U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

[redacted]
Brooklyn Defender Services
177 Livingston, 7th Floor
Brooklyn NY 11201

DHS/ICE Office of Chief Counsel - NYV
201 Varick Street, Rm. 1130
New York NY 10014

Name: [redacted]

Date of this Notice: 7/24/2023

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Userteam: Docket

GS

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DHS/ICE Office of Chief Counsel - NYV
201 Varick Street, Rm. 1130
New York NY 10014

Name: [redacted]

Date of this Notice: 7/24/2023

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Userteam: Docket

NOT FOR PUBLICATION

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

MATTER OF:

[redacted]

Respondent

FILED
Jul 24, 2023

ON BEHALF OF RESPONDENT: [redacted]

ON BEHALF OF DHS: Xiao Chen, Assistant Chief Counsel

IN REMOVAL PROCEEDINGS
On Remand from a Decision of the United States Court of Appeals for the Second Circuit

Before: Goodwin, Appellate Immigration Judge; Greer, Appellate Immigration Judge; Liebmann, Appellate Immigration Judge

Opinion by Appellate Immigration Judge Greer

GREER, Appellate Immigration Judge

This case is before the Board pursuant to a May 17, 2021, order of the United States Court of Appeals for the Second Circuit, remanding the case to us upon stipulation and agreement of the parties. On remand, the respondent, a native and citizen of El Salvador, has filed a brief. The Department of Homeland Security ("DHS") has responded. The appeal will be sustained, and the record will be remanded.

On September 27, 2019, the Immigration Judge pretermitted the respondent's application for cancellation of removal for certain nonpermanent residents under section 240A(b)(1) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1229b(b)(1) after determining that the respondent's conviction for criminal possession of a controlled substance (cocaine) in the fifth degree under section 220.06(5) of the New York Penal Law is an offense under section 212(a)(2)(A)(i)(II) of the INA, 8 U.S.C. § 1182(a)(2)(A)(i)(II), which applies to any "violation of . . . any law or regulation of a State . . . relating to a controlled substance (as defined in section 802 of title 21)." On July 22, 2020, we dismissed the respondent's appeal of the Immigration Judge's decision. On May 17, 2021, the Second Circuit issued an opinion dismissing the respondent's petition for review and remanding the case to the Board upon joint stipulation of the parties.

In the joint stipulation, the parties requested that the petition for review be withdrawn without prejudice and that the matter be remanded to the Board to consider additional Second Circuit case law in determining whether section 220.06(5) of the New York Penal Law is overbroad in its definition of cocaine compared to the federal definition and whether such overbreadth would render the application of a realistic probability test unnecessary, citing a line of subsequent cases that developed the discussion in *Hylton v. Sessions*, 897 F.3d 57 (2d Cir. 2018). The joint

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stipulation further directed the Board to consider New York state law in analyzing the respondent's argument that isomers are means, not elements of a cocaine possession conviction, and that section 220.06(5) of the New York Penal Law is indivisible.

To be eligible for cancellation of removal, the respondent must establish that he has not been convicted of a disqualifying offense. INA § 240A(b)(1)(C), 8 U.S.C. § 1229b(b)(1)(C). To determine whether the respondent has been convicted of a disqualifying offense under section 212(a)(2)(A)(i)(II) of the INA, 8 U.S.C. § 1182(a)(2)(A)(i)(II), we employ the categorical approach, which requires us to focus on the elements of the conviction rather than the respondent's conduct. *Matter of P-B-B-*, 28 I&N Dec. 43, 45 (BIA 2020). Applying that approach, upon consideration of case law issued subsequent to *Hylton*, we conclude that section 220.06(5) of the New York Penal Code is categorically overbroad in its definition of cocaine, as it includes "cocaine . . . their salts, isomers, and salts of isomers"[1] (N.Y. Pub. Health Law § 3306, Sched. II(b)(4) (McKinney 2016)), while the federal definition only includes "any optical or geometric isomer" of cocaine. *See* 21 C.F.R. § 1300.01(b) (defining isomer as any "optical or geometric" isomer in reference to 21 C.F.R. § 1308.12(b)(4) which lists cocaine as a Schedule II substance); *Id.* (covering different combinations of optical, geometric, positional isomers, depending on the drug, and defining the term "positional isomer" with reference to specific drugs).

The Board has held that where there is a categorical mismatch between a state and a federal statute, the respondent must demonstrate that there is "realistic probability" that the state would actually punish conduct falling outside the generic federal definition of an immigration crime. *See Matter of C. Morgan*, 28 I&N Dec. 508, 510 (BIA 2022); *Matter of Aguilar-Barajas*, 28 I&N Dec. 354, 356, 365 n.2 (BIA 2021); *see also Moncrieffe v. Holder*, 569 U.S. 184, 191, 206 (2013) (citing *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). The Board's view is that the realistic probability test should be applied regardless of whether the statute is facially overbroad. *See Matter of Navarro Guadarrama*, 27 I&N Dec. 560, 566-67 (BIA 2019) ("[T]here must be a realistic probability of a State applying a statute beyond the Federal definition for the State law to fail the categorical inquiry, and . . . whether such a probability exists depends on if the State actually prosecutes the offense in a manner broader than the Federal law." (quotations and citation omitted)).

However, the realistic probability test is not required in circuits where there is contrary law holding that where an element is overbroad on its face, the realistic probability test need not be employed. *Id.* at 567 ("This approach to the realistic probability test should be applied in any circuit that does not have binding legal authority requiring a contrary interpretation."). The Second Circuit has specifically held that when there is not a categorical match between a state and a federal statute, a realistic probability test is inapplicable when the state statute "on its face reaches beyond the federal definition," and the statutory language itself creates the realistic probability that "a state would apply the statute to conduct outside the generic definition." *Williams v. Barr*, 960 F.3d 68, 78 (2d Cir. 2020).

[1] The respondent's inadmissibility depends on the law in effect at the time of his conviction. *Doe v. Sessions*, 886 F.3d 203, 208 (2d Cir. 2018). Thus, the categorical approach requires us to compare the New York and federal drug schedules as they existed in January 2018.

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Here, the New York state statute under which the respondent was convicted is facially overbroad, as it criminalizes the possession of all isomers of cocaine, while the federal statute criminalizes only the possession of optical and geometric isomers. Although *Hylton v. Sessions*, 897 F.3d at 57, applied facial overbreadth in the context of a drug trafficking aggravated felony, a subsequent line of cases extended its holding to other contexts. *See Jack v. Barr*, 966 F.3d 95, 98 (2d Cir. 2020) (facial overbreadth of "firearm" element precluded realistic probability test); *Williams v. Barr*, 960 F.3d at 68, 77 (same); *United States v. Thompson*, 961 F.3d 545, 552 (2d Cir. 2020) (discussing facial overbreadth of "controlled substance" element); *cf. Matthews v. Barr*, 927 F.3d 606, 620 (2d Cir. 2019) (endangering the welfare of a child was not categorically overbroad, requiring the realistic probability test). This case is akin to the *Thompson* case in which the Ninth Circuit found that New York's controlled substances included hCG, a substance not listed in the Federal Controlled Substances Act, and the statute was therefore facially overbroad. *United States v. Thompson*, 961 F3d. at 552. The New York Statute in question includes isomers of cocaine not listed in federal statutes as a controlled substance. Because the state statute is facially overbroad, it is not a categorical match to the federal statute, and the realistic probability test is inapplicable under Second Circuit case law.

As we have now determined that section 220.06(5) of the New York Penal Law is overbroad, we next address divisibility. Under the categorical approach, a statute is divisible if the identity of the drug possessed is an "element" of the crime that must be proven to a jury beyond a reasonable doubt or if the statute prescribes different penalties for different drugs, and indivisible if it merely describes alternative "means," brute facts about which a jury need not agree. *Mathis v. U.S.*, 136 S. Ct. 2243, 2249 (2016); *see also Harbin v. Sessions*, 860 F.3d 58, 65 (2d Cir. 2017) (a New York controlled substance offense is indivisible where the text of the statute "provides no indication that the sale of each substance is a distinct offense." To resolve the divisibility question, we first look at the statute and then to "authoritative sources of state law." *Mathis v. U.S.*, 136 S. Ct. at 2256.

First, section 220.06 of the New York Penal Law does not prescribe different penalties for possessing different isomers of cocaine. N.Y. Penal Law § 220.06 (McKinney 2003) (possession of any drug under this statute is punishable as a "D" felony). Second, in *People v. Burnett*, 666 N.Y.S.2d 658, 659 (N.Y. App. Div. 1997), New York's Appellate Division upheld a conviction under section 220.06(5) of the New York Penal Law in which the court found that the defendant had been found to possess cocaine without determining which isomer he possessed. We therefore conclude that the isomers of cocaine in section 220.06(5) are means, not elements, and the statute is therefore indivisible.

Because we have determined that section 220.06(5) is both overbroad and indivisible, we conclude that the respondent was not convicted of a controlled substance violation under section 212(a)(2)(A)(i)(II) of the INA, 8 U.S.C. § 1182(a)(2)(A)(i)(II). [2] We therefore remand the proceedings to the Immigration Judge to consider whether the respondent is eligible for

[2] We do not reach additional arguments raised by DHS, which were not previously raised before the Immigration Judge, the Board, or the Second Circuit.

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cancellation of removal for certain nonpermanent residents under section 240A(b)(1) of the INA, 8 U.S.C. § 1229b(b)(1). On remand, the Immigration Judge may take any actions he deems appropriate to resolve the issues in this case. In remanding, we express no opinion on the ultimate outcome of these proceedings.

Accordingly, the following orders will be entered.

ORDER: The appeal is sustained.

FURTHER ORDER: The record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion and for the entry of a new decision.