UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
201 VARICK ST., 5TH FL RM 507
NEW YORK, NY 10014

Brooklyn Defender Services
Lampert, Alexandra Lynn
156 Pierrepont Street
Brooklyn, NY 11201

In the matter of [redacted] File [redacted] DATE: Dec 7, 2021

__ Unable to forward - No address provided.
__ Attached is a copy of the decision of the Immigration Judge. This decision is final unless an appeal is filed with the Board of Immigration Appeals within 30 calendar days of the date of the mailing of this written decision. See the enclosed forms and instructions for properly preparing your appeal. Your notice of appeal, attached documents, and fee or fee waiver request must be mailed to: Board of Immigration Appeals
Office of the Clerk
5107 Leesburg Pike, Suite 2000
Falls Church, VA 22041
__ Attached is a copy of the decision of the immigration judge as the result of your Failure to Appear at your scheduled deportation or removal hearing. This decision is final unless a Motion to Reopen is filed in accordance with Section 242b(c)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1252b(c)(3) in deportation proceedings or section 240(b)(5)(C), 8 U.S.C. § 1229a(b)(5)(C) in removal proceedings. If you file a motion to reopen, your motion must be filed with this court:
IMMIGRATION COURT
201 VARICK ST., 5TH FL RM 507
NEW YORK, NY 10014
__ Attached is a copy of the decision of the immigration judge relating to a Reasonable Fear Review. This is a final order. Pursuant to 8 C.F.R. § 1208.31(g)(1), no administrative appeal is available. However, you may file a petition for review within 30 days with the appropriate Circuit Court of Appeals to appeal this decision pursuant to 8 U.S.C. § 1252; INA §242.
__ Attached is a copy of the decision of the immigration judge relating to a Credible Fear Review. This is a final order. No appeal is available.
_X_ Other: __**IJ DECISION; MOTION TO TERMINATE** _____

_____**K. DURÉ**_____
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cc: ASSISTANT CHIEF COUNSEL
201 VARICK STREET, ROOM #1130
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UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
201 VARICK STREET
NEW YORK, NEW YORK

File No: [redacted]

In the Matter of:	**DETAINED**
[redacted]	**IN REMOVAL PROCEEDINGS**
Respondent.	

CHARGES: INA § 237(a)(2)(A)(iii) — Aggravated Felony under INA § 101(a)(43)(B), Illicit Drug Trafficking

INA § 237(a)(2)(B)(i) — Controlled Substance Violation

APPLICATION: Motion to Terminate

ON BEHALF OF RESPONDENT
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ON BEHALF OF DHS
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DECISION OF THE IMMIGRATION JUDGE

The Respondent filed a motion to terminate proceedings on October 27, 2021, on the grounds that the Department failed to meet its burden of proof to establish he is removable as charