OFFENSE	STATUTE	CRIME INVOLVING MORAL TURPITUDE (CIMT)?	AGGRAVATED FELONY?	OTHER GROUNDS OF DEPORTABILITY OR INADMISSIBILITY?[1]	COMMENTS AND PRACTICE TIPS
Prostitution, commercial sexual conduct, commercial exploitation of a minor	18.2-346.01	Yes	Possibly, under 8 U.S.C. § 1101(a)(43)(K)(i) if the offense relates to "owning, controlling, managing, or supervising a prostitution business" or (K)(ii) if relating to transporting persons for the purpose of	Probably, under the prostitution and commercialized vice grounds of inadmissibility at 8 U.S.C. § 1182(2)(D) Possibly, as a crime of child abuse under 8 U.S.C. § 1227(a)(2)(E)(i) if prostitution solicited from a minor	Consider alternative pleas to 18.2-415 (disorderly conduct) or 18.2-427 (use of profane language or making obscene proposal) to avoid the CIMT, prostitution-related, and crime of child abuse -related grounds of removal To avoid sexual abuse of a minor aggravated felony, ensure that age of solicited individual is left out of the record of conviction; if crime is of solicitation, seek conviction under 18.2-346(B), not (B)(i) or (B)(ii).

[1] Including, but not limited to: controlled substance offense, prostitution offense, commercialized vice offense, firearm offense, crimes of domestic violence, crimes of stalking, and crimes against children.

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			prostitution to obtain commercial advantage[2] Possibly, under "sexual abuse of a minor" grounds at U.S.C. § 1101(a)(43)(A) if convicted under 18.2-346(i) or (ii)		

[2] *Matter of Ding*, 27 I&N Dec. 295 (BIA 2018) held that "for purposes of section 101(a)(43)(K)(i) of the Act, we now hold that the term "prostitution" is not limited to offenses involving sexual intercourse but is defined as engaging in, or agreeing or offering to engage in, sexual conduct for anything of value. This definition is similar to the "[a]ct of performing, or offering or agreeing to perform a sexual act for hire," as Black's Law Dictionary 1222 (6th ed. 1990) defined "prostitution" when section 101(a)(43)(K)(i) was enacted. Please note that in *Matter of Gertsenshteyn*, 24 I&N Dec. 111 (BIA 2007), the BIA held that "The categorical approach to determining whether a criminal offense satisfies a particular ground of removal does not apply to the inquiry whether a violation of 18 U.S.C. § 2422(a) was committed for "commercial advantage" and thus, this statute qualifies as an aggravated felony under section 101(a)(43)(K)(ii) of the INA, where "commercial advantage" is not an element of the offense and the evidence relating to that issue is not ordinarily likely to be found in the record of conviction. The BIA there held that the respondent's offense was committed for "commercial advantage" where it was evident from the record of proceeding, including the respondent's testimony, that he knew that his employment activity was designed to create a profit for the prostitution business for which he worked.

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Keeping, residing in, or frequenting a bawdy house	18.2-347	Yes[3]	Possibly, under 8 U.S.C. § 1101(a)(43)(K)(i) if the offense relates to "owning, controlling, managing, or supervising a prostitution business" or (K)(ii) if relating to transporting persons for the purpose of prostitution to obtain commercial advantage[4]	Probably, under the prostitution and commercialized vice grounds of inadmissibility at 8 U.S.C. § 1182(2)(D) Possibly, as a crime of child abuse under 8 U.S.C. § 1227(a)(2)(E)(i) if prostitution solicited from a minor	Consider alternative pleas to 18.2-415 (disorderly conduct) or 18.2-427 (use of profane language or making obscene proposal) to avoid the CIMT, prostitution-related, and crime of child abuse -related grounds of removal

[3] Please note that under *Belcher v. Commonwealt*h, S.E.2d 2022 WL 4472825 (September 27, 2022), Class 1 misdemeanor in VA is not equivalent to "1 year." As such, those sentenced to Class 1 misdemeanor under this statute could avail themselves of the "petty offense" exception under 212(a)(2)(A)(ii)(II).

