U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: G[redacted] R[redacted], E[redacted] **A[redacted]784**

Date of this notice: 12/20/2017

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Creppy, Michael J.
Liebowitz, Ellen C
Mullane, Hugh G.

Userteam: Docket

File: [redacted] 784 – Los Angeles, CA Date: DEC 20 2017

In re: E[redacted] G[redacted] R[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Alex Holguin, Esquire

APPLICATION: Cancellation of removal

The respondent appeals the Immigration Judge's June 30, 2015, decision pretermitting his application for cancellation of removal under section 240A(b) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b). The appeal will be sustained and the record will be remanded.

We review the findings of fact, including the determination of credibility, made by the Immigration Judge 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 Immigration Judge pretermitted the respondent's application for cancellation of removal, concluding that the respondent's conviction under Cal. Penal Code § 273a(b) ("§ 273a(b)") was categorically a "crime of child abuse, child neglect, or child abandonment," under section 237(a)(2)(E)(i) of the Act, 8 U.S.C. § 1227(a)(2)(E)(i), which rendered him ineligible for cancellation of removal under section 240A(b)(1)(C) of the Act (IJ at 3-4). The respondent now appeals.

On appeal, the respondent argues that his conviction is not a categorical "crime of child abuse," and therefore, he is not statutorily ineligible for cancellation of removal (Respondent's Br. at 2). We will reexamine whether the respondent's conviction renders him ineligible for cancellation of removal, in light of relevant intervening case law from the United States Supreme Court, the United States Court of Appeals for the Ninth Circuit, and the Board since the Immigration Judge's June 30, 2015, decision in this case.

To determine whether a state criminal conviction is a crime of child abuse, we must follow the "categorical approach." *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013). Under the categorical approach, we compare the state statute of conviction, which in this case is the respondent's conviction under Cal. Penal Code § 273a(b), with the generic offense – here, a "crime of child abuse" – to determine whether the state offense is a categorical match to the generic offense, such that every violation of that statute qualifies as a crime of child abuse. *See id.*; *see also Diego v. Sessions*, 857 F.3d 1005, 1009 (9th Cir. 2017).

In 2010, the respondent was convicted of violating Cal. Penal Code § 273a(b). California Penal Code § 273a(b) provides:

> Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health may be endangered, is guilty of a misdemeanor.

In applying the categorical approach, we must first determine the definition of the generic offense. We have previously defined a "crime of child abuse" to mean an offense "involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child or that impairs a child's physical or mental well-being." *Matter of Velazquez-Herrera*, 24 I&N Dec. 503, 512 (BIA 2008). The term is not limited to offenses that require proof of actual harm or injury, as the phrase "act or omission that constitutes maltreatment of a child" encompasses some crimes of child endangerment. *See Matter of Soram*, 25 I&N Dec. 378, 383 (BIA 2010); *see also Matter of Mendoza Osorio*, 26 I&N Dec. 703, 704 (BIA 2016). As states use a variety of terms to describe the degree of threat required under endangerment-type offenses, "a [s]tate-by-[s]tate analysis is appropriate to determine whether the risk of harm required by the endangerment-type language in any given [s]tate statute is sufficient to bring an offense within the definition of 'child abuse' under the Act." *Matter of Soram*, 25 I&N Dec. at 383. In *Matter of Mendoza Osorio*, we held that the elements of N.Y. Penal Code § 260.10(1), the child endangerment statute at issue in that case, which punished a knowing mental state coupled with an act or acts creating a likelihood of harm to a child, fit within the generic definition of a crime of child abuse. *Matter of Mendoza Osorio*, 26 I&N Dec. at 706.

