U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: LUVISIA, SHARON KHAKAI

A 099-785-387

Date of this notice: 1/16/2018

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.

Userteam: Docket

File: A099 785 387 – Fort Snelling, MN Date: JAN 16 2018

In re: Sharon Khakai LUVISIA a.k.a. Sharon Khakai

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Robyn Meyer-Thompson, Esquire

ON BEHALF OF DHS: Cassondra Bly
Assistant Chief Counsel

APPLICATION: Reinstatement of proceedings

The Department of Homeland Security ("DHS") appeals from an Immigration Judge's decision dated August 10, 2017, granting the respondent's motion to terminate the proceedings and terminating the removal proceedings. 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).

We adopt and affirm the decision of the Immigration Judge. *See Matter of Burbano*, 20 I&N Dec. 872, 874 (BIA 1994).

The respondent, a native and citizen of Kenya, was convicted on February 10, 2016, for the offense of aggravated robbery in violation of Minn. Stat. 609.245, subd. 1. On September 3, 2013, the respondent was convicted for the offense of contributing to the abuse, neglect or delinquency of a child in violation of S.D. Codified Laws § 26-9-1. The DHS charged the respondent with removability under sections 237(a)(2)(A)(ii) and 237(a)(2)(E)(i) of the Immigration and Nationality Act, 8 U.S.C. §§ 1227(a)(2)(A)(ii) and 1227(a)(2)(E)(i). The Immigration Judge determined that the DHS did not establish the respondent's removability under either of these sections by clear and convincing evidence because the respondent's conviction under S.D. Codified Laws § 26-9-1 was not a crime involving moral turpitude ("CIMT") nor a crime of child abuse (IJ at 2-5).

We conclude that the Immigration Judge set forth the appropriate legal framework to determine whether an offense is a CIMT (IJ at 2-5). *See Matter of Silva-Trevino*, 26 I&N Dec. 826 (BIA 2016) (concluding that the categorical and modified categorical approaches provide the proper framework for determining when a conviction is for a crime involving moral turpitude); *see also Chanmouny v. Ashcroft*, 376 F.3d 810 (8th Cir. 2004).

In applying the categorical approach, the Immigration Judge properly looked, not to the facts of the respondent's criminal case, but instead at "whether 'the state statute defining the crime of

conviction' categorically fits within the "generic federal definition of a corresponding" ground for removal. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684; *see also Matter of Silva-Trevino*, 26 I&N Dec. at 831-33 ("To determine whether the respondent's offense qualifies as a CIMT, we employ the 'categorical approach,' which requires a focus on the minimum conduct that has a realistic probability of being prosecuted under the statutes of conviction rather than on the actual conduct which led to the respondent's particular convictions"); *Matter of Chairez*, 26 I&N Dec. 819, 820 (BIA 2016). As the Immigration Judge noted, the United States Court of Appeals for the Eighth Circuit applies the "realistic probability" test. *See Villatoro v. Holder*, 760 F.3d 872, 877-79 (8th Cir. 2014).

The respondent's statute of conviction[1] provides,

> Any person who, by any act, causes, encourages or contributes to the abuse, the neglect or the delinquency of a child, or any person, other than a parent who, by any act, causes a child to become a child in need of supervision, as such phrases with reference to children are defined by chapters 26-7A, 26-8A, 26-8B and 26-8C, or who is, in any manner, responsible therefor, is guilty of a Class 1 misdemeanor.

S.D. Codified Laws § 26-9-1.

We agree with the Immigration Judge that there is a realistic probability that the statute of conviction may be used to prosecute a person for non-turpitudinous behavior, and thus, is categorically overbroad (IJ at 4). The Immigration Judge's determination is supported by the South Dakota Supreme Court's decision in *State v. McVay*, 612 N.W. 572 (2000), in which the court affirmed a conviction for contributing to delinquency of minor for furnishing alcohol to a minor. *See Matter of P-*, 2 I&N Dec. 117, 120-21 (BIA 1944) (violations of liquor laws, such as selling alcohol to a child under 18 does not qualify as a crime involving moral turpitude).