[4] An immigration practitioner should challenge the aggravated felony ground of removability by arguing that "bawdy place" and "immoral purposes" are overbroad under Virginia case law. *See Hensley v. City of Norfolk*, 218 S.E.2d 735, 740 (Va. 1975)(lewdness and assignation therefore do not inherently relate to prostitution, making "bawdy place" as an element overly broad). *See also Cmmw. v. Croatan Books, Inc.*, 323 S.E.2d 86, 87–88, 90 (Va. 1984); *Warshaw v. City of Norfolk*, 58 S.E.2d 884, 885 (Va. 1950). In *Matter of Ding*, 27 I&N Dec. 295 (BIA 2018), the BIA analyzed a

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Aiding in Prostitution	18.2-348	Yes	Probably, under 8 U.S.C. § 1101(a)(43)(K)(i) if the offense relates to "owning, controlling, managing, or supervising a prostitution business" or (K)(ii) if relating to transporting persons for the purpose of prostitution to obtain commercial advantage Possibly, under "sexual abuse of a	Probably, under the prostitution and commercialized vice grounds of inadmissibility at 8 U.S.C. § 1182(2)(D) Possibly, as a crime of child abuse under 8 U.S.C. § 1227(a)(2)(E)(i) if prostitution solicited from a minor	Consider alternative pleas to 18.2-415 (disorderly conduct) or 18.2-427 (use of profane language or making obscene proposal) to avoid the CIMT, prostitution-related, and crime of child abuse -related grounds of removal

Wisconsin statute and held that 101(a)(43)(K)(i) of the Act is not limited to offenses involving sexual intercourse for hire. Rather, it encompasses offenses relating to the operation of a business that involves engaging in, or agreeing or offering to engage in, sexual conduct for anything of value. Consequently, the BIA concluded that the respondent's conviction for keeping a place of prostitution in violation of section 944.34(1) of the Wisconsin Statute was categorically for an aggravated felony and renders the respondent removable under section 237(a)(2)(A)(iii) of the Act."

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			minor" grounds at U.S.C. § 1101(a)(43)(A) if convicted under 18.2-348 with reference to 18.2-361(B)		
Trafficking or taking a person to become a prostitute	18.2-355	Yes	Probably, under 8 U.S.C. § 1101(a)(43)(K)(i) if the offense relates to "owning, controlling, managing, or supervising a prostitution business" or (K)(ii) if relating to transporting persons for the purpose of prostitution to	Probably, under the prostitution and commercialized vice grounds of inadmissibility at 8 U.S.C. § 1182(2)(D) Possibly, as a crime of child abuse under 8 U.S.C. § 1227(a)(2)(E)(i) if prostitution solicited from a minor	Consider alternative pleas to 18.2-415 (disorderly conduct) or 18.2-427 (use of profane language or making obscene proposal) to avoid the CIMT, prostitution-related, and crime of child abuse -related grounds of removal

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			obtain commercial advantage Possibly, under "sexual abuse of a minor" grounds at U.S.C. § 1101(a)(43)(A) if convicted under 18.2-355(3)		
Receive money to place a prostitute or trafficking	18.2-356	Yes	Probably, under 8 U.S.C. § 1101(a)(43)(K)(i) if the offense relates to "owning, controlling, managing, or supervising a prostitution business" or (K)(ii) if relating to transporting persons for the purpose of	Probably, under the prostitution and commercialized vice grounds of inadmissibility at 8 U.S.C. § 1182(2)(D) Possibly, as a crime of child abuse under 8 U.S.C. § 1227(a)(2)(E)(i) if prostitution solicited from a minor	Consider alternative pleas to 18.2-415 (disorderly conduct) or 18.2-427 (use of profane language or making obscene proposal) to avoid the CIMT, prostitution-related, and crime of child abuse -related grounds of removal