We agree with the respondent that Cal. Penal Code § 273a(b) punishes a broader range of conduct than the generic definition of "crime of child abuse." In its decision in *Fregozo v. Holder*, the Ninth Circuit held that the "full range of conduct" punished under § 273a(b) is broader than our definition of "crime of child abuse." *Fregozo v. Holder*, 576 F.3d 1030, 1037 (9th Cir. 2009).[1] In so holding, the court stated that the fourth prong of § 273a(b), which involves willfully causing or permitting a child – in one's care or custody – to be placed in a situation where his or her person or health may be endangered, "makes criminal conduct that creates only the bare potential for nonserious harm to a child. . . " *Id.* at 1038.

As we noted in *Matter of Mendoza Osorio*, in concluding that § 273a(b) is broader than our definition of "crime of child abuse," the *Fregozo* court cited a California state case that upheld a conviction under § 273a(b) where a defendant "plac[ed] an unattended infant in the middle of a tall bed without a railing, even though the child was never injured." *Fregozo v. Holder*, 576 F.3d at 1037; *see also Matter of Mendoza Osorio*, 26 I&N Dec. at 711; *People v. Little*, 9 Cal. Rptr. 3d 446, 449-50 (Cal. Ct. App. 2004) (defendant was convicted under § 273a(b) for

[1] We note that *Fregozo v. Holder* was decided prior to our decisions in *Matter of Soram*, 25 I&N Dec. at 378, and *Matter of Mendoza Osorio*, 26 I&N Dec. at 703.

placing a child in a bed without railings or restraints, where she *could have been injured* from falling) (emphasis added). We agree that the facts in *People v. Little*, as construed by the *Fregozo* court, do not define a crime of child abuse.

In light of the foregoing discussion, we agree with the respondent that as the fourth prong of Cal. Penal Code § 273a(b) punishes allowing a child in one's care or custody to be placed in a situation where he or she *may* be endangered, the statute punishes a broader range of conduct than the generic definition of "crime of child abuse." *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007) ("to find that a state statute creates a crime outside the generic definition . . . requires a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime."); *see also Fregozo v. Holder*, 576 F.3d at 1037-38; *People v. Little*, 9 Cal. Rptr. 3d at 449-50. As we agree that § 273a(b) criminalizes more conduct than the elements of the generic offense of "child abuse," the respondent is correct that § 273a(b) is overbroad and thus is not categorically a "crime of child abuse," within the meaning of section 237(a)(2)(E)(i) of the Act.

As she concluded that § 273a(b) was categorically a crime of child abuse, the Immigration Judge did not reach the issue of divisibility (IJ at 3-4). As we have determined that § 273a(b) is overbroad, we must examine whether § 273a(b) is divisible under current case law from the Supreme Court, the Ninth Circuit, and the Board.

When a statute is overbroad and thus not a categorical match to the generic offense, we next determine whether the state statute of conviction is "divisible" or "indivisible." *See Diego v. Sessions*, 857 F.3d at 1009; *see also Descamps v. United States*, 133 S. Ct. 2276, 2281, 2283 (2013). To determine whether a statute is divisible, we ask whether a statute contains alternative "elements" defining multiple crimes or alternative "means" by which a defendant might commit the same crime. *See Mathis v. United States*, 136 S. Ct. 2243, 2256 (2016). If the statute of conviction has an indivisible set of elements, it is "indivisible" and the modified categorical approach cannot be applied. *See Descamps v. United States*, 133 S. Ct. at 2282; *see also Matter of Chairez-Castrejon*, 26 I&N Dec. 819, 819-20 (BIA 2016) (holding that the divisibility analysis outlined in *Descamps* and *Mathis* "applies in immigration proceedings nationwide to the same extent that it applies in criminal sentencing proceedings").

To determine whether § 273a(b) is divisible, we first look to the text of the statute itself. The first part of the statutory text of § 273a(b) requires that the conduct be done "under circumstances or conditions other than those likely to produce great bodily harm or death." The second part of the statute outlines four prongs, phrased disjunctively, that present alternative ways in which a defendant can injure or endanger a child. Although the statute is phrased disjunctively, that does not automatically render the statute divisible. *See Mathis v. United States*, 136 S. Ct. at 2249. It is not clear on the face of the statute whether these four prongs outline alternative means of committing the offense or if they are alternative elements punishing different offenses.

