted]

	Total Financial Assessment			690.00
	Total Payments and Credits			690.00
	Balance Due as of 06/16/2017			**0.00**
06/21/2002	Converted Payment	Receipt # 02036905	NO NAME AVAILABLE	(690.00)
06/21/2002	Transaction			690.00

STATE OF MINNESOTA
COUNTY OF RAMSEY, CITY SP
SECOND JUDICIAL DISTRICT

FILE NO. [redacted]

S.I.D. NO. 6211009938
D.O.B. MN06209D0
CN NO. 01000404

PROBATION REFERRAL
PAGE 1 OF _____

JUDGMENT UPON CONVICTION/WARRANT OF COMMITMENT

DEFENDANT INFORMATION

NAME: [redacted] A/K/A
Last
ADDRESS: [redacted] PHONE:
[redacted] SEX: ☒ M ☐ F
RACE: ☐ White ☐ Hispanic ☐ African-American ☒ Asian ☐ American-Indian ☐ Other
CUSTODY STATUS: *(Circle One)* CUS OR CR BAIL BOND

CONVICTION INFORMATION

Level of Conviction: (F) GM M On 4/25/02 the defendant:
☒ Plead Guilty ☐ Found Guilty by Court before Judge Bastian
☐ Found Guilty by Jury ☐ Motion to Execute Sentence

*** FOR PROBATION USE ONLY ***
Supervising P.O.: _____
Investigation Assigned to: _____
If prob. P.O. assigned: _____

to the offense(s) of Prohib Act - Hire <18 ? = 16S DOC 8.1.01
Guilty Ct(s) 2 Ct 2 MS 609.324 1c2 UOC _____ GOC _____
_____ Ct _____ MS _____ UOC _____ GOC _____
Ct's Dism 1 Plea Agreement _____ No ✓ Yes (Details) Stay Insp 30dy cap if no fel
Referral Type: ☒ PSI ☐ Update PSI ☐ CD Eval ☐ Memo/MSG Worksheet ☐ Psychological Eval ☒ Psychiatric Eval ☐ Other _____
Prosecutor S. Wilton Defense Atty D. Gill ☐ Interpreter-Language _____
Add'l Info: _____ Clerk Initials _____
SENTENCING DATE 6.21.02 JUDGE Bastian TIME: 9:00 ROOM 130

FELONY LEVEL SENTENCE

Count _____ PV Date _____ Admit/Deny
Date of Sentence _____ Judge _____
☐ Committed to Commissioner of Corrections for:
_____ Years, _____ Months, _____ Days and $_____ Fine
☐ Minimum Incarceration _____, Maximum Supervised Release _____
☐ Sex Offender Conditional Release Purs. to MS 609.346(5) ___ 5 yrs (1st offense)
☐ Stay of Execution ___ 10 yrs (2nd/subsequent)
☐ Stay of Imposition } _____ Years to: _____ Court
☐ Stay of Adjudication 152.18 } _____ Probation
☐ Stay of Adjudication
Sentence is: ☐ Concurrent ☐ Consecutive with Case #: _____
☐ DOC ☐ Comm. from Court _____

MISDEMEANOR / GROSS MISDEMEANOR LEVEL SENTENCE

Count _____ PV Date _____ Admit/Deny
Date of Sentence _____ Judge _____
☐ Sentence of _____ Days/Mos/Year and/or $_____ Fine
☐ Stay of Execution: _____ Years _____ Months to: ☐ Court ☐ Probation
☐ Stay of Imposition: _____ Years _____ Months to: ☐ Court ☐ Probation
☐ Sentence is: ☐ Concurrent ☐ Consecutive with case #: _____
☐ Committed from Court
Other Information: _____

CONDITIONS

☐ To serve _____ days/mos/year at _____ RCCF; _____ VOA; _____ ADC
☐ Credit for _____ days ☐ TSI on _____; at _____ AM/PM
☐ Home Confinament/Electronic Home Monitoring ☐ Work Release if eligible
☐ If eligible; STS call: (651) 266-2348; ☐ Weekends ☐ Wilder Day Program
☐ Pay $_____ fine. OR _____ SAVE option _____ Fine suspended
☐ Fees W Or I (circle one) ☐ Chem Fee W or I $_____
☐ Pay Fine/Restitution via prison earnings/suprvsd release
☐ Complete _____ hours of Community Service by _____
☐ Pay restitution of $_____ or ☐ Amt. to be determined by Probation
☐ Usual conditions of probation/law abiding ☐ Continue Probation Same Terms/Conditions
☐ No same or similar violations ☐ Psychological ☐ Psychiatric Eval/Recs
☐ Rule 25 Eval / Recs ☐ Mental Health Counseling/Recs
☐ Chem Eval / Recs ☐ Sex Offender Treatment
☐ Abstain from Drugs/Alcohol/Chem's ☐ Register as Sex Offender
☐ No Non-Prescription Drugs ☐ DNA Testing
☐ Two Day Anoka Prgm ☐ MADD Prgm ☐ Educational, Vocational Counseling
☐ Random Ua's/Breathalyzer per PO ☐ Sign Confession of Judgment
☐ CA ☐ NA - or ☐ AA Meetings ☐ Confession signed? ☐ Yes ☐ No
☐ No Alcohol related offenses ☐ Domestic Abuse Cnslg/Recs
☐ Treatment and Aftercare/Recs ☐ Domestic Fee - $125
☐ Turn in Plates # _____ ☐ Anger Management Counseling/Recs
By: _____ ☐ No Contact Order still in effect
☐ No Drink/Drive Violations ☐ No Contact Order Lifted
☐ No DL/Insurance Violations ☐ Have no contact with _____

TO THE DEFENDANT:
☒ You must report IMMEDIATELY to Room 88 in the Courthouse for interview by Probation.
☐ You must go IMMEDIATELY to Room 410, Maplewood Courthouse for interview by Probation.
☐ You must contact Probation at (651) 266-2300 after 3 (three) days.

50 Kellogg
[illegible] Courthouse

DEFENDANT

40

[Pet Add. 19]

000142

State of Minnesota | County of Ramsey | District Court

CCT	LIST CHARGE STATUTE ONLY	MOC	GOC
1	609.324, Subd. 1 (c) (1)	Z1986	F
2	609.324, Subd. 1 (c) (2)	Z1986	F

☐ ✓If more than 6 counts ☐ ✓Domestic Assault

CO ATTY FILE NO.

CONTROLLING AGENCY
0620900

CONTROL NO.
01000404

COURT FILE NO.

DATE FILED

AMENDED

☐ AMENDED ☐ TAB CHARGE PREVIOUSLY FILED

STATE OF MINNESOTA,

PLAINTIFF,

VS.

☒ SERIOUS FELONY
☐ FELONY
☐ GROSS MISD DWI
☐ GROSS MISD

☒ SUMMONS
☐ WARRANT
☐ ORDER OF DETENTION

NAME: first, middle, last	DATE OF BIRTH	SJIS COMPLAINT NUMBER RAMSEY COUNTY
[redacted] DEFENDANT	[redacted]	62-11-0-099389

COMPLAINT

The Complainant, being duly sworn, makes complaint to the above-named Court and states that there is probable cause to believe that the Defendant committed the following offense(s). The Complainant states that the following facts establish PROBABLE CAUSE:

[redacted]

[redacted]

COUNT I

[redacted]

THEREFORE, Complainant requests that said Defendant, subject to bail or conditions of release be:
(1) arrested or that other lawful steps be taken to obtain Defendant's appearance in court; or
(2) detained, if already in custody, pending further proceedings, and that said Defendant otherwise be dealt with according to law.

COMPLAINANT'S NAME:
KEVIN NAVARA

COMPLAINANT'S SIGNATURE

Being duly authorized to prosecute the offense(s) charged, I hereby approve this Complaint.

DATE:

PROSECUTING ATTORNEY'S SIGNATURE

PROSECUTING ATTORNEY

NAME/TITLE
CHRIS WILTON
Assistant County Attorney
Attorney Registration #

ADDRESS/TELEPHONE
50 W. Kellogg Blvd., #315, St. Paul, MN 55102
651-266-3156/lmd

Court Case # _____

This COMPLAINT was subscribed and sworn to before the undersigned this ____ day of _____, 2002.

NAME: *SIGNATURE*

TITLE:

FINDING OF PROBABLE CAUSE

From the above sworn facts, and any supporting affidavits or supplemental sworn testimony, I, the Issuing Officer, have determined that probable cause exists to support, subject to bail or conditions of release where applicable, Defendant's arrest or other lawful steps be taken to obtain Defendant's appearance in court, or his detention, if already in custody, pending further proceedings. The Defendant is thereof charged with the above-stated offense.