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			prostitution to obtain commercial advantage Possibly, under "sexual abuse of a minor" grounds at U.S.C. § 1101(a)(43)(A) if convicted under 18.2-356(i); Yes if convicted under 18.2-356(ii)		
Receive money from earnings of prostitute	18.2-357	Yes	Probably, under 8 U.S.C. § 1101(a)(43)(K)(i) if the offense relates to "owning, controlling, managing, or supervising a prostitution business" or (K)(ii) if relating	Probably, under the prostitution and commercialized vice grounds of inadmissibility at 8 U.S.C. § 1182(2)(D) Possibly, as a crime of child abuse under 8 U.S.C. § 1227(a)(2)(E)(i) if	Consider alternative pleas to 18.2-415 (disorderly conduct) or 18.2-427 (use of profane language or making obscene proposal) to avoid the CIMT, prostitution-related, and crime of child abuse -related grounds of removal

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			to transporting persons for the purpose of prostitution to obtain commercial advantage	prostitution solicited from a minor	
Commercial sex trafficking	18.2-357.1	Yes	Yes, under 8 U.S.C. § 1101(a)(43)(K)(i) if the offense relates to "owning, controlling, managing, or supervising a prostitution business" or (K)(ii) if relating to transporting persons for the purpose of prostitution to obtain commercial advantage	Probably, under the prostitution and commercialized vice grounds of inadmissibility at 8 U.S.C. § 1182(2)(D) Possibly, as a crime of child abuse under 8 U.S.C. § 1227(a)(2)(E)(i) if prostitution solicited from a minor	Consider alternative pleas to 18.2-415 (disorderly conduct) or 18.2-427 (use of profane language or making obscene proposal) to avoid the CIMT, prostitution-related, and crime of child abuse grounds of removal

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Taking indecent liberties with children	18.2-370	Yes	Yes, under the "sexual abuse of a minor" grounds at 8 U.S.C. § 1101(a)(43)(A)[5]	Probably a crime of child abuse under 8 U.S.C. § 1227(a)(2)(E)[6]	Seek alternative plea to simple assault 18.2-57; if this is not possible consider an alternative plea to 18.2-371(i) contributing to the delinquency of a minor and specify subsection (i) in the record – note that this will likely avoid the CIMT and aggravated felony grounds but may not avoid the crime of child abuse grounds of deportability[7]

[5] The Fourth Circuit Court of Appeals determined this offense to constitute sexual abuse of a minor aggravated felony in an unpublished decision in 2008, *Waffi v. Mukasey*, 285 Fed. Appx. 26 (4th Cir. 2008). Generally, the Fourth Circuit has defined "sexual abuse of a minor" in the sentencing context as "physical or non-physical misuse or maltreatment of a minor for a purpose associated with sexual gratification." *U.S. v. Diaz-Ibarra*, 522 F.3d 343, 352 (4th Cir. 2008); *U.S. v. Cabrera-Umanzor*, 728 F.3d 347, 352 (4th Cir. 2013).

[6] The "crime of child abuse" ground of deportability at 8 U.S.C. § 1227(a)(2)(E)(i) has been defined broadly by the Board of Immigration Appeals, requiring the elements of a knowing mental state, coupled with an act or acts of creating a likelihood of harm to a child. *See Matter of Mendoza-Osoria*, 16 I&N Dec. 703(BIA 2016); see also *Matter of Velasquez-Herrera*, 24 I. & N. Dec. 503 (BIA 2008) (defining crime of child abuse as "any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child or that impairs a child's physical or mental well-being, including sexual abuse or exploitation."). The question on whether Congress intended 8 U.S.C. § 1227 (a)(2)(E)(i) to apply to aliens convicted of an attempt or inchoate offense and whether a strict liability statute can satisfy the BIA's interpretation of 8 U.S.C. § 1227(a)(2)(E)(i) is currently pending before the BIA. *See David Marquez Cruz v. Robert Wilkinson,* No. 20-1529 (4th Cir. 2021).

[7] *See supra* note 6.

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Indecent liberties by children; penalty.	18.2-370.01	Yes[8]	Yes, under the "sexual abuse of a minor" grounds at 8 U.S.C. § 1101(a)(43)(A)[9]	Probably a crime of child abuse under 8 U.S.C. § 1227(a)(2)(E)[10]	Seek alternative plea to simple assault 18.2-57; if this is not possible consider an alternative plea to 18.2-371(i) contributing to the delinquency of a minor and specify subsection (i) in the record – note that this will likely avoid the CIMT and aggravated felony grounds but may not avoid the crime of child abuse grounds of deportability. Also check if this is the ONLY conviction for a client as it may qualify for CIMT exceptions under 212 inadmissibility grounds, but may not waive deportability grounds under 237(a)(2)(E)(i).