We are not persuaded by the DHS's argument on appeal that the statute has been used to prosecute and convict someone for morally turpitudinous behavior (DHS's Br. at 9-10). Specifically, based on the current paradigm for assessing whether a conviction qualifies as a CIMT, the adjudicator's focus is on the *minimum conduct* that has a realistic probability of being prosecuted under the statute of conviction rather than on the actual conduct which led to the respondent's particular conviction. *Matter of Silva-Trevino*, 26 I&N Dec. at 831-33. The DHS's citation to *Matter of Discipline of Mergren*, 455 N.W. 2d 856, 857 (S.D. 1990), a case in which an individual was prosecuted under the statute of conviction for moral turpitudinous conduct, does not overcome the fact that a court has prosecuted an individual under the same statute, for conduct in which moral turpitude did not inhere, *State v. McVay*, 612 N.W. at 572. The Immigration Judge properly weighed and considered both of these cases in reaching her determination that the DHS did not sustain its burden of proving the respondent's removability under section 237(a)(2)(A)(ii) of the Act.

[1] The respondent does not contest that her conviction for robbery in the first degree is a CIMT (IJ at 3; Exh. 3).

In addition, for the reasons cited by the Immigration Judge, we agree that the statute of conviction does not contain the requisite scienter to be a CIMT (IJ at 4-5). *See Bobadilla v. Holder*, 679 F.3d 1052, 1053-54 (8th Cir. 2012); *Matter of Leal*, 26 I&N Dec. 20, 22 (BIA 2012) (the offense must also be committed with some form of scienter: "specific intent, knowledge, willfulness, or recklessness."), *aff'd sub. nom.*, *Leal v. Holder*, 771 F.3d 1140 (9th Cir. 2014). As the Immigration Judge noted, the statute of conviction is interpreted broadly, is meant to cover a wide range of behavior; moreover, it is a general intent crime, which prohibits "*any* act," and states that a person can be convicted if they are "*in any manner*, responsible therefor" (IJ at 4). S.D. Codified Laws § 26-9-1 (emphasis added). The DHS does not present any meaningful arguments addressing the Immigration Judge's determination in this regard. Thus, based on the foregoing, we uphold the Immigration Judge's conclusion that the respondent's conviction was not for a CIMT because it is categorically overbroad and indivisible as to scienter (IJ at 6-7). *See Matter of Silva-Trevino*, 26 I&N Dec. at 827.

We also affirm the Immigration Judge's conclusion that the DHS did not meet its burden of establishing the respondent's removability under section 237(a)(2)(E)(i) of the Act for the reasons cited in her decision (IJ at 5-7). The Immigration Judge correctly relied on *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008) in which we stated:

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

Id. at 512; *see also Matter of Soram*, 25 I&N Dec. 378, 381 (BIA 2010) (clarifying that the term "crime of child abuse" is not limited to offenses that require proof of actual harm or injury to a child and holding that some crimes of child endangerment are included in the definition of child abuse); *Matter of Mendoza Osorio*, 26 I&N Dec. 703 (BIA 2016).

As the Immigration Judge noted, while the Board's definition for child abuse is broad, the respondent's statute of conviction is overbroad because it covers acts that cause the "abuse, neglect, or *delinquency* of any child" (IJ at 6). S.D. Codified Laws § 26-9-6; *see also* S.D. Codified Laws § 26-8C-2 (defining a delinquent charge). As noted above, the respondent's statute of conviction contains a realistic probability of prosecution and conviction for purchasing alcohol for a minor child. While such conduct may be immoral, we agree with the Immigration Judge that such acts do not rise to the level of harm articulated in *Matter of Velazquez-Herrera*, 24 I&N Dec. at 503 (IJ at 6).