☒ **SUMMONS**

THEREFORE You, THE ABOVE-NAMED DEFENDANT, ARE HEREBY SUMMONED to appear on the day of , 2002 at 1:30 P.M., before the above-named court at 14 West Kellogg Boulevard, St. Paul, Minnesota, to answer this complaint. IF YOU FAIL TO APPEAR in response to this SUMMONS, a WARRANT FOR YOUR ARREST shall be issued.

☐ **WARRANT**

☐ *EXECUTE IN MINNESOTA ONLY* ☐ *EXECUTE NATIONWIDE*

To the Sheriff of the above-named county; or other person authorized to execute this WARRANT; I hereby order, in the name of the State of Minnesota, that the above-named Defendant be apprehended and arrested without delay and brought promptly before the above-named court (if in session, and if not, before a Judge or Judicial Officer of such court without unnecessary delay, and in any event not later than 36 hours after the arrest or as soon thereafter as such Judge or Judicial Officer is available) to be dealt with according to law.

☐ **ORDER OF DETENTION**

Since the above-named Defendant is already in custody; I hereby order, subject to bail or conditions of release, that the above-named Defendant continue to be detained pending further proceedings.

Bail: $ 5,000.00

Conditions of Release: No Contacat with R.L.D.

This COMPLAINT – SUMMONS, duly subscribed and sworn to, is issued by the undersigned Judicial Officer this day of , 2002.

JUDICIAL OFFICER:

NAME: *SIGNATURE*

TITLE:

Sworn testimony has been given before the Judicial Officer by the following witnesses:

STATE OF MINNESOTA COUNTY OF RAMSEY

STATE OF MINNESOTA

Plaintiff,

vs.

[redacted]

Defendant

Clerk's Signature or File Stamp:

RETURN OF SERVICE

I hereby Certify and Return that I have served a copy of this COMPLAINT – SUMMONS upon the Defendant herein named.

609.324 PATRONS; PROSTITUTES; HOUSING INDIVIDUALS ENGAGED IN PROSTITUTION; PENALTIES.

Subdivision 1. **Engaging in, hiring, or agreeing to hire minor to engage in prostitution; penalties.** (a) Whoever intentionally does any of the following may be sentenced to imprisonment for not more than 20 years or to payment of a fine of not more than $40,000, or both:

(1) engages in prostitution with an individual under the age of 13 years;

(2) hires or offers or agrees to hire an individual under the age of 13 years to engage in sexual penetration or sexual contact; or

(3) hires or offers or agrees to hire an individual who the actor reasonably believes to be under the age of 13 years to engage in sexual penetration or sexual contact.

(b) Whoever intentionally does any of the following may be sentenced to imprisonment for not more than ten years or to payment of a fine of not more than $20,000, or both:

(1) engages in prostitution with an individual under the age of 16 years but at least 13 years;

(2) hires or offers or agrees to hire an individual under the age of 16 years but at least 13 years to engage in sexual penetration or sexual contact; or

(3) hires or offers or agrees to hire an individual who the actor reasonably believes to be under the age of 16 years but at least 13 years to engage in sexual penetration or sexual contact.

(c) Whoever intentionally does any of the following may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both:

(1) engages in prostitution with an individual under the age of 18 years but at least 16 years;

(2) hires or offers or agrees to hire an individual under the age of 18 years but at least 16 years to engage in sexual penetration or sexual contact; or

(3) hires or offers or agrees to hire an individual who the actor reasonably believes to be under the age of 18 years but at least 16 years to engage in sexual penetration or sexual contact.

Subd. 1a. **Housing unrelated minor engaged in prostitution; penalties.** Any person, other than one related by blood, adoption, or marriage to the minor, who permits a minor to reside, temporarily or permanently, in the person's dwelling without the consent of the minor's parents or guardian, knowing or having reason to know that the minor is engaging in prostitution may be sentenced to imprisonment for not more than one year or to payment of a fine of not more than $3,000, or both; except that, this subdivision does not apply to residential placements made, sanctioned, or supervised by a public or private social service agency.

