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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>JOSE ORTIZ-IBANEZ,</p> <p>Petitioner,</p> <p>v.</p> <p>ERIC H. HOLDER, Jr., Attorney General,</p> <p>Respondent.</p>
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Nos. 06-73942  
07-74249

Agency No. A077-378-756

MEMORANDUM\*

On Petitions for Review of Orders of the  
Board of Immigration Appeals

Submitted November 8, 2011\*\*

Before: O’SCANNLAIN, TASHIMA, and GRABER, Circuit Judges.

In these consolidated petitions for review, Jose Ortiz-Ibanez, a native and citizen of Mexico, petitions pro se for review of the Board of Immigration Appeals’ (“BIA”) orders dismissing his appeal from an immigration judge’s removal order and denying his motion to reopen. Our jurisdiction is governed by

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\* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

\*\* The panel unanimously concludes this case is suitable for decision without oral argument. See Fed. R. App. P. 34(a)(2).

8 U.S.C. § 1252. We review de novo questions of law. *Pelayo-Garcia v. Holder*, 589 F.3d 1010, 1012 (9th Cir. 2009). We grant the petition for review and remand in No. 06-73942. We dismiss the petition for review in No. 07-74249.

Ortiz-Ibanez’s conviction for third-degree rape under Oregon Revised Statute § 163.355 is not categorically an aggravated felony with respect to either of the federal generic definitions we have since adopted for “sexual abuse of a minor” in 8 U.S.C. § 1101(a)(43)(A), because the statute of conviction lacks the elements of abuse and a four-year age difference. *See Rivera-Cuartas v. Holder*, 605 F.3d 699, 701-02 (9th Cir. 2010). We therefore remand for the BIA to apply the modified categorical approach in the first instance. *See United States v. Aguila-Montes De Oca*, 655 F.3d 915, 928 (9th Cir. 2011) (per curiam) (proceeding to the modified categorical approach is permissible where the statute of conviction is missing a requisite element); *Fregozo v. Holder*, 576 F.3d 1030, 1039 (9th Cir. 2009).

We need not address the petition for review in No. 07-74249 in light of our disposition in No. 06-73942.

**In No. 06-73942: PETITION FOR REVIEW GRANTED;  
REMANDED.**

**In No. 07-74249: PETITION FOR REVIEW DISMISSED.**