We are not persuaded by the DHS's arguments on appeal (DHS's Br. at 6-8). The DHS has not shown how the *minimum conduct* proscribed by the statute, to wit, delinquency of a child, falls within the generic definition of child abuse. The DHS's citation to the additional factual circumstances in *State v. McVay* do not overcome the Immigration Judge's determination that the statute may be used to prosecute and convict someone for conduct which does not rise to the level of harm articulated in *Matter of Velazquez-Herrera*. Thus, because the respondent has established a realistic probability of being convicted for conduct that does not constitute child abuse, neglect, or abandonment, the statute of conviction is overbroad and does not match section 237(a)(2)(E)(i) of the Act. Further, even if the respondent's statute of conviction were divisible, such that the overbroad portion of delinquency were a separate element, the record of conviction does not clarify whether she was convicted of contributing to the "abuse, neglect, or delinquency" of the minor (IJ at 6; Exh. 4). Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

FOR THE BOARD

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

File Number: A099-785-387 **Dated:** AUG 10 2017

In the Matter of:

Sharon Khakai LUVISIA,
a.k.a. Sharon Khakai
Respondent.

IN REMOVAL PROCEEDINGS

-Detained-

Charges: INA § 237(a)(2)(A)(ii) – at any time after admission, an alien who has been convicted of two crimes involving moral turpitude not arising out of a single scheme of criminal misconduct.

INA § 237(a)(2)(E)(i) – 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.

Re: Respondent's Motion to Terminate

ON BEHALF OF RESPONDENT:
Robyn Meyer-Thompson, Esq.
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ON BEHALF OF THE DHS:
Laura Trosen, Esq.
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MEMORANDUM AND ORDER OF THE IMMIGRATION JUDGE

I. Background

Sharon Khakai Luvisia, Respondent, is a 22-year-old woman. (Ex. 2). On May 31, 2017, the Department of Homeland Security (DHS) commenced removal proceedings against Respondent with the filing of the Notice to Appear (NTA) charging Respondent with removability pursuant to the above-captioned charges. (Ex. 1). DHS alleges that Respondent is a native and citizen of Kenya and was admitted to the United States at Minneapolis, Minnesota on or about February 22, 2010 as an AS8. Id. DHS further alleges that Respondent's status was adjusted to that of a lawful permanent resident on August 17, 2012 under section 209(b) of the Act. Id. DHS also alleges that Respondent was convicted on February 10, 2016 for the offense of aggravated robbery in the first degree in violation of Minn. Stat. 609.245, subd. 1; that on September 3, 2013, Respondent was convicted for the offense of contributing to the abuse, neglect or delinquency of a child in violation of S.D. CODIFIED LAWS § 26-9-1; and that these crimes did not arise out of a single scheme of

criminal misconduct. Id. On July 31, 2017, Respondent filed a motion to terminate. (Ex. 5). On August 10, 2017, the DHS filed its opposition. For the following reasons, the Court grants Respondent's motion to terminate.

II. Removability

A. Removability under INA § 237(a)(2)(A)(ii)

DHS has charged Respondent with removability pursuant to INA § 237(a)(2)(A)(ii) which states, "any alien who at any time after admission is convicted of two or more crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct...is deportable." INA § 237(a)(2)(A)(ii) DHS bears the burden of establishing removability. INA § 240(c)(3)(A); 8 C.F.R. § 1240.8(a).