Subd. 2. **Prostitution in public place; penalty for patrons.** Whoever, while acting as a patron, intentionally does any of the following while in a public place is guilty of a gross misdemeanor:

(1) engages in prostitution with an individual 18 years of age or older; or

(2) hires, offers to hire, or agrees to hire an individual 18 years of age or older to engage in sexual penetration or sexual contact.

Except as otherwise provided in subdivision 4, a person who is convicted of violating this subdivision must, at a minimum, be sentenced to pay a fine of at least $1,500.

Subd. 3. **General prostitution crimes; penalties for patrons.** (a) Whoever, while acting as a patron, intentionally does any of the following is guilty of a misdemeanor:

(1) engages in prostitution with an individual 18 years of age or older; or

(2) hires, offers to hire, or agrees to hire an individual 18 years of age or older to engage in sexual penetration or sexual contact. Except as otherwise provided in subdivision 4, a person who is convicted of violating this paragraph must, at a minimum, be sentenced to pay a fine of at least $500.

(b) Whoever violates the provisions of this subdivision within two years of a previous prostitution conviction for violating this section or section 609.322 is guilty of a gross misdemeanor. Except as otherwise provided in subdivision 4, a person who is convicted of violating this paragraph must, at a minimum, be sentenced as follows:

(1) to pay a fine of at least $1,500; and

(2) to serve 20 hours of community work service.

The court may waive the mandatory community work service if it makes specific, written findings that the community work service is not feasible or appropriate under the circumstances of the case.

Subd. 4. **Community service in lieu of minimum fine.** The court may order a person convicted of violating subdivision 2 or 3 to perform community work service in lieu of all or a portion of the minimum fine required under those subdivisions if the court makes specific, written findings that the convicted person is indigent or that payment of the fine would create undue hardship for the convicted person or that person's immediate family. Community work service ordered under this subdivision is in addition to any mandatory community work service ordered under subdivision 3.

Subd. 5. **Use of motor vehicle to patronize prostitutes; driving record notation.** (a) When a court sentences a person convicted of violating this section while acting as a patron, the court shall determine whether the person used a motor vehicle during the commission of the offense and whether the person has previously been convicted of violating this section or section 609.322. If the court finds that the person used a motor vehicle during the commission of the offense, it shall forward its finding along with an indication of whether the person has previously been convicted of a prostitution offense to the commissioner of public safety who shall record the finding on the person's driving record. Except as provided in paragraph (b), the finding is classified as private data on individuals, as defined in section 13.02, subdivision 12, but is accessible for law enforcement purposes.

(b) If the person has previously been convicted of a violation of this section or section 609.322, the finding is public data.

Subd. 6. **Prostitution in public place; penalty for prostitutes.** Whoever, while acting as a prostitute, intentionally does any of the following while in a public place is guilty of a gross misdemeanor:

(1) engages in prostitution with an individual 18 years of age or older; or

(2) is hired, offers to be hired, or agrees to be hired by an individual 18 years of age or older to engage in sexual penetration or sexual contact.

Subd. 7. **General prostitution crimes; penalties for prostitutes.** (a) Whoever, while acting as a prostitute, intentionally does any of the following is guilty of a misdemeanor:

(1) engages in prostitution with an individual 18 years of age or older; or

(2) is hired, offers to be hired, or agrees to be hired by an individual 18 years of age or older to engage in sexual penetration or sexual contact.

(b) Whoever violates the provisions of this subdivision within two years of a previous prostitution conviction for violating this section or section 609.322 is guilty of a gross misdemeanor.

History: *1979 c 255 s 4; 1984 c 628 art 3 s 11; 1986 c 448 s 5,6; 1990 c 463 s 1-4; 1Sp2003 c 2 art 10 s 5; 2004 c 228 art 1 s 72; 2009 c 137 s 8,9; 2009 c 170 s 2-4; 1Sp2011 c 1 art 5 s 4-7; 2015 c 65 art 6 s 11; 2016 c 189 art 4 s 15*

File: A095-538-919 – Orlando, FL Date: JAN 11 2019

In re: Jesus RODRIGUEZ-DANU a.k.a. Lorenzo B. Quintanilla-Hernandez

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: John R. Gihon, Esquire

ON BEHALF OF DHS: David Delgado
Assistant Chief Counsel

APPLICATION: Termination

The respondent appeals the Immigration Judge's July 19, 2018, written decision denying his motion to terminate proceedings.[1] The Immigration Judge concluded that the respondent's conviction for traveling to meet a minor in violation of Fla. Stat. § 847.0135(4)(a) is an aggravated felony rendering him removable under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii), as it falls within the federal definition of sexual abuse of a minor offense. Section 101(a)(43)(A) of the Act, 8 U.S.C. § 1101(a)(43)(A). The Department of Homeland Security moves for a summary affirmance. The appeal will be sustained and the proceedings terminated without prejudice.

