**LEGAL ALERT**
**BIA DECISION IN *MATTER OF NAVARRO GUADARRAMA* SHOULD NOT AFFECT *HARBIN/HYLTON* DEFENSES IN THE 2D CIRCUIT**
June 12, 2019

On June 11, the Board of Immigration Appeals (BIA) issued a decision in which it held that, where a noncitizen has been convicted of violating a state drug statute that includes a controlled substance that is not on the federal controlled substance schedules, the noncitizen must establish a "realistic probability" that the state would actually apply the language of the statute to prosecute conduct involving that substance in order to avoid the immigration consequences of conviction of an offense relating to a federally controlled substance. *Matter of Navarro Guadarrama*, 27 I&N Dec. 560 (BIA 2019). At the end of the new BIA decision, the BIA states that its approach to the realistic probability test "should be applied in any circuit that does not have binding legal authority requiring a contrary interpretation." 27 I&N Dec. at 567.

This Legal Alert discusses why **the approach to the realistic probability test of *Matter of Navarro Guadarrama* is not applicable in removal proceedings in the Second Circuit** as removal cases in the Second Circuit involving drug schedule mismatches are governed by the contrary binding legal authority of the Second Circuit precedent decisions in *Harbin v Sessions*, 860 F.3d 58 (2d Cir. 2017) and *Hylton v. Sessions*, 897 F.3d 57 (2d Cir. 2018).

**Second Circuit binding precedent rejecting realistic probability test**

In *Harbin*, the Second Circuit held that a noncitizen's conviction for New York criminal sale of controlled substance in the fifth degree under NYPL § 220.31 is not a drug-trafficking aggravated felony because New York's controlled substance schedules include a substance (chorionic gonadotropin) that is not on the federal controlled substance schedules. 860 F.3d at 68. The Second Circuit so ruled in *Harbin* without requiring the noncitizen to make any realistic probability showing of convictions or prosecutions of cases involving chorionic gonadotropin. Instead, the Second Circuit just described the state/federal drug schedule mismatch and simply concluded that "[b]ecause NYPL § 220.31 can punish conduct that is not criminal under the CSA, it is not an aggravated felony." *Id.*

In *Hylton*, the Second Circuit held that a noncitizen's conviction for New York criminal sale of marijuana in the third degree under NYPL § 221.45 was likewise not a drug trafficking aggravated felony because the text of that state statute also covered conduct that would not have been a drug trafficking crime under federal law. 897 F.3d at 63-65. The Second Circuit in *Hylton* expressly rejected a government argument that the noncitizen in that case was required to make a realistic probability showing, ruling that the BIA's application of the realistic probability test was legal error where the state statute by its terms punished conduct that was not necessarily a felony under federal law, i.e., transfer without remuneration of less than an ounce of marijuana. *Id.* at 63. Stating that "[t]he realistic probability test is obviated by the wording of the state statute, which on its face extends to

conduct beyond the definition of the corresponding federal offense," the Second Circuit explained:

> The requirement that a defendant show a "realistic probability" that "the State would apply its statute to conduct that falls outside the generic definition of a crime" operates as a backstop when a statute has indeterminate reach, and where minimum conduct analysis invites improbable hypotheticals. . . . There is no such requirement, however, "when the statutory language itself, rather than the application of legal imagination to that language, creates the realistic probability that a state would apply the statute to conduct beyond the generic definition."

*Id*.

While *Hylton* did not involve a drug schedules mismatch, the Second Circuit in *Hylton* specifically rejected *Matter of Ferreira*, 26 I&N Dec. 415 (BIA 2014), which was the prior BIA decision followed by *Matter of Navarro Guadarrama*, and which had applied the realistic probability test in a case involving a drug schedule mismatch. 897 F.3d at 64. Indeed, in support of its legal conclusion that a realistic probability test is not required where a state drug statute is facially overbroad, the Second Circuit cited Supreme Court precedent including *Mellouli v. Lynch*, 135 S.Ct. 1980 (2015), also a case involving a drug schedule mismatch:

> A pair of recent Supreme Court opinions clarified that, in applying the categorical approach, an unambiguous state statute can be broader on its face than its federal counterpart. See Mellouli, 135 S. Ct. at 1990 ("the Government's construction of the federal removal statute stretches to the breaking point, reaching state-court convictions ... in which no controlled substance as defined [in the federal code] figures as an element of the offense") (internal quotation marks and citation omitted); Mathis [v. United States], 136 S. Ct. at 2251 (no realistic probability test considered when the state statute "cover[ed] a greater swath of conduct" by its 12 terms than the ACCA).

