**FILED**
**United States Court of Appeals**
**Tenth Circuit**

**August 22, 2023**

**Christopher M. Wolpert**
**Clerk of Court**

**UNITED STATES COURT OF APPEALS**

**FOR THE TENTH CIRCUIT**

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ZULEMA ESPINOZA,

Petitioner,

v.

MERRICK B. GARLAND, United States Attorney General,

Respondent.

No. 22-9577
(Petition for Review)

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**ORDER AND JUDGMENT***

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Before **HARTZ**, **TYMKOVICH**, and **MATHESON**, Circuit Judges.

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Zulema Espinoza petitions for review of a Board of Immigration Appeals ("BIA") decision concluding that her 2004 Colorado child abuse conviction made her ineligible for cancellation of removal. Exercising jurisdiction under 8 U.S.C. § 1252, we deny the petition.

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* After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist in the determination of this petition for review. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

## I. BACKGROUND

Ms. Espinoza, a native and citizen of Mexico, entered the United States in 1993. In 2004, she was convicted of child abuse resulting in injury under Colo. Rev. Stat. § 18-6-401(1)(a), (7)(a)(VI).

In 2010, the Department of Homeland Security served her with a Notice to Appear ("NTA"), charging her with inadmissibility under the Immigration and Nationality Act ("INA"). *See* 8 U.S.C. § 1182(a)(6)(A)(1). She admitted the NTA allegations, conceded removability, and applied for cancellation of removal under 8 U.S.C. § 1229b(b)(1). An immigration judge ("IJ") denied her application under 8 U.S.C. §§ 1229b(b)(1)(C)[1] and 1227(a)(2)(E)(i) due to her 2004 child abuse conviction. Ms. Espinoza appealed. The BIA dismissed.

In 2013, this court decided *Ibarra v. Holder*, 736 F.3d 903 (10th Cir. 2013). We held the petitioner's state conviction for criminally negligent child abuse not resulting in injury was not a "crime of child abuse, child neglect, or child abandonment" under § 1227(a)(2)(E)(i), so the conviction did not disqualify her for cancellation of removal under § 1229b(b)(1)(C). *Ibarra*, 736 F.3d at 918.

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[1] 8 U.S.C. §§ 1229b(b)(1)(C) provides:

> The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien . . . has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3) of this title, subject to paragraph (5).

In 2014, Ms. Espinoza moved to reopen with the BIA, arguing *Ibarra* entitled her to cancellation of removal. The BIA granted the motion and remanded to the IJ.

The IJ held a hearing and again denied cancellation of removal, holding the child abuse conviction still made Ms. Espinoza ineligible for relief. She appealed to the BIA.

The BIA affirmed, agreeing that the Colorado statute underlying her conviction meets the federal definition of a "crime of child abuse, child neglect, or child abandonment" under § 1227(a)(2)(E)(i). This petition followed.

## II. **DISCUSSION**

### A. ***Legal Background***

Because a single board member issued the BIA decision, we review it "as the final agency determination and limit our review to issues specifically addressed therein." *Diallo v. Gonzales*, 447 F.3d 1274, 1279 (10th Cir. 2006). "We review de novo the BIA's conclusions on questions of law, including whether a particular state conviction results in ineligibility for discretionary relief," *Zarate-Alvarez v. Garland*, 994 F.3d 1158, 1161 (10th Cir. 2021). The legal question here is whether Ms. Espinoza's child abuse conviction disqualifies her for cancellation of removal under 8 U.S.C. § 1227(a)(2)(E)(i).

To determine whether a state conviction meets the federal definition of a disqualifying criminal conviction under the INA, we use the categorical approach. "[W]e compare the elements of the statute of conviction with the generic federal definition of the crime to determine whether conduct that would satisfy the former

would necessarily also satisfy the latter." *Zarate-Alvarez*, 994 F.3d at 1161. In doing so, "we ignore [Ms. Espinoza's] actual conduct and examine only the minimum conduct needed for a conviction under the relevant state law." *Id.* (quotations omitted).

