

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

JESUS ADAME GARCIA,

Petitioner,

v.

TODD BLANCHE, Attorney
General,

Respondent.

No. 16-71147

Agency No.
A095-972-973

OPINION

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

Argued and Submitted January 12, 2026
Pasadena, California

Filed August 10, 2026

Before: Consuelo M. Callahan and Patrick J. Bumatay,
Circuit Judges, and Jed S. Rakoff, District Judge.*

Opinion by Judge Rakoff

* The Honorable Jed S. Rakoff, United States District Judge for the Southern District of New York, sitting by designation.

SUMMARY**

Immigration

Denying Jesus Adame Garcia’s petition for review of a decision of the Board of Immigration Appeals affirming the denial of cancellation of removal, the panel held that Adame’s conviction under California Penal Code § 288.2(b), for the distribution of harmful matter to a minor for the purpose of, among other things, seducing that minor, is a “crime of child abuse, child neglect, or child abandonment” under 8 U.S.C. § 1227(a)(2)(E)(i).

Applying *Leon-Briviesca v. Blanche*, 179 F.4th 1180 (9th Cir. 2026), the panel concluded that Section 288.2(b) is categorically a crime of child abuse. The panel rejected Adame’s various arguments that the *actus reus* of Section 288.2 is overbroad in comparison to the generic definition.

First, because *Leon-Briviesca* held that the generic definition does not require actual injury, only a risk of physical or emotional harm, the panel rejected Adame’s contention that Section 288.2(b) does not require actual injury to a minor. Moreover, as a matter of California law, actual injury always occurs whenever Section 288.2(b) is violated because the statute assumes that young victims suffer profound harm whenever they are perceived and used as objects of sexual desire.

Second, the panel rejected Adame’s argument that Section 288.2(b) is overbroad because it reaches consensual

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

sexual communications between older minors. The panel explained that a violation of Section 288.2(b) cannot be based solely on consensual conduct because the statute requires the presence of “harmful matter,” meaning some material that is, among other things, “patently offensive.” Moreover, Adame did not point to any realistic probability, as opposed to a mere theoretical possibility, that California would prosecute consensual conduct as a violation of Section 288.2(b).

Third, the panel rejected Adame’s argument that Section 288.2(b) reaches the transmission of harmful matter to an individual who the defendant believes to be a minor, but who is actually an adult. The panel explained that Adame failed to show any realistic probability that California would charge a violation of Section 288.2(b) where an alleged victim was not actually a minor.

Finally, the panel rejected Adame’s argument that Section 288.2(b) reaches situations where a defendant directs a communication at a minor who does not receive, see, or have awareness of the communication and, thus, cannot be harmed by it. The panel noted that Adame abandoned this argument on reply. Moreover, he did not cite any case showing that California would charge a violation of Section 288.2(b) where the intended minor recipient of a communication did not in fact receive or become aware of it.

COUNSEL

Kathleen Foley (argued), Zimmer Citron & Clarke LLP, Washington, D.C.; David J. Zimmer, Zimmer Citron & Clarke LLP, Cambridge, Massachusetts; Jose R. Diaz, Gomez & Associates, La Puente, California; Raul Gomez and Juliana Garcia, Gomez & Associates, Los Angeles, California; for Petitioner.

Matthew B. George (argued), Senior Litigation Counsel; Douglas E. Ginsburg, Assistant Director; Office of Immigration Litigation; Chad A. Readler, Acting Assistant Attorney General; Civil Division, United States Department of Justice, Washington, D.C.; for Respondent.

OPINION

RAKOFF, District Judge:

Petitioner Jesus Adame Garcia (“Adame”) challenges an order of the Board of Immigration Appeals (“BIA”) dismissing his appeal of a decision by an Immigration Judge (“IJ”) to deny his application for cancellation of removal. Both the IJ and BIA concluded that the relief that Adame sought was barred by his conviction for violating California Penal Code § 288.2(b) (“Section 288.2(b)”), which criminalizes the distribution of “harmful matter” to a minor for the purpose of, among other things, seducing that minor.¹

¹ California has amended Penal Code § 288.2 multiple times since Adame was convicted under this provision in 2012. We use the statute’s numbering at the time of Adame’s conviction.

The IJ and BIA held that Adame’s conviction was for a crime of “child abuse, child neglect, or child abandonment” and, therefore, rendered Adame deportable under 8 U.S.C. § 1227(a)(2)(E)(i). Adame primarily contends that Section 288.2(b) is not a crime of child abuse because it is overbroad in comparison with the generic federal definition of such a crime. We have jurisdiction under 8 U.S.C. § 1252(a). Our review is *de novo*. See *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412 (2024) (holding that “Courts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority”). We deny Adame’s petition because, in light of our analysis in *Leon-Briviesca v. Blanche*, 179 F.4th 1180 (9th Cir. 2026), Section 288.2(b) is categorically a crime of child abuse.

Adame is a citizen of Mexico who entered the United States without inspection in approximately 1981, when he was three years old. As of 2016, when he initiated this appeal, Adame was married and had four children, all United States citizens. On March 28, 2012, Adame pleaded *nolo contendere* and was convicted of violating Section 288.2(b) on account of having sent lewd and sexually explicit messages to a minor. That same day, the court sentenced him to fourteen days’ incarceration. After the Department of Homeland Security commenced removal proceedings against Adame in 2012, he applied for cancellation of removal. The IJ pretermitted his application, concluding that Section 288.2(b) was both a crime involving moral turpitude and a crime of child abuse. Adame appealed to the BIA, which, on May 25, 2016, dismissed his appeal on the basis that Section 288.2(b) is categorically a crime of child abuse. The BIA declined to reach, and therefore we do not reach, Adame’s further argument that his offense was not a crime involving moral turpitude.