[8] Please note that if this is the ONLY conviction, check CIMT exceptions under 212(a)(2): if the crime was convicted when the person was under 18 AND the crime was committed more than 5 years before the date of application 212(a)(2)(A)(ii)(I). Additionally, please note that under *Belcher v. Commonweal*th, S.E.2d 2022 WL 4472825 (September 27, 2022), Class 1 misdemeanor in VA is not equivalent to "1 year." As such, those sentenced to Class 1 misdemeanor under this statute could avail themselves of the "petty offense" exception under212(a)(2)(A)(ii)(II).
[9] *See supra* note 5.
[10] *See supra* note 6.

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Sex offenses prohibiting proximity to children; penalty	18.2-370.2	Yes	Likely not, but the underlying sex offense will presumably qualify	Possibly, if this is the second CIMT under 8 U.S.C. § 1227(a)(2)(A)(ii). Possibly a crime against children under 8 U.S.C. § 1227(a)(2)(E)	In the record, attempt to specify that there was no incidences of child abuse in connection with the violation of this statute
Sex offenses prohibiting residing in proximity to children; penalty.	18.2-370.3	Yes	Likely not, but the underlying sex offense will presumably qualify	Possibly, if this is the second CIMT under 8 U.S.C. § 1227(a)(2)(A)(ii). Possibly a crime against children under 8 U.S.C. § 1227(a)(2)(E)	In the record, attempt to specify that there was no incidences of child abuse in connection with the violation of this statute
Sex offenses prohibiting working on school	18.2-370.4	Yes	Likely not, but the underlying sex offense will presumably qualify	Possibly, if this is the second CIMT under 8 U.S.C. § 1227(a)(2)(A)(ii).	In the record, attempt to specify that there was no incidences of child abuse in connection with the violation of this statute

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property; penalty				Possibly a crime against children under 8 U.S.C. § 1227(a)(2)(E)	
Sex offenses prohibiting entry onto school or other property; penalty	18.2-370.5	Yes	Likely not, but the underlying sex offense will presumably qualify	Possibly, if this is the second CIMT under 8 U.S.C. § 1227(a)(2)(A)(ii). Possibly a crime against children under 8 U.S.C. § 1227(a)(2)(E)	In the record, attempt to specify that there was no incidences of child abuse in connection with the violation of this statute
Penetration of mouth of child with lascivious intent; penalty	18.2-370.6	Yes	Yes, under the "sexual abuse of a minor" grounds at 8 U.S.C. § 1101(a)(43)(A)[11]	Probably a crime of child abuse under 8 U.S.C. § 1227(a)(2)(E)[12]	Seek alternative plea to simple assault 18.2-57; if this is not possible consider an alternative plea to 18.2-371(i) contributing to the delinquency of a minor and specify subsection (i) in the record – note that this will likely avoid the CIMT and aggravated felony grounds but

[11] *See supra* note 5.
[12] *See supra* note 6

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					may not avoid the crime of child abuse grounds of deportability
Contributing to delinquency of a minor	18.2-371	No if convicted under subsection (i); possibly if convicted under subsection (ii)[13]	No[14]	Probably a crime of child abuse under 8 U.S.C. 1227(a)(2)(E)(i)[15]	Plead to subsection (i) rather than (ii) and ensure that the record of conviction demonstrates as much; note that this will likely avoid the CIMT and aggravated felony grounds but may not avoid the crime of child abuse grounds of deportability[16]

[13] *See Prudencio v. Holder*, 669 F.3d 472 (4th Cir. 2012) (determining the first subsection to include conduct that is not turpitudinous but finding the second subsection to be categorically a CIMT, and looking to the record of conviction to determine under which subsection the respondent was convicted).