We next look at "authoritative sources of state law" to determine whether the statute is divisible. *See Mathis v. United States*, 136 S. Ct. at 2256. To begin, we note that § 273a is divided into subsections (a) and (b). Subsection (a) is a felony and punishes four alternative scenarios that occur "under circumstances or conditions likely to produce great bodily harm or death." As noted

above, subsection (b) is a misdemeanor and punishes four alternative scenarios that occur "under circumstances or conditions *other than those* likely to produce great bodily harm or death" (emphasis added).[2] The language detailing the four alternative scenarios in both subsections (a) and (b) is identically worded. Due to the identical language of the relevant portions of both subsections, although this case only involves looking at subsection (b), in analyzing state case law to determine whether § 273a(b) is divisible, we also look to case law involving subsection (a).

California case law has determined that there are two distinct ways that an individual can violate the statute. First, an individual can violate the statute by "direct infliction," namely, by inflicting unjustifiable physical pain or mental suffering on a child. *See In re L.K.*, 132 Cal. Rptr. 3d 342, 346-47 (Cal. Ct. App. 2011) (analyzing subsection (a) of section 273a). The statute can also be violated by "indirect infliction," namely, by willfully causing or permitting any child to suffer; willfully causing or permitting the person or health of a child – in one's care or custody – to be injured; or willfully causing or permitting a child – in one's care or custody – to be placed in a situation where his or her person or health may be endangered.[3] *Id.* Of the three "indirect infliction" prongs of the statute, only the final prong, which punishes willfully causing or permitting a child – in one's care or custody – to be placed in a situation where his or her person or health may be endangered, falls outside of our definition of a crime of child abuse. Therefore, to determine whether the statute is divisible vis-à-vis our definition of "crime of child abuse," we must determine whether this final prong is merely an alternative means of violating the statute or whether it is an element of the offense that requires jury unanimity in order for a conviction. *Mathis v. United States*, 136 S. Ct. at 2248.

In *Ramirez v. Lynch*, the Ninth Circuit examined whether a conviction under Cal. Penal Code § 273a(a) is categorically an aggravated felony crime of violence. *Ramirez v. Lynch*, 810 F.3d at 1127. In concluding that § 273a(a) is overbroad and indivisible, the court held that the four prongs of the statute were alternative means of committing a single offense, rather than alternative elements requiring jury unanimity. *See id.* at 1138. Although *Ramirez* dealt with a different inquiry than the one in the instant case, the court relied on two California Courts of Appeal cases that aid us in our analysis of the instant case.

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[2] Subsections (a) and (b) qualify as distinct elements of the offense rather than as "brute facts," or mere means of commission as they contain different sentencing provisions affecting the degree of punishment. *See Matter of Chairez-Castrejon*, 26 I&N Dec. at 823; *see also Mathis v. United States*, 136 S. Ct. at 2256 ("If statutory alternatives carry different punishments, then under *Apprendi* [*v. New Jersey*, 530 U.S. 466 (2000),] they must be elements.").

[3] The California Supreme Court has determined that a violation of the "direct infliction" prong requires the state to prove general criminal intent, whereas a violation of the "indirect infliction" prongs only requires the state to prove criminal negligence. *See People v. Valdez*, 42 P.3d 511, 518-19 (Cal. 2002). Our definition of "crime of child abuse" encompasses both a mens rea of general intent (i.e., willfulness) and a mens rea of criminal negligence. *Matter of Velasquez-Herrera*, 24 I&N Dec. at 512 (our definition of a crime of child abuse requires "an intentional, knowing, reckless, or criminally negligent act or omission.").