Our opinion in *Leon-Briviesca*, the lead case in a group of appeals that were consolidated for purposes of oral argument after the Supreme Court vacated our decision in *Diaz-Rodriguez v. Garland*, 55 F.4th 697 (9th Cir. 2022), vacated, 144 S. Ct. 2705 (2024), sets forth the framework within which we analyze Adame’s petition. In brief, we apply the so-called “categorical approach” to determine whether Adame’s offense of conviction—not his actual conduct—is a crime of child abuse. See *Leon-Briviesca*, 179 F.4th at 1184–85. Such a crime must have a *mens rea* of at least criminal negligence and an *actus reus* of placing a minor in a situation that is likely to produce harm. See *id.* at 1191–96.

Adame does not dispute that Section 288.2(b) requires a *mens rea* of both knowing and intentional conduct. As to knowledge, a defendant must know that a recipient of a communication is a minor, and the *actus reus* of the crime must be done knowingly. See Cal. Penal Code § 288.2(b). As to intent, Section 288.2(b) requires both the intent of “arousing, appealing to, or gratifying the lust or passions or sexual desire of [the defendant] or a minor” and the intent, or “purpose,” of “seducing a minor.” *Id.*

Adame offers four unavailing arguments that the *actus reus* of Section 288.2 is overbroad in comparison to the generic definition. First, Adame contends that Section 288.2(b) does not require actual injury to a minor. But we held in *Leon-Briviesca* that the generic definition does not require actual injury, only a risk of physical or emotional harm. See 179 F.4th at 1195–96. Moreover, as a matter of California law, actual injury *always* occurs whenever Section 288.2(b) is violated because the statute “assumes that young victims suffer profound harm whenever they are perceived and used as objects of sexual desire.” *People v.*

Shockley, 58 Cal. 4th 400, 404 (2013) (citation omitted); *see also People v. Hsu*, 82 Cal. App. 4th 976, 988–89 (2000).

Second, Adame argues that Section 288.2(b) is overbroad because it reaches consensual sexual communications between older minors and, therefore, cannot be a crime of child abuse in light of the Supreme Court’s reasoning in *Esquivel-Quintana v. Sessions*, 581 U.S. 385 (2017). Other Circuits have assumed, if not decided, that the reasoning of *Esquivel-Quintana* is limited to aggravated felonies and statutory rape offenses. *See Mondragon-Gonzalez v. Att’y Gen.*, 884 F.3d 155, 160 (3d Cir. 2018); *Thompson v. Barr*, 922 F.3d 528, 534 (4th Cir. 2019); *Matthews v. Barr*, 927 F.3d 606, 614–16 (2d Cir. 2019); *Garcia v. Barr*, 969 F.3d 129, 134 (5th Cir. 2020). But even assuming that *Esquivel-Quintana* applies to convictions like Adame’s, a violation of Section 288.2(b) cannot be based solely on consensual conduct because the statute requires the presence of “harmful matter,” meaning some material that is, among other things, “patently offensive.” *See* Cal. Penal Code § 288.2(b) (citing *id.* § 313(a)). Moreover, Adame has not pointed to any “realistic probability,” as opposed to a mere “theoretical possibility,” that California would prosecute consensual conduct as a violation of Section 288.2(b). *See Moncrieffe v. Holder*, 569 U.S. 184, 191 (2013).

Third, Adame claims that Section 288.2(b) cannot categorically be a crime of child abuse because it reaches the transmission of harmful matter to an individual who the defendant believes to be a minor, but who is actually an adult. Again, Adame has failed to show any realistic probability that California would charge a violation of Section 288.2(b) where an alleged victim was not actually a minor. His cases on this point all involve the separate crime

of attempting to violate Section 288.2(b). *See, e.g., People v. Nakai*, 183 Cal. App. 4th 499, 501 (2010); *People v. Hyder*, No. A114029, 2008 WL 485134, at *1 (Cal. Ct. App. Feb. 25, 2008); *see also People v. Collom*, 52 Cal. App. 5th 35, 42–44 (2020).

Fourth, and finally, Adame contends that Section 288.2(b) is overbroad because it reaches situations where a defendant directs a communication at a minor who does not receive, see, or have awareness of the communication and, thus, cannot be harmed by it. Adame abandoned this argument on reply, and he has not cited any case showing that California would charge a violation of Section 288.2(b) where the intended minor recipient of a communication did not in fact receive or become aware of it.

For all these reasons, Section 288.2(b) is a categorical match with the generic federal definition of a crime of child abuse, and the BIA properly dismissed Adame’s appeal of the IJ’s decision denying his application for cancellation of removal.² Adame’s petition for review of the BIA’s order is **DENIED**.

² The Attorney General argues that certain of Adame’s arguments are unexhausted, waived, or both because he failed to present them to the BIA or did not raise them in his opening brief. That is incorrect, however, because all the arguments at issue are simply illustrations of Adame’s long-running “general argument” that Section 288.2(b) is overbroad in comparison to the generic definition. *See, e.g., Bare v. Barr*, 975 F.3d 952, 960 (9th Cir. 2020).