[14] Subsection (ii) of 18.2-371 criminalizes consensual sex acts performed by a person 18 years or older with a person 15 years or older. This provision encompasses offenses colloquially referred to as "statutory rape." Looking at a similar statutory rape statute in California, the U.S. Supreme Court found that, because the least of the acts criminalized under the statute would be consensual sex between a victim almost 18 and a perpetrator just turned 21, the statute was categorically overbroad and did not constitute sexual abuse of a minor aggravated felony under 8 U.S.C. § 1101(a)(43)(A). *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562 (2017). In the case of subsection (ii) of 18.2-371, the least of the acts criminalized by the statute would be consensual sex between a victim of 17 years of age and a perpetrator of 18 years of age. Therefore, under the logic of *Esquivel-Quintana*, 18.2-371 is categorically not a sexual abuse of a minor aggravated felony.

[15] *See supra* note 6.

[16] *See supra* note 6.

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Abuse and neglect of children; penalty; abandoned infant	18.2-371.1(A)	Probably not[17]	Possibly, under 8 U.S.C. § 1101(a)(43)(F) if sentence imposed is at least one year[18] Maybe, under 8 U.S.C. §	Yes, crime related to child abuse ground of deportability at 8 U.S.C. § 1227(a)(2)(E)[19]	Seek alternative plea to simple assault 18.2-57; if this is not possible consider an alternative plea to 18.2-371(i) contributing to the delinquency of a minor, and specify subsection (i) in the record – note that this will likely avoid the CIMT and aggravated felony

[17] An immigration practitioner would have a strong argument that this offense is not a CIMT because it includes omissions and negligence. Generally, offenses involving negligence, strict liability, general intent, or intent to break the law are not CIMTs. *See Matter of Ortega-Lopez*, 26 I&N Dec. 99, 100 (BIA 2013). Furthermore, in *Sotnikau v. Lynch*, 846 F.3d 741 (4th Cir. 2017) the Fourth Circuit held that the Virginia involuntary manslaughter statute was categorically overbroad and therefore not a CIMT when it extended to punishing conduct committed through "criminal negligence," which is a *mens rea* lower than specific intent or recklessness and therefore insufficient for a CIMT finding. The same argument could be applied to 18.2-371.1(A).

[18] An immigration practitioner would have a strong argument that this offense does not constitute a crime of violence aggravated felony under 8 U.S.C. 1101(a)(43)(F) because the offense may be committed without the use of "force" as defined for the purposes of 18 U.S.C. § 16, for example through a refusal to act or a reckless disregard for a child's life. Accordingly, an immigration practitioner can argue that the statute is categorically overbroad as to the crime of violence aggravated felony. Furthermore, there is an argument not yet addressed by the Fourth Circuit Court of Appeals that the risk-based element of 18 U.S.C. § 16 is unconstitutional. This is because, as three Circuit Courts of Appeals have found, *Johnson v. United States*, 135 S.Ct. 2551 (2015), a case in which the Supreme Court held the Armed Criminal Career Act ("ACCA") residual clause – a federal statute almost identical to 18 U.S.C. § 16(b) -- is unconstitutionally void for vagueness, compels the conclusion that 18 U.S.C. § 16(b) is also unconstitutionally void for vagueness. See *United States v. Gregorio Gonzalez-Longoria*, 813 F.3d 225 (5th Cir. 2015); *United States v. Vivas-Ceja*, 808 F.3d 719 (7th Cir. 2015); *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015).

[19] *See supra* note 6. *Matter of Soram*, 25 I&N Dec. 378 (BIA 2010) Interpreted INA § 237(a)(1)(E)(i) to include endangerment within the meaning of "child abuse, child neglect, or child abandonment." Limited exception for those endangerment offenses that do not require a "sufficient" "risk of harm." *See also Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008).