A crime involves moral turpitude "if the relevant statute defines the offense in such a manner that it necessarily entails conduct on the part of the offender that is inherently base, vile, or depraved, and contrary to accepted rules of morality and the duties owed between persons or to society in general." Matter of Kochlani, 24 I&N Dec. 128, 129 (BIA 2007). Morally turpitudinous conduct is "per se morally reprehensible and intrinsically wrong or malum in se, so it is the nature of the act itself and not the statutory prohibition of it which renders a crime one involving moral turpitude." Chanmouny v. Ashcroft, 376 F.3d 810, 811 (8th Cir. 2004). The Board of Immigration Appeals ("BIA" or "the Board") has held that "[n]either the seriousness of a criminal offense nor the severity of the sentence imposed is determinative of whether a crime involves moral turpitude." Kochlani, 24 I&N Dec. at 129. A crime involving moral turpitude (CIMT) must also involve some degree of scienter, whether specific intent, deliberateness, recklessness, or willfulness. Bobadilla v. Holder, 679 F.3d 1052, 1053-54 (8th Cir. 2012); Matter of Louissaint, 24 I&N Dec. 754, 756-57 (BIA 2009). "Among the tests to determine if a crime involves moral turpitude is whether the act is accompanied by a vicious motive or a corrupt mind," but "the presence or absence of a corrupt or vicious mind is not controlling." Chanmouny, 376 F.3d at 811; see also Hernandez-Perez v. Holder, 569 F.3d 345, 348 (8th Cir. 2009).

When analyzing whether a crime involves moral turpitude, Immigration Judges and the BIA use the categorical and modified categorical approaches as the proper framework. Matter of Silva-Trevino, 26 I&N Dec. 826, 831 (BIA 2016). Where the INA contains the phrase "convicted of," the Court employs a categorical approach to determine whether the respondent's statute of conviction matches the generic definition of the ground of removability in the INA. See Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013). Under this approach, the Court looks not to the particular facts of the case but instead to the minimum conduct that is required for a conviction, and then decides whether that conduct necessarily involves facts that equate to the generic definition. Id.

The first step in assessing whether a crime involves moral turpitude is to look to the statutory language of the crime and "examine the statute itself to determine whether the inherent nature of the crime involves moral turpitude." Chanmouny, 376 F.3d at 811; see also Hernandez-Perez, 569 F.3d at 348. "If the statute defines a crime in which moral turpitude necessarily inheres," because its elements match or are narrower than the generic CIMT definition, the conviction is categorically a CIMT and the analysis ends. Chanmouny, 376 F.3d at 811; see also Descamps v. United States, 133 S.Ct. 2276, 2281 (2013). Alternatively, if the statute sweeps more broadly than

the CIMT definition, so that it encompasses both turpitudinous and non-turpitudinous conduct, the Court must examine divisibility and, if the statute is divisible, proceed to the modified categorical approach, which involves reviewing the record of conviction. See Descamps, 133 S.Ct. at 2281, 2283; Chanmouny, 376 F.3d at 812. If the statute of conviction is overly broad as to the definition of child abuse, then it is not a categorical match to the removability ground. If, however, the statute is divisible as to elements, the Court may proceed to the modified categorical approach. Mathis v. United States, 136 S. Ct. 2243 (2016). An element is "what the jury must find beyond a reasonable doubt to convict the defendant, [or] what the defendant necessarily admits when he pleads guilty." Id. at 2248. If state law is unclear in ascertaining what the elements of an offense are, a Court peek at the record of conviction "for the sole and limited purpose of determining whether the listed items are elements of the offense." Id. at 2256-57.

In evaluating the criminal statute under the categorical approach, the Court uses the "realistic probability test," if the controlling Federal circuit applies it. Silva-Trevino, 26 I&N Dec. at 831-33; see also Matter of Chairez, 26 I&N Dec. 819, 820 (BIA 2016). The Eighth Circuit uses the "realistic probability" test. See Villatoro v. Holder, 760 F.3d 872, 877-79 (8th Cir. 2014). Under this test, assessing the minimum conduct criminalized by the statute is "not an invitation to apply 'legal imagination' to the offense." Moncrieffe, 133 S. Ct. at 1684-85. Rather, there must be "a realistic probability," not simply a theoretical possibility, that the statute would be applied to conduct that falls outside the generic definition of the relevant removability ground. Id. Ultimately, a respondent's statute of conviction matches the removability ground at issue only if his conviction " 'necessarily' involved . . . facts equating to" the generic offense, and whether his actual conduct involved such facts is "quite irrelevant." Id. at 1684 (citations omitted).