In *People v. Vargas*, the California Court of Appeal held that where a case involves a continuous course of conduct,[4] "it is permissible for members of the jury to determine that the underlying facts establish a violation of the statute under different legal theories such as direct infliction of abuse or permitting the child's health or safety to be endangered." *People v. Vargas*, 251 Cal. Rptr. 904, 909 (Cal. Ct. App. 1988). In other words, the jury did not need to agree as to whether the defendant violated the prong of the statute punishing the direct infliction of physical pain or the prong of the statute punishing the indirect infliction of injury by willfully permitting her child to be injured, so long as the jury unanimously agreed that the defendant violated § 273a(a). *Id.*

Furthermore, in *In re L.K.*, the California Court of Appeal upheld the lower court's judgment, but on a different prong of § 273a(a). *In re L.K.*, 132 Cal. Rptr. 3d at 347. The trial court found that the defendant violated the "direct infliction" portion of the statute, but in so doing, applied the incorrect mental state of criminal negligence (as opposed to general intent). *Id.* at 346. The appellate court agreed with the defendant that the trial court had erred in concluding that her actions violated the "direct infliction" portion of the statute. *Id.* However, the appellate court still upheld the lower court's judgment, concluding that the defendant had violated the first prong of the statute, by willfully permitting her brother to suffer unjustifiable physical pain and mental suffering. *Id.* at 347. Thus, even though the trial court erred in finding that the defendant violated the "direct infliction" portion of the statute, the appellate court upheld the conviction under § 273a(a), concluding that the evidence supported a conviction under a different prong. *Id.*

These cases reveal that in order to sustain a conviction under § 273a(b), the state of California need not prove that a defendant violated a particular prong of the statute, so long as the jury agrees that the defendant violated one of the four prongs necessary for a conviction. *See generally In re L.K.*, 132 Cal. Rptr. 3d at 342; *People v. Vargas*, 251 Cal. Rptr. at 904. As such, the four prongs of § 273a(b) are merely alternative means of violating the statute that do not require jury unanimity, as opposed to separate elements. Therefore, after examining the authoritative sources of state law, we conclude that § 273a(b) is not divisible. As § 273a(b) is not a divisible statute, our analysis stops here, and we cannot apply the modified categorical approach to the instant case.

In sum, we conclude that § 273a(b) is broader than the generic offense of a "crime of child abuse," and is not divisible; therefore, it is not a crime of child abuse under section 237(a)(2)(E)(i) of the Act. As such, the respondent is not precluded from applying for cancellation of removal, as

[4] Under California law, a jury verdict must be unanimous, and the jury must unanimously agree that a defendant is guilty of a specific crime. *People v. Russo*, 25 P.3d 641, 645 (Cal. 2001). An exception to the juror unanimity requirement exists for certain offenses, including § 273a, when the state alleges a pattern of abuse, or a "continuous course of conduct." *People v. Ewing*, 140 Cal. Rptr. 299, 300-01 (Cal. Ct. App. 1977). When a prosecutor alleges a "continuous course of conduct," the jury is required to unanimously decide whether the defendant was guilty of that course of conduct, as distinguished from whether the defendant committed a specific act on a specific date. *Id.*

he has not been convicted of a disqualifying offense under section 240A(b)(1)(C) of the Act.[5] In light of our conclusion, we will remand the record to the Immigration Judge to further determine whether the respondent is eligible for cancellation of removal. Due to the passage of time since the Immigration Judge's decision in this case, the parties should be allowed to update the record with new evidence or arguments on remand. Accordingly, the following orders will be entered.

ORDER: The respondent's appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and for the entry of a new decision.

Ellen Rubowitz
FOR THE BOARD

[5] As the Immigration Judge concluded that the respondent was statutorily ineligible for cancellation of removal due to his conviction under Cal. Penal Code § 273a(b), the Immigration Judge did not reach whether the respondent's remaining convictions would otherwise render him ineligible for cancellation of removal (IJ at 2 n.1). On remand, the Immigration Judge should address any remaining issues regarding the respondent's statutory eligibility for cancellation of removal.