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			1101(a)(43)(A) if offense involved sexual abuse		grounds but may not avoid the crime of child abuse grounds of deportability[20]
	18.2-371.1(B)	Yes	Possibly, under 8 U.S.C. § 1101(a)(43)(F) if sentence imposed is at least one year[21] Maybe, under 8 U.S.C. § 1101(a)(43)(A) if offense involved sexual abuse	Yes, crime related to child abuse ground of deportability at 8 U.S.C. § 1227(a)(2)(E)[22]	

[20] *See supra* note 6.
[21] *See supra* note 18.
[22] *See supra* note 6. *Matter of Soram*, 25 I&N Dec. 378 (BIA 2010) Interpreted INA § 237(a)(1)(E)(i) to include endangerment within the meaning of "child abuse, child neglect, or child abandonment." Limited exception for those endangerment offenses that do not require a "sufficient" "risk of harm." *See also Matter of Velazquez-Herrera*, 24 I&N Dec. 503 (BIA 2008).

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Production, publication, sale, financing, etc., of child pornography	18.2-374.1	Yes[23]	Probably, under 8 U.S.C. § 1101 (a)(43)(i) relating to child pornography[24] Maybe, under 8 U.S.C. §	Crime related to child abuse ground of deportability at 8 U.S.C. § 1227(a)(2)(E)[25] Likely also inadmissible under 8 U.S.C. § 1182(2)(D)	To preserve an argument that the offense is not a sexual abuse of a minor aggravated felony, make affirmative record of no sexual abuse against child

[23] *See generally Matter of Olquin*, 23 I&N Dec. 896 (BIA 2006), holding that the offense of possession of child pornography in violation of section 827.071(5) of the Florida Statutes is a crime involving moral turpitude.

[24] Arguably, this Section is not a categorical match. The relevant federal offense (18 U.S.C. § 2252) and the statute of conviction appear similar in a number of ways: they require actual depictions of a minor, the same level of mens rea, and same definition of minors. There is some overbreadth in that the scope of sexually explicit depictions in the state statute cover non-federal conduct. Unlike the definition of sexually explicit conduct in 18 U.S. Code § 2256, the legal definition of sexual conduct under the Virginia statute punishes, among other things, explicit actual or explicitly simulated acts of homosexuality (quoted term, not endorsing language). *See* VA Code § 18.2-390 (3) and 18 U.S. Code § 2256 (2). The Virginia definition likewise contemplates physical contact which includes an act of apparent sexual stimulation or gratification with a female breast whereas the federal definition does not. *Id*. Lastly, the Virginia definition of sexually explicit conduct punishes nudity, which includes the exposure of the buttocks and the showing of female breasts with less than a full opaque covering of a portion below the top of the nipple. VA § 18.2-390. The federal definition of sexually explicit conduct in 18 U.S.C. § 2256(2)(A), which is referenced in 18 U.S.C. § 2252, does not include depictions of buttocks or the female breasts in the way Virginia does. At least two circuits have used the overboard argument: *Salmoran v. Att'y Gen. United States*, 909 F.3d 73, 79 (3d Cir. 2018) (finding a NJ conviction of child pornography to be overbroad because it criminalized visual depictions of the inner thigh, breasts, or buttocks whereas the federal definition is limited to depictions of the anus, genitals, or pubic area of any person.); *Chavez-Solis v. Lynch*, 803 F.3d 1004, 1009 (9th Cir. 2015) (finding a California conviction for possessing child pornography is overbroad because California's definition of depicted sexual conduct is quite broad and not restricted to specific body parts). An attorney can also argue that VA Code § 18.2 374.1 is indivisible.

[25] *See supra* note 6.

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			1101(a)(43)(A) if offense involved sexual abuse	(relating to prostitution and commercialized vice)	
Possession, reproduction, distribution, solicitation, and	18.2-374.1:1	Yes[26]	Probably, under 8 U.S.C. § 1101 (a)(43)(i) relating to child pornography[27]	Crime related to child abuse ground of deportability at 8	To preserve an argument that the offense is not a sexual abuse of a minor aggravated felony, make affirmative record of no sexual abuse against child

[26] *Matter of Olquin*, 23 I&N Dec. 896 (BIA 2006), holding that the offense of possession of child pornography in violation of section 827.071(5) of the Florida Statutes is a crime involving moral turpitude. The Supreme Court has also acknowledged that child pornography is intrinsically related to the sexual abuse of children because, as a permanent record of a child's abuse, the circulation of child pornography continues to harm the child's reputation and emotional well-being. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002).

