NOT FOR PUBLICATION

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U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JUAN LEMUS-HUERTA, Petitioner, v. MERRICK B. GARLAND, Attorney General, Respondent.	No. 22-1984 Agency No. A092-418-131 MEMORANDUM*

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

Submitted November 15, 2023
Seattle, Washington

Before: McKEOWN and GOULD, Circuit Judges, and BENNETT, District Judge.**

Juan Lemus Huerta petitions for review of a decision of the Board of Immigration Appeals ("BIA") dismissing his appeal of a final removal order from an Immigration Judge ("IJ") based in part on aggravated felony grounds. In 2019,

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Richard D. Bennett, United States District Judge for the District of Maryland, sitting by designation.

Lemus Huerta pled guilty to two charges, including one offense predicated on Oregon's § 163.427(1)(a)(A) for Attempted Sexual Abuse in the First Degree. The Petitioner contends that intervening case law abrogates the precedent on which the BIA and IJ relied to conclude that a conviction under this statute constitutes an "aggravated felony" under 8 U.S.C. § 1101(a)(43).

When the BIA adopts and affirms the IJ's decision under *Matter of Burbano* while providing its own review, we review both the IJ and BIA decisions. *Chuen Piu Kwong v. Holder*, 671 F.3d 872, 876 (9th Cir. 2011). We review the IJ's and BIA's conclusions of law de novo, including whether an offense is an "aggravated felony." *Id.* We have jurisdiction under 8 U.S.C. § 1252, and we deny the petition.

1. A court may only review a final order of removal if the petitioner has exhausted all administrative remedies available as of right. 8 U.S.C. § 1252(d)(1). If a petitioner properly raises the issue in question before the IJ and the BIA, the petitioner has not waived or failed to exhaust his administrative remedies. *See Barron v. Ashcroft*, 358 F.3d 674, 678 (9th Cir. 2004); *see also Santos-Zacaria v. Garland*, 598 U.S. 411, 417-19 (2023). Lemus Huerta expressly raised the "aggravated felony" issue before the IJ and the BIA, both of which based their decisions in part on this question. The issue properly comes before us. *See id.*

2. The Immigration and Nationality Act ("INA") defines an "aggravated felony" to include "sexual abuse of a minor" or "an attempt… to commit" this offense. 8 U.S.C. § 1101(a)(43)(A), (U). To determine if a state criminal offense constitutes an aggravated felony, courts apply the categorical approach. *See Diego v. Sessions*, 857 F.3d 1005, 1009-14 (9th Cir. 2017). For "sexual abuse of a minor," we consider whether an offense falls under one of two federal generic definitions: the first based on the elements of 18 U.S.C. § 2243 for statutory rape, and a second, broader definition requiring: (1) sexual conduct, (2) with a minor, (3) constituting abuse. *Id.* at 1012.

Because ORS § 163.427(1)(a)(A) criminalizes sexual contact with someone under the age of 14, we held in *Diego* that this offense falls under the second definition and constitutes an aggravated felony. *Id.* at 1012, 1015. The Supreme Court subsequently clarified the federal generic definition of sexual abuse of a minor but limited its holding to statutory rape offenses that would fall under the first definition. *See Esquivel-Quintana v. Sessions*, 581 U.S. 385, 390-91, 396, 398, 401 (2017). *Diego*'s holding remains intact. *Compare id. with Diego*, 857 F.3d at 1015. We have continued to recognize and apply the second, broader definition. *See Mero v. Barr*, 957 F.3d 1021, 1022-23 (9th Cir.

2020); *Quintero-Cisneros v. Sessions*, 891 F.3d 1197, 1200 (9th Cir. 2018).

ORS § 163.427(1)(a)(A), the subparagraph at issue in *Diego*, also provides the predicate offense for the conviction at issue in Lemus Huerta's petition. Petitioner here contends that *Esquivel-Quintana* abrogated *Diego*. Because the IJ and the BIA concluded that *Diego* survives *Esquivel-Quintana*, the BIA and the IJ properly applied *Diego* as precedent to conclude that the Petitioner's conviction constitutes an aggravated felony for sexual abuse of a minor. *See* 8 U.S.C. § 1101(a)(43); *Diego*, 857 F.3d at 1015; *Esquivel-Quintana*, 581 U.S. at 390-91, 396, 401.

PETITION DENIED. Petitioner's Motion to Stay Removal is also **DENIED** as moot.