When Ms. Espinoza was convicted in 2004, Colo. Rev. Stat. § 18-6-401(1)(a), (7)(a)(VI) provided:

> (1)(a) A person commits child abuse if such person causes an injury to a child's life or health, or permits a child to be unreasonably placed in a situation that poses a threat of injury to the child's life or health, or engages in a continued pattern of conduct that results in malnourishment, lack of proper medical care, cruel punishment, mistreatment, or an accumulation of injuries that ultimately results in the death of a child or serious bodily injury to a child.
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> * * *
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> (7)(a) Where death or injury results, the following shall apply:
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> * * *
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> (VI) When a person acts with criminal negligence and the child abuse results in any injury other than serious bodily injury to the child, it is a class 2 misdemeanor.

Title 8 U.S.C. § 1227(a)(2)(E)(i) provides: "Any alien who at any time after admission is convicted of . . . a crime of child abuse, child neglect, or child abandonment is deportable." BIA precedent holds that state crimes involving maltreatment of a child committed with a mens rea of criminal negligence and not resulting in actual injury to a child are "crimes of child abuse, child neglect, or child abandonment" under § 1227(a)(2)(E)(i). *See Matter of Velazquez-Herrera*,

24 I. & N. Dec. 503, 503, 511–12 & n.11 (B.I.A. 2008) (citing the Colorado child abuse statute, including Colo. Rev. Stat. § 18-6-401, (7)(a)(VI), as illustrating the "growing acceptance" among states when § 1227(a)(2)(E)(i) was enacted that "the concept of 'child abuse' included not just the intentional infliction of physical injury, but also . . . criminally negligent acts [and] acts causing mental or emotional harm").

After *Velazquez-Herrera* and *Ibarra*, we held in *Zarate-Alvarez* that convictions under the Colorado child abuse statute resulting in no injury but committed with a mens rea of recklessness are crimes of "child abuse, child neglect, or child abandonment" under § 1227(a)(2)(E)(i).

### B. *Analysis*

Ms. Espinoza argues the Colorado statutory provision under which she was convicted was not a "crime of child abuse, child neglect, or child abandonment" under § 1227(a)(2)(E)(i) because, like the provision of that statute that was at issue in *Ibarra*, it required a mens rea of only criminal negligence.[2] She argues that only a minority of states had criminalized negligent conduct resulting in injury to a child when Congress enacted § 1227(a)(2)(E)(i). *See Ibarra*, 736 F.3d at 914 ("When a state law criminalizes conduct that most other States would not consider to be a

[2] The statute of conviction in *Ibarra* was Colo. Rev. Stat. § 18-6-401(a), (7)(b)(II), which, at the time of the petitioner's conviction in 2004, was a misdemeanor "[w]hen no death or injury results . . . [and] when a person acts with criminal negligence."

crime, a conviction under such a law cannot be a deportable offense." (quotation omitted)).

But Ms. Espinoza overreads *Ibarra*. As we later explained in *Zarate-Alvarez*, the issue in *Ibarra* was whether the BIA's interpretation of "a crime of child abuse, child neglect, or child abandonment was overinclusive because it covered non-injurious criminally negligent conduct." 994 F.3d at 1164 (quotations omitted). Our determination that the conviction in *Ibarra* was not disqualifying under the INA is not conclusive here because Ms. Espinoza's conviction was for criminally negligent conduct resulting in injury.

In *Zarate-Alvarez*, this court upheld the BIA's interpretation of § 1227(a)(2)(E)(i) to include crimes requiring proof of recklessness and risk of injury to a child. *See* 994 F.3d at 1165–66.[3] Here, Ms. Espinoza's crime required proof of criminal negligence *and* actual injury, a weaker mens rea but a stronger actus reus—actual injury rather than risk of injury—than the statute in *Zarate-Alvarez*. The statute in *Ibarra* did not require either risk of injury or actual injury.

The statute of conviction in this case required proof of more serious conduct than the statutes in both *Ibarra* and *Zarate-Alvarez*. We conclude that Ms. Espinoza's 2004 conviction was categorically a "crime of child abuse, child neglect,

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[3] The statute of conviction in *Zarate-Alvarez* was Colo. Rev. Stat. § 18-6-401(a), 7(b)(I), which prohibited "knowingly or recklessly" "permit[ting] a child to be unreasonably placed in a situation that poses a threat of injury to the child's life or health."

or child abandonment" under 8 U.S.C. § 1227(a)(2)(E)(i). We uphold the BIA's decision.

## III. **CONCLUSION**

We deny the petition for review.

Entered for the Court

Scott M. Matheson, Jr.
Circuit Judge