PRACTICE ADVISORY:
CAL PENAL CODE § 273A(B) IS NOT A DEPORTABLE CRIME OF CHILD ABUSE

Kathy Brady, Immigrant Legal Resource Center
February 19, 2016

This Advisory discusses *Matter of Mendoza-Osorio*, 26 I&N Dec. 703, 710 (BIA 2016), found at www.justice.gov/sites/default/files/pages/attachments/2016/02/09/3856.pdf

Bottom line: A noncitizen is deportable who, after admission to the U.S. and after Sept. 30, 1996 is convicted of a "crime of child abuse, neglect, or abandonment" (hereafter, a "crime of child abuse"). INA § 237(a)(2)(E)(i), 8 USC § 1227(a)(2)(E)(i). The question here is whether California's misdemeanor child endangerment statute, Cal PC § 273a(b), is a deportable "crime of child abuse."

The Board of Immigration Appeals stated that the minimum conduct to commit § 273a(b) is *not* a crime of child abuse. *Matter of Mendoza-Osorio, supra*. Although this characterization of § 273a(b) was not part of the holding of the case, under administrative law rules immigration judges and officials are expected to follow it.

It appears that § 273a(b) has no other adverse immigration consequences other than being a misdemeanor conviction (e.g., for purposes of bars to DACA). It is not a crime involving moral turpitude (although the safest plea is specifically to negligent conduct).[1]

In contrast, Cal PC § 273a(a), felony child endangerment, will be held a deportable crime of child abuse and might be charged as a crime involving moral turpitude. See discussion of § 273a(a) in the *California Quick Reference Chart*, www.ilrc.org/chart.

Discussion: The Board of Immigration Appeals (BIA) has not provided a specific definition of the term "crime of child abuse, neglect, or abandonment" (hereafter, "crime of child abuse") and has stated that it will evaluate child endangerment statutes state-by-state. Because of this, we have not known how authorities would treat relatively minor endangerment statutes such as § 237a(b).

In *Matter of Mendoz-Osorio* the BIA stated that PC § 273a(b) is *not* a deportable crime of child abuse, because the minimum conduct to commit the offense does not require a sufficiently high likelihood that harm would result.

> We recognize that there are child endangerment statutes that do not require a sufficiently high risk of harm to a child to meet the definition of child abuse, neglect, or abandonment under the Act. For example, the child endangerment statute at section 273a(b) of the California Penal Code criminalizes conduct that places a child "in a situation where his or her person or health *may* be endangered." (Emphasis added.) In *Fregozo v. Holder*, 576 F.3d 1030 (9th Cir. 2009), the Ninth Circuit held that this statute did not categorically define a "crime of child abuse" within the meaning of the Act. The court observed that the statute

> does not "require that the circumstances create any particular likelihood of harm to a child" and punishes "conduct that creates only the bare potential for nonserious harm to a child." Id. at 1037–38. In this regard, the court cited as an example of facts that did not meet our definition of child abuse the case of a parent "placing an unattended infant in the middle of a tall bed without a railing, even though the child was never injured." Id. Based on the facts as construed by the court, we would agree that they do not, alone, define a crime of child abuse or neglect.

Matter of Mendoza-Osorio, 26 I&N Dec. at 710.

As the Board notes, in *Fregozo* the Ninth Circuit found that PC § 273a(b) reaches situations that create the bare potential for relatively minor harm, including the example of the infant on the bed. The court noted that placing "an unattended infant in the middle of a tall bed without a railing …. in addition to evidence of unsanitary household conditions, supported a conviction under section 273a(b))," citing *People v. Little*, 115 Cal. App. 4th 766 (2004). *Fregozo, supra* at 1037.

Mendoza-Osorio concerned the child endangerment statute at New York Penal Code § 260.10(1), which requires "knowingly acting in a manner likely to be injurious to the physical, mental, or moral welfare of a child." The Board held that this *is* categorically a crime of child abuse. Whereas Cal PC § 273a(b) requires that harm "may" result, NYPC § 260.10(1) requires the defendant to know that harm is "likely" to result. *Mendoza-Osorio*, 23 I&N Dec. 704-711. The Board held that the respondent did not present proof of successful prosecutions under the New York statute that involved facts that were outside the definition of child abuse, and therefore every conviction under that statute is a deportable crime of child abuse.

Can counsel rely on the BIA's statement that § 273a(b) is not a deportable crime of child abuse, given that this was not the holding of the case (which concerned the New York statute)? Basically, yes. While in Article III federal courts the statement might be dismissed as dicta, administrative courts are not bound by the case and controversy rule.[2] The Board often makes findings not required by the question before it, with the intention of setting set out a formal interpretation. (Of course, as always the BIA could reconsider this issue en banc, or the Ninth Circuit could reconsider it, although in this instance these contingencies appear unlikely.)

Finally, if the Ninth Circuit in *Fregozo* held that § 273a(b) is not a crime of child abuse, why didn't that control? In *Fregozo* the Ninth Circuit held that it would give *Chevron* deference to the Board's definition of the term "child abuse, neglect, or abandonment" as set out in *Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008). The court found that the BIA's definition requires actual, not potential, harm, and therefore held that § 273a(b) does not come within it. Subsequently in *Matter of Soram*, 25 I&N Dec. 378, 380-81 (BIA 2010), the Board stated that *Fregozo* was incorrect and its does not require actual harm. Unfortunately, in *Soram* the Board did not go on to say whether § 273a(b) constituted child abuse. Now the Board has made that determination in *Mendoza-Osorio.*

---

[1] Negligent conduct does not involve moral turpitude. See, e.g., *Matter of Torres-Varela*, 23 I&N Dec. 78 (BIA 2001). Under Ninth Circuit law, PC § 273a(a) is not divisible between negligent and other conduct, because a jury is not required to decide unanimously between statutory alternatives. See *Almanza-Arenas v. Lynch*, 809 F.3d 515 (9th Cir. 2015) and see ruling on a similar statute in *Hernandez-Cruz v. AG of the United States*, 764 F.3d 281 (3d Cir. 2014). But because an immigration authority might misapply the divisibility definition, or the Supreme Court conceivably will change it, defense counsel are advised to plead specifically to negligence.

[2] See, e.g., *Matter of Luis*, 22 I&N Dec. 747, 752–54 (BIA 1999), cited in *Matter of Cerda-Reyes*, 26 I&N Dec. 528, n.3 (BIA 2015).