Respondent argues that her conviction for contributing to the abuse, neglect or delinquency of a child in violation of S.D. CODIFIED LAWS § 26-9-1 is not a CIMT.[1] Respondent's statute of conviction reads:

> Any person who, by any act, causes, encourages, or contributes to the abuse, the neglect, or the delinquency of a child, or any person, other than a parent who, by any act, causes a child to become a child in need of supervision, as such phrases with reference to children are defined by chapters 26-7A, 26-8A, 26-8B, and 26-8C, or who is, in any manner, responsible therefor, is guilty of a Class 1 misdemeanor.

S.D. CODIFIED LAWS § 26-9-1.

Respondent argues that this statute of conviction is categorically overbroad and indivisible. Except when related to sexual offenses, contributing to the delinquency of minors has been traditionally found to not be a CIMT. See Matter of P-, 2 I&N Dec. 117, 121-22 (BIA 1944) (finding that the Washington statute prohibiting the willful contribution to the delinquency of minors does not involve moral turpitude where neither the statute nor the underlying record of conviction disclosed an evil intent); Sheikh v. Gonzales, 427 F.3d 1077, 1082 (8th Cir. 2005) (misdemeanor conviction for contributing to delinquency of a minor was a CIMT for having sexual intercourse with a minor).

[1] Respondent does not argue that her conviction for robbery in the first degree, Ex. 3, is not a CIMT.

The Supreme Court of South Dakota has found, in the context of a violation of professional responsibility rules, that S.D. CODIFIED LAWS § 26-9-1 involves moral turpitude. See Matter of Discipline of Bergren, 455 N.W.2d 856, 857 (S.D. 1990) ("When a lawyer provides alcohol to a minor, and then initiates a kiss, the offense may rise to the Class 1 misdemeanor of contributing to the delinquency of a minor, SDCL 26-9-1, an offense which involves moral turpitude."). Contrary to DHS's assertion, Respondent points to State v. McVay, 612 N.W.2d 572 (2000) to argue that there is a realistic probability of the state prosecuting a defendant of non-morally turpitudinous conduct under this statute. In McVay, a parent's conviction was upheld under S.D. CODIFIED LAWS § 26-9-1 for providing her teenage son with alcohol. Id. In reaching its conclusion, the Supreme Court of South Dakota stated, "[t]hese statutes are liberally construed in favor of the state to protect children from the improper conduct, acts, or bad example of persons which may be calculated to cause, encourage, or contribute to the delinquency of children." McVay, 612 N.W.2d at 575 (citing to S.D. CODIFIED LAWS § 26-9-7). The BIA has held, in published and unpublished decisions, that this kind of conduct is not turpitudinous. In Matter of P-, the Board stated, "Violation[s] of liquor laws do not involve moral turpitude," and cited the example of selling alcohol to a child just under 18. Matter of P-, 2 I&N Dec. 117, 120-21 (BIA 1944)); See also Matter of Barros, 2008 WL 2517576, at *1-*2 (BIA June 6, 2008) [unpublished] (holding "the Massachusetts offense of furnishing alcoholic beverages to persons under 21 years of age is not sufficient, standing alone, to make this a "crime involving moral turpitude.") (citing P, 2 I&N Dec. at 120-22). Thus, because a defendant can be convicted of purchasing alcohol for a minor, there is a realistic probability that a defendant would be convicted of non-turpitudinous behavior, and Respondent's statute of conviction is categorically overbroad.

