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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

<p>ALFREDO CHAVEZ,</p> <p>Petitioner,</p> <p>v.</p> <p>ERIC H. HOLDER, Jr., Attorney General,</p> <p>Respondent.</p>
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No. 04-71040

Agency No. A011-349-706

MEMORANDUM*

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted December 19, 2011**

Before: GOODWIN, WALLACE, and McKEOWN, Circuit Judges.

Alfredo Chavez, a native and citizen of Mexico, petitions for review of the Board of Immigration Appeals' ("BIA") order dismissing his appeal from an immigration judge's removal order. We have jurisdiction under 8 U.S.C. § 1252.

* 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).

We review de novo questions of law, *Pelayo-Garcia v. Holder*, 589 F.3d 1010, 1012 (9th Cir. 2009), and we grant the petition for review and remand.

Chavez’s 2002 conviction for oral copulation with a minor in violation of California Penal Code § 288a(b)(1), is not categorically an aggravated felony with respect to either of the federal generic definitions we have adopted for “sexual abuse of a minor” under 8 U.S.C. § 1101(a)(43)(A), because the statute of conviction lacks the elements of abuse, a four-year age difference between the defendant and the victim, and a victim under the age of 16. *See Rivera-Cuartas v. Holder*, 605 F.3d 699, 701-02 (9th Cir. 2010); *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147, 1159 (9th Cir. 2008), *abrogated on other grounds by United States v. Aguila-Montes De Oca*, 655 F.3d 915 (9th Cir. 2011) (per curiam). We therefore remand for the BIA to apply the modified categorical approach in the first instance. *See Aguila-Montes De Oca*, 655 F.3d at 928 (proceeding to the modified categorical approach is permissible where the statute of conviction is missing a requisite element).

PETITION FOR REVIEW GRANTED; REMANDED.