G R E
784

Handed out on JUN 3 0 15 IJ Basis

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
LOS ANGELES, CALIFORNIA

File No.: **A 784**

In the Matter of:

G R, E

IN REMOVAL PROCEEDINGS

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act (INA) (2011) – *entered without inspection or parole*

APPLICATION: Cancellation of Removal for Certain Nonpermanent Residents, pursuant to INA § 240A(b)(1)

ON BEHALF OF RESPONDENT:
Alex Holguin, Esquire
714 West Olympic Boulevard, Suite 450
Los Angeles, California 90015

ON BEHALF OF THE DEPARTMENT:
Andrea Hong, Assistant Chief Counsel
U.S. Department of Homeland Security
606 South Olive Street, Eighth Floor
Los Angeles, California 90014

INTERIM DECISION AND ORDERS OF THE IMMIGRATION JUDGE

I. Procedural History

E G R (Respondent) is a native and citizen of Mexico. *See* Exh. 1. On November 22, 2011, the U.S. Department of Homeland Security (Department) personally served Respondent with a Notice to Appear (NTA), alleging therein that Respondent entered the United States at an unknown place, on an unknown date, and was not then admitted or paroled after inspection by an immigration officer. *See id.* Accordingly, the Department charged Respondent with inadmissibility pursuant to INA § 212(a)(6)(A)(i). *Id.* Jurisdiction vested and removal proceedings commenced when the Department filed the NTA with this Court on November 25, 2011. *See* 8 C.F.R. § 1003.14(a) (2011).

On December 19, 2012, Respondent admitted factual allegations one, two, and four, and conceded the charge of inadmissibility. He denied factual allegation three, contending that he entered the United States in 1988. On September 4, 2013, he filed a Form EOIR-42B, Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents (cancellation of removal). *See* Exh. 3. The Respondent does not seek voluntary departure in the alternative.

On April 27, 2010, the Respondent was convicted of driving with a blood alcohol level of 0.08% or higher in violation of section 23152(b) of the California Vehicle Code, a misdemeanor. He was sentenced to 36 months of probation and a fine, or in the alternative, to serve 13 days in jail. See Exhs. 3 and 4. In that same case, he was convicted of willful cruelty to a child in violation of section 273a(b) of the California Penal Code, a misdemeanor. He was sentenced to 48 months of probation and 10 days of CalTrans. See Exhs. 3 and 4. The Respondent drove drunk with his child in the car.

On January 29, 2014, Respondent filed a brief on eligibility for cancellation of removal, asserting that his conviction pursuant to California Penal Code (CPC) § 273a(b) is not a crime of child abuse. The Department filed a response brief on August 6, 2014. For the following reasons, Respondent is statutorily barred from cancellation of removal.[1]

II. Law and Analysis

The Attorney General *may* cancel the removal and adjust the status of an alien who is inadmissible or removable from the United States to that of an alien lawfully admitted for permanent residence. *See* INA § 240A(b)(1). To qualify for cancellation of removal under INA § 240A(b)(1), an applicant must establish, among other requirements, that he has not been convicted of an offense under INA §§ 212(a)(2), 237(a)(2), or 237(a)(3). INA § 240A(b)(1)(C). A dispositive issue in the instant case is whether Respondent's conviction under CPC § 237a(b) qualifies as a crime of child abuse under INA § 237(a)(2)(E)(i).