*Hylton,* 897 F.3d at 65.

Moreover, in rejecting the need for a realistic probability showing, the Second Circuit in *Hylton* cited *Harbin*, interpreting *Harbin* as rejecting applicability of the realistic probability test where a state controlled substance offense by its terms covers a substance not on the federal controlled substance schedules. *Id*. at 64. The following passage from the *Hylton* opinion can be cited in particular to rebut any contention by Department of Homeland Security or Justice Department Office of Immigration Litigation lawyers that *Matter of Navarro Guadarrama*'s realistic probability test requirement applies in Second Circuit drug schedule mismatch cases:

> This circuit . . . applies the categorical approach to a controlled substance offense by comparing the conduct captured by the state statute to the elements of the CSA crime without resort to a "realistic probability" test or a catalog of state court

> decisions. Harbin, 860 F.3d at 68 (concluding that a New York conviction is not an aggravated felony because the state statute, by its terms, punishes conduct that is not criminal under the CSA); Obeya [v. Sessions], 884 F.3d at 447 n.4. When the state law is facially overbroad, "we look no further[.]" Martinez [v. Mukasey], 551 F.3d at 120.

*Id.; see also Doe v. Sessions*, 886 F.3d 203, 207-10 (2d Cir. 2018) (also applying categorical approach without resort to a realistic probability test in assessing removability in a drug schedules mismatch case).

In a post-*Hylton* unpublished opinion, a Second Circuit panel well summarized the Second Circuit's binding authority rejecting application of the realistic probability test in a drug schedules mismatch case:

> The BIA erred in relying on the realistic probability test. When the wording of a state statute on its face extends to conduct beyond the definition of the corresponding federal offense, the need for the realistic probability test is obviated. Hylton, 897 F.3d at 63; see Mathis v. United States, -- U.S. --, 136 S.Ct. 2243, 2251, 195 L.Ed.2d 604 (2016).
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> Hylton recognized that "in applying the categorical approach, an unambiguous state statute can be broader on its face than its federal counterpart." 897 F.3d at 65 (citing Mellouli, 135 S.Ct. at 1990; Mathis, 136 S.Ct. at 2251). "By demanding that [the petitioner] produce old state cases to illustrate what the statute makes punishable by its text," the BIA "misses the point of the categorical approach." Id. at 64 (internal quotation marks omitted).

*Hnatyuk v. Whitaker*, 757 Fed.Appx. 10, 12 (2d Cir. 2018).

**BIA discussion of Second Circuit precedent in *Matter of Navarro Guadarrama***

In *Matter of Navarro Guadarrama*, the BIA appears to recognize that Second Circuit has binding precedent contrary to its realistic probability test position when it acknowledges that the Second Circuit in *Hylton* "held, without applying the realistic probability test, that the sale of marijuana in the third degree under New York law was not an aggravated felony drug-trafficking offense because the State statute, on its face, *explicitly* included an offense that is punishable as a misdemeanor under Federal law." *Matter of Navarro Guadarrama*, 27 I&N Dec. at 565 (emphasis added). Moreover, when the BIA acknowledges that the position that a realistic probability showing is not required in drug mismatch cases has legal support and observed that "some circuit courts have looked only to a State statute if they found that its language was plain and clearly reached conduct outside the generic definition," the BIA referenced the Second Circuit decision in *Hylton*. *Id*.

The BIA does insert a footnote in its opinion in *Matter of Navarro Guadarrama* that stakes out a position that *Hylton* is limited to the specific issue addressed in that case -- whether Mr. Hylton was convicted of a drug-trafficking aggravated felony. *Id.*, note 5. However, the

Second Circuit's rejection in *Hylton* of the realistic probability test in drug overbreadth cases was not limited narrowly to the aggravated felony context. Indeed, in rejecting applicability of the realistic probability test, *Hylton* relied on the Supreme Court decision in *Mellouli*, where the Court did not apply the realistic probability test in a drug schedules mismatch case involving a more general controlled substance removability charge. *Hylton*, 897 F.3d at 65, citing *Mellouli*, 135 S.Ct. 1980 (applying categorical approach minimum conduct test without resort to a realistic probability test in a drug mismatch case involving a removal charge under the general drug deportability ground at INA § 237(a)(2)(B)(i)); *see also Doe*, 886 F.3d at 207-08 (same, also citing *Mellouli*); *Hnatyuk*, 757 Fed.Appx. at 11-12 (same, also citing *Mellouli*, but in a drug mismatch case involving a removal charge under the general drug inadmissibility ground at INA § 212(a)(2)(A)(i)(II)).