Moreover, S. D. CODIFIED LAWS § 26-9-1 does not require the requisite intent for this offense to be a CIMT. South Dakota law interprets this statute broadly, and it is meant to cover a wide range of behavior. For example,

> In order to find any person guilty of violating this chapter, it is not necessary to prove that the child has actually become abused, neglected, or delinquent, provided it appears from the evidence that through any act of abuse, neglect, or omission of duty or by any improper act or conduct on the part of any such person the abuse, neglect, or delinquency of any child may have been caused or merely encouraged.

S.D. CODIFIED LAWS § 26-9-6.

The statute of conviction prohibits "*any* act," and states a person can be convicted if they are "*in any manner,* responsible therefor." S.D. CODIFIED LAWS § 26-9-1. This is a general intent crime and thus does not reach the required scienter required to be a CIMT. See Bobadilla, 679 F.3d at 1053-54; Matter of Louissaint, 24 I&N Dec. at 756-57. In addition, South Dakota clearly intends for this statute to be interpreted broadly. See S.D. CODIFIED LAWS §§ 26-9-6; 29-6-7; McVay, 612 N.W.2d at 575. The jury instructions as described in McVay also show that the specific intent of the defendant is not an element of the offense.[2] See also S.D. Codified Laws § 22-1-2,

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[2] The jury instructions in McVay were that:

> the elements of the crime of contributing to the delinquency of a minor, each of which the state must prove beyond a reasonable doubt, are that at the time and place alleged: (1) That [Defendant] by any

subd. 1 (for definitions of words the South Dakota legislature used to designate mens rea); State v. Schouten, 707 N.W.2d 820, 824 (S.D. 2005); State v. Liaw, 878 N.W.2d 97, 100 (S.D. 2016).

Because Respondent's statute of conviction is categorically overbroad as to intent and the statute is indivisible as to scienter, the Court need to reach the issue of divisibility as to the act of the offense. Since S.D. CODIFIED LAWS § 26-9-1 does not have the requisite scienter and there is a realistic probability that a defendant would be convicted under this statute of nonturpitudinous conduct, the Court concludes that Respondent's statute of conviction is categorically not a CIMT. Because INA § 237(a)(2)(A)(ii) requires that an alien be convicted of two CIMTs to be removable, and DHS has not met its burden to show that S.D. CODIFIED LAWS § 26-9-1 is a CIMT, the Court concludes that the charge under INA § 237(a)(2)(A)(ii) is not sustainable.

B. Removability under INA § 237(a)(2)(E)(i)

The DHS has also charged Respondent with removability pursuant to INA § 237(a)(2)(E)(i) for a conviction "of a crime of domestic violence, a crime of stalking, or a crime of child abuse, child neglect, or child abandonment."

The BIA has held that child abuse, child neglect, and child abandonment are defined together as a "unitary concept." Matter of Soram, 25 I&N Dec. 378, 381 (BIA 2010). Child abuse is broadly defined as:

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

Matter of Velazquez-Herrera, 24 I&N Dec. 503, 512 (BIA 2008). A child is "an individual who had not yet reached the age of 18 years." Id. The crime of child abuse does not require proof of actual harm or injury to the child. Matter of Soram, 25 I&N Dec. at 381; see also Loeza-Dominguez v. Gonzales, 428 F.3d 1156, 1158 (8th Cir. 2005) (granting deference to the BIA's definition). The offender can be anyone, and is not limited to the child's parent or guardian. Velazquez-Herrera, 24 I&N Dec. at 513. Where a statute requires "a knowing mental state coupled with an act or acts creating a likelihood of harm to a child" and there is no realistic probability that a defendant would

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> act; (2) Caused, encouraged or contributed to the delinquency of [minor]; and (3) That [minor] is under eighteen years of age.

McVay, 612 N.W.2d at 575 n.8.

be convicted of overbroad conduct, that constitutes child abuse. Matter of Osorio, 26 I&N Dec. 703, 706 (BIA 2016).