To determine whether CPC § 273a(b) is a crime of child abuse, a court must first examine the statute of conviction to ascertain whether it is *categorically* a crime of child abuse. *See Fregozo v. Holder*, 576 F.3d 1030, 1035 (9th Cir. 2009). If that categorical inquiry does not resolve the question and the statute is divisible, containing one or more elements of the offense in the alternative, the court proceeds to conduct a modified-categorical analysis by looking to the record of conviction. *Descamps v. United States*, 133 S.Ct. 2276, 2283 (2013). However, if the statute is indivisible, one not containing multiple elements, then this Court may not conduct a modified-categorical analysis. *Id.*

In *Fregozo*, the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) held that a conviction under CPC § 273a(b) is not categorically a crime of child abuse. 576 F.3d at 1037-38. The court found that section 273a(b) did not match the generic definition of a crime of child abuse because a conviction under the statute did not require actual injury to the child. *Id.* In reaching this conclusion, the court relied on an interpretation of "child abuse" supplied by the Board of Immigration Appeals (Board). *See id.* at 1036-38 (citing and analyzing *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008)). Subsequent to *Fregozo*, the Board revisited the definition of "child abuse" and clarified that it is "not limited to offenses requiring proof of injury to the child." *Matter of Soram*, 25 I&N Dec. 378, 381 (BIA 2010). Because the Board

[1] On November 9, 2011, the Respondent was also convicted of Driving when Privilege Suspended or Revoked for Driving Under the Influence in violation of section 14601.2(a) of the California Vehicle Code, which is a crime involving moral turpitude (CIMT). *See Marmolejo-Campos v. Holder*, 558 F.3d 903 (9th Cir. 2009) (en banc). Because this Court finds that his CPC § 273a(b) conviction is a crime of child abuse under INA § 237(a)(2)(E)(i), it need not additionally analyze whether this conviction is a CIMT, rendering him ineligible for relief for having been convicted of two CIMTs pursuant to INA § 237(a)(2)(A)(ii).

cited *Fregozo* and supplanted its reasoning, this Court is not persuaded by Respondent's argument that actual injury is required under the INA definition of child abuse. *See* Resp't's Br. at 4-5 (Jan. 29, 2014). Thus, this Court will examine CPC § 273a(b) in the first instance to determine whether it categorically constitutes a crime of child abuse.[2]

To constitute a categorical crime of child abuse, a statute must: (1) involve an intentional, knowing, reckless, or criminally negligent act or omission that (2) constitutes maltreatment of a child or that impairs a child's physical or mental well-being. *Fregozo*, 576 F.3d at 1036; *Velazquez-Herrera*, 24 I&N Dec. at 512. CPC § 273a(b) reads:

> Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or willfully causes or permits that child to be placed in a situation where his or her person or health may be endangered, is guilty of a misdemeanor.

To begin, the Supreme Court of California has interpreted the term "willfully" as used in CPC § 273a(b) to require a *mens rea* of criminal negligence. *People v. Valdez*, 27 Cal. 4th 778, 787-88 (2002); *People v. Sargent*, 19 Cal. 4th 1206, 1223 (1999) ("The scienter required for both section 273a [subdivisions (a) and (b)] violations is the same."). As such, the *mens rea* required for a conviction under section 273a(b) is consistent with the first element of the INA definition of crime of child abuse, which requires an "intentional, knowing, reckless, or criminally negligent act or omission." *Soram*, 25 I&N Dec. at 383.

Turning to the second element, child endangerment may constitute maltreatment, and a "State-by-State analysis is appropriate to determine whether the risk of harm required by the endangerment-type language . . . is sufficient to bring an offense within the definition of 'child abuse' under the [INA]." *Id.* For example, in *Soram*, the Board held that a Colorado child endangerment statute satisfied the second element where (1) the legislative purpose of the law was to protect children from risk and dangerous situations; (2) the culpability required of those who place children in such situations was high; and (3) the statute required the perpetrator *unreasonably* place a child in such a situation. *Id.* at 383-86.