[27] There is an argument to be made that this Section is not a categorical match. The relevant federal offense (18 U.S.C. § 2252) and the statute of conviction appear similar in a number of ways: they require actual depictions of a minor, the same level of mens rea, and same definition of minors. There is some overbreadth in that the scope of sexually explicit depictions in the state statute cover non-federal conduct. Unlike the definition of sexually explicit conduct in 18 U.S. Code § 2256, the legal definition of sexual conduct under the Virginia statute punishes, among other things, explicit actual or explicitly simulated acts of homosexuality (term of art, not endorsing language). *See* VA Code § 18.2-390 (3) and 18 U.S. Code § 2256 (2). The Virginia definition likewise contemplates physical contact which includes an act of apparent sexual stimulation or gratification with a female breast whereas the federal definition does not. *Id*. Lastly, the Virginia definition of sexually explicit conduct punishes nudity, which includes the exposure of the buttocks and the showing of female breasts with less than a full opaque covering of a portion below the top of the nipple. VA § 18.2-390. The federal definition of sexually explicit conduct in 18 U.S.C. § 2256(2)(A), which is referenced in 18 U.S.C. § 2252, does not include depictions of buttocks or the female breasts in the way Virginia does. At least two circuits have used the overboard argument: *Salmoran v. Att'y Gen. United States*, 909 F.3d 73, 79 (3d Cir. 2018)(finding a NJ conviction of child pornography to be overbroad because it criminalized visual depictions of the inner thigh, breasts, or buttocks whereas the federal definition is limited to depictions of the anus, genitals, or pubic area of any person.); *Chavez-Solis v. Lynch*, 803 F.3d 1004, 1009 (9th Cir. 2015)(finding a California conviction for possessing child pornography is overbroad because

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facilitation of child pornography			Maybe, under 8 U.S.C. § 1101(a)(43)(A) if offense involved sexual abuse	U.S.C. § 1227(a)(2)(E)[28] Likely also inadmissible under 8 U.S.C. § 1182(2)(D) (relating to prostitution and commercialized vice)	
Use of communications systems to facilitate certain offenses	18.2-374.3	Yes[29]	Maybe, under 8 U.S.C. § 1101(a)(43)(A) if offense involved sexual abuse[30]	Crime related to child abuse ground of deportability at 8 U.S.C. § 1227(a)(2)(E)[31]	To preserve an argument that the offense is not a sexual abuse of a minor aggravated felony, make affirmative record of no sexual abuse against child

California's definition of depicted sexual conduct is quite broad and not restricted to specific body parts). However, VA Code § 18.2 374.1:1 is possibly indivisible.

[28] *See supra* note 6.

[29] In *Matter of Jimenez-Cedillo*, 27 I&N Dec. 782 (BIA 2020), BIA analyzed a similar MD statute and held that "Sexual solicitation of a minor in violation of section 3-324(b) of the Maryland Criminal Law with the intent to engage in an unlawful sexual offense under section 3-307 is categorically a crime involving moral turpitude."

[30] The Fourth Circuit affirmed the view that sexual solicitation of minors, without actual contact, was sufficiently serious to constitute sexual abuse of a minor for purposes of the aggravated felony provisions in section 101(a)(43)(A) of the Act. *Thompson v. Barr*, 922 F.3d 528 (4th Cir. 2019). Could also reach out to IRAC for a copy of relevant unpublished BIA decisions, at www.irac.net.

[31] *See supra* note 6.

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involving children					
Unlawful creation of image of another	18.2-386.1	Possibly[32]	Maybe, under 8 U.S.C. § 1101 (a)(43)(i) relating to child pornography Maybe, under 8 U.S.C. § 1101(a)(43)(A) if offense involved sexual abuse	Possibly, under 8 U.S. C. § 1182 (a)(2)(A)(i)(I) Maybe, under child abuse ground of deportability at 8 U.S.C. § 1227(a)(2)(E)[33]	Keep any reference of age to offended party out of the record. To preserve an argument that the offense is not a sexual abuse of a minor aggravated felony, make affirmative record of no sexual abuse against child.