Here, for purposes of Respondent's statute of conviction, the definition of a "child" is not confined to an individual under 18 years of age, as required by the BIA. See Velazquez-Herrera, 24 I&N Dec. at 512. However, this is a continuing jurisdiction definition and does not make this statute not a match. See S.D. CODIFIED LAWS § 26-7A-1(6); State v. McVay, 2000 S.D. 72, ¶ 18, 612 N.W.2d 572, 576 ("Here the jury was given extensive instructions regarding contributing to the delinquency of a minor. It was instructed that the elements of the crime included any act abusing, encouraging or contributing to the delinquency of a person *under age 18*.") (emphasis added); State v. Byrd, 398 N.W.2d 747, 749-50 (S.D. 1986) ("The statute defines a person between the ages of eighteen and twenty-one as a 'child' only to allow jurisdiction for a continuing juvenile program which has not yet expired before the person becomes an adult.").

Though the BIA's definition for child abuse is broad, Respondent's statute of conviction is categorically overbroad. Respondent's statute of conviction covers acts that cause "the abuse, neglect, or *delinquency* of any child." (emphasis added). S.D. CODIFIED LAWS § 26-9-6. A delinquent child, as defined in S.D. CODIFIED LAWS § 26-8C-2, is very broad and encompasses a multitude of criminal offenses as:

> any child ten years of age or older who, regardless of where the violation occurred, has violated any federal, state, or local law or regulation for which there is a penalty of a criminal nature for an adult, except state or municipal hunting, fishing, boating, park, or traffic laws that are classified as misdemeanors, or petty offenses or any violation of § 35-9-2 or 32-23-21.

S.D. CODIFIED LAWS § 26-8C-2. DHS points to the BIA's definition of "mental or emotional harm, including acts injurious to morals" in Velazquez-Herrera, 24 I&N Dec. at 512. The phrase "acts injurious to morals" modifies "mental or emotional harm" as designated by the comma setting off the second phrase and the word "including." See id. DHS has not articulated how "delinquency" in Respondent's statute of conviction matches the "mental or emotional harm" as required by Velazquez-Herrera. As addressed above, Respondent's statute of conviction includes a realistic probability of prosecution and a conviction for purchasing alcohol for a minor child. Though encouraging or contributing to a minor's conduct that breaks the law may be immoral, such acts do not rise to the level of harm articulated by Velazquez-Herrera. See Matter of Osorio, 26 I&N Dec. 703; Matter of Soram, 25 I&N Dec. 378; see also In Re: Aureliano Aguilar-Perez, 2017 WL 1130657 (DCBABR Feb. 1, 2017) [unpublished]. Because Respondent has established a realistic probability of being convicted for conduct that does not constitute child abuse, neglect, or abandonment, the Court concludes that Respondent's statute of conviction is categorically overbroad and not a match to INA § 237(a)(2)(E)(i). Though the parties address divisibility of S.D. CODIFIED LAWS § 26-9-1, Respondent's record of conviction states that she was convicted of "contribute to abuse, neglect, or delinquency." (Ex. 4). Thus, even if the statute of conviction is divisible as to the act such that the overbroad portion of delinquency was a separate element, Respondent's record of conviction does not state under which one she was convicted. This does not meet the " 'demand for certainty' " regarding the conviction. Mathis, 136 S. Ct. at 2247 (quoting Shepard v. United States, 544 U.S. 13, 21 (2005)). Therefore, the Court must conclude

that DHS has not met its burden to establish removability, and the Court does not sustain the charge under INA § 237(a)(2)(E)(i).

Accordingly, the Court enters the following orders:

ORDERS

IT IS HEREBY ORDERED that Respondent's charge under INA § 237(a)(2)(A)(ii) is **NOT SUSTAINED**.

IT IS FURTHER ORDERED that Respondent's charge under INA § 237(a)(2)(E)(i) is **NOT SUSTAINED**.

IT IS FURTHER ORDERED that Respondent's motion to terminate be **GRANTED.**

Kristin W. Olmanson

Kristin W. Olmanson
Immigration Judge