CPC § 273a punishes child endangerment as either a felony or misdemeanor depending on the degree of risk of great bodily harm or death. *See People v. Jaramillo*, 98 Cal. App. 3d 830, 835 (1979). Although CPC § 273a(b) as a misdemeanor proscribes actions committed "under circumstances other than those likely to produce great bodily harm or death," the statute as a whole is "intended to protect a child from an abusive situation in which the probability of serious injury is great." *Id.* As the Board noted in *Soram*, this purpose "is similar to that of Congress in enacting section 237(a)(2)(E)(i) of the [INA]." 25 I&N Dec. at 383.

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[2] Respondent argues that *Ibarra v. Holder*, 736 F.3d 903 (10th Cir. 2013), rejected the Board's interpretation of "child abuse" as encompassing criminally negligent conduct with no ensuing injury. *See* Resp't's Br. at 2-4 (Jan. 29, 2014). Because *Ibarra* only controls in the Tenth Circuit's jurisdiction, it is merely persuasive authority for this Court. *See, e.g., Matter of Anselmo*, 20 I&N Dec. 25, 31-32 (BIA 1989). Moreover, the Second Circuit found *Ibarra*'s reasoning "erroneous," and further held that the Board's definition of "child abuse" is entitled to *Chevron* deference. *Florez v. Holder*, 779 F.3d 207, 212-14 (2d Cir. 2015).

Examining the harm to the child, CPC § 273a(b) proscribes conduct both directly causing unjustifiable injury, and placing children in situations where their health may be endangered. First, any actual injury must be "unjustifiable," which the California Court of Appeals has interpreted to mean "unreasonable" under the ordinary standard of care. *People v. Deskin*, 10 Cal. App. 4th 1397, 1402 (1992). This adjective limits the array of injuries that could result in a conviction. *See Soram*, 25 I&N Dec. at 384-86. Next, to be convicted for placing a child in a situation where his or her health may be endangered, it is not enough that a custodian make a simple mistake, considering the "number and kind of situations where a child's life or health may be imperiled are infinite." *Deskin*, 10 Cal. App. 4th at 1402. Rather, "the defendant's conduct must amount to a reckless, gross or culpable departure from the ordinary standard of due care; it must reach such a departure from what would be the conduct of an ordinarily prudent person under the same circumstances as to be incompatible with a proper regard for human life." *Id.* This criminal negligence standard therefore assumes that "serious physical danger or health hazard is reasonably foreseeable," thereby limiting the scope of what is proscribed. *Id.* Indeed, "[p]arents sometimes make mistakes that are detrimental to their children's health or injure their children, but such parents will not be charged with and convicted of a violation of section 273a unless they are criminally negligent." *Id.* at 1403. Therefore, as in *Soram*, the culpability of the perpetrator is high, and the full range of endangerment situations covered by CPC § 273a(b) is sufficiently limited by a reasonableness standard that it falls squarely within the ambit of maltreatment of a child. *See Soram*, 25 I&N Dec. at 385-86. Thus, CPC § 273a(b) is categorically a crime of child abuse.

The Court finds that the Respondent is, therefore, statutorily barred from cancellation of removal under section 240A(b)(1)(C) in that he was convicted of an offense under section 237(a)(2) of the Act, specifically, section 237(a)(2)(E)(i) of the Act.

Accordingly, the following orders will be entered:

ORDERS

IT IS ORDERED that Respondent's application for cancellation of removal for certain nonpermanent residents under section 240A(b)(1) is **DENIED**.

IT IS FURTHER ORDERED that Respondent be removed to Mexico as charged in the Notice to Appear. If the Respondent fails to appear pursuant to a final order of removal at the time and place ordered by the Department of Homeland Security, other than because of exceptional circumstances beyond his control, such as serious illness to the Respondent or death of an immediate relative, but nothing less compelling, the Respondent will become ineligible for certain forms of relief for a period of 10 years from the date the Respondent was scheduled to appear for removal, such as voluntary departure, cancellation of removal, change or adjustment of status.

Date: JUNE 30, 2015

Lori R. Bass

Lori R. Bass
Immigration Judge