We review the factual findings, including the Immigration Judge's credibility determination, under the "clearly erroneous" standard. 8 C.F.R. § 1003.1(d)(3)(i). We review all other issues, including issues of law, discretion, or judgment, under a de novo standard. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent's only removability charge is that his conviction constitutes an aggravated felony sexual abuse of a minor offense under section 101(a)(43)(A) of the Act.[2] We apply the categorical approach involving an elements comparison rather than considering the facts underlying the respondent's crime to determine whether his conviction is a federal aggravated felony. *Esquivel-Quintana v. Sessions,* 137 S. Ct. 1562, 1567-68 (2017); *Choizilme v. U.S. Att'y Gen.,* 886 F.3d 1016, 1022 (11th Cir. 2018). The state statute will constitute a conviction for the generic offense only "if the statute's elements are the same as, or narrower than, those of the generic offense." *Descamps v. United States,* 570 U.S. 254, 257 (2013). Therefore, unless the minimally culpable conduct under the respondent's section 847.0135(4)(a) offense falls within the generic aggravated sexual abuse of a minor

[1] The respondent also appeals the Immigration Judge's August 1, 2018, decision ordering him removed to Mexico.

[2] As the Immigration Judge discussed, the DHS withdrew the additional removability charge under section 237(a)(2)(E)(i) of the Act (IJ at 2).

definition the respondent's conviction is not an aggravated felony. *Mathis v. United States,* 136 S. Ct. 2243, 2248 (2016); *Moncrieffe v. Holder,* 569 U.S. 184 (2013).

As the respondent observes, the Supreme Court has held that under the generic federal definition of sexual abuse of a minor the victim must be under 16 years-old. *Esquivel-Quintana v. Sessions,* 137 S. Ct. at 1568; *Matter of Deang,* 27 I&N Dec. 57, 63 (BIA 2018) (citing Supreme Court's conclusion that the generic definition of aggravated felony sexual abuse of a minor under section 101(a)(43)(A) of the Act "requires that the victim be younger than 16"). By contrast, the respondent's crime applies to a broader group of victims, including those older than 16 years-old. Fla. Stat. § 847.001(8) (defining minor as those under 18 years-old). Because the respondent's offense is overbroad as compared to the federal definition of sexual abuse of a minor, he is not removable as charged.

Accordingly, the following orders are entered.

ORDER: The appeal is sustained, and the respondent's proceedings are terminated without prejudice.

FOR THE BOARD

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[redacted] **Petitioner,** **v.** **William Barr,** **U.S. Attorney General,** **Respondent.**	**Nos.** [redacted] Immigration File No. [redacted] Petition for Review from the Decision of the Board of Immigration Appeals

CERTIFICATE OF SERVICE

I hereby certify that on March 28, 2019, I electronically filed the foregoing ADDENDUM with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and will be served by the CM/ECF system.

Dated: March 28, 2019

s/ John Bruning

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

[redacted] **Petitioner,** **v.** **William Barr,** **U.S. Attorney General,** **Respondent.**	**Nos.** [redacted] Immigration File No. [redacted] Petition for Review from the Decision of the Board of Immigration Appeals

CERTIFICATE OF COMPLIANCE

Pursuant to Eighth Cir. R. 28A(h), I certify that the foregoing ADDENDUM has been scanned for viruses and is virus-free.

Dated: March 28, 2019

s/ John Bruning

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UNITED STATES COURT OF APPEALS
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CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2019, pursuant to Eighth Cir. R. 28A(d), I caused 10 paper copies of the foregoing document to be sent to the Court and 1 copy to be served on Respondent at the following address:

Melissa K. Lott, Trial Attorney
Office of Immigration Litigation
U.S. Department of Justice / Civil Division
P.O. Box 878, Ben Franklin Station
Washington, DC 20044

Dated: April 3, 2019

s/ John Bruning

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