[32] VA Code § 18.2-386.1(A)(ii) is a CIMT. VA Code § 18.2-386.1(D) could possibly be a CIMT because the intent to achieve an immoral result may be considered inherent in the willful commission of sexual crimes involving young children. *See Matter of Jimenez-Cedillo*, 27 I&N Dec. 782, 793 (BIA 2020). *See also United States v. Malloy*, 568 F.3d 166, 171 (4th Cir. 2009) (holding that it does not allow a mistake of age defense); and the Supreme Court has determined that solicitation of child pornography is not constitutionally protected activity. *United States v. Williams*, 553 U.S. 285, 307 (2008); Cf. *Matter of Olquin-Rufino*, 23 I&N Dec. 896, 898 (BIA 2006) (holding that the offense of possession of child pornography in violation of section 827.071(5) of the Florida Statutes is a crime involving moral turpitude). Please note that under *Belcher v. Commonwealt*h, S.E.2d 2022 WL 4472825(September 27, 2022), Class 1 misdemeanor in VA is not equivalent to "1 year." As such, those sentenced to Class 1 misdemeanor under this statute could avail themselves of the "petty offense" exception under 212(a)(2)(A)(ii)(II).

[33] *See supra* note 6.

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Indecent exposure	18.2-387	Possibly[34]	Maybe, under 8 U.S.C. § 1101(a)(43)(A) if offense involved sexual abuse of a minor	Crime related to child abuse ground of deportability at 8 U.S.C. § 1227(a)(2)(E) if it involved a minor	Keep any reference of age to offended party out of the record to avoid child abuse aggravated felony
Obscene sexual	18.2-387.1[35]	Yes[36]	Maybe, under 8 U.S.C. § 1101(a)(43)(A) if offense involved		Consider alternative pleas to 18.2-415 (disorderly conduct) or 18.2-427 (use of profane language or

[34] In *Matter of Cortes Medina*, the BIA found that a statute punishing deliberate obscene display required an element of "lewd intent" in order to be a CIMT, meaning exposure "for purposes of sexual arousal, gratification, or affront." 26 I&N Dec. 79, 85 (BIA 2013). According to the BIA, this requirement excludes as overbroad statutes that punish mere nudity, for example, or childish insults like mooning. Virginia's indecent exposure statute does not, on the face of the statute, require a "lewd intent." However, it does require an "obscene display or exposure," and in order for something to be found "obscene" the evidence must show a related "prurient interest in sex." *See Hart v. Commonwealth*, 441 S.E.2d 706, 709 (Va. Ct. App. 1994). An immigration practitioner could try to argue that the circumstances in which the Commonwealth has convicted people under Va. Code 18.2-387 go beyond "lewd intent," as Virginia case law shows that there has been a successful conviction under the statute where the perpetrator purposefully exposed his G-string swim suit to an office supply store worker, even though his genitals were covered. *See Id*. *Matter of Mueller*, 11 I&N Dec. 268 (BIA 1965), the BIA analyzed indecent exposure under Wisconsin law section 944.20(2) and held that it was not a CIMT because it does not require a specific intent or that a violator has a vicious motive or corrupt mind, and can be done carelessly.

[35] In *Copeland v. Commonwealth*, 525 S.E.2d 9, 10 (Va. Ct. App. 2000), the court noted that "[t]o be obscene, conduct must violate contemporary community standards of sexual candor."

[36] *See supra* note 34. Please note that under *Belcher v. Commonweal*th, S.E.2d 2022 WL 4472825(September 27, 2022), Class 1 misdemeanor in VA is not equivalent to "1 year." As such, those sentenced to Class 1 misdemeanor under this statute could avail themselves of the "petty offense" exception under 212(a)(2)(A)(ii)(II).

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display; penalty.			sexual abuse of a minor		making obscene proposal) to avoid the CIMT grounds of removal To preserve an argument that the offense is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(A), make affirmative record that offense did not involve sexual abuse and that no minors were present
Profane swearing or intoxication in public	18.2-388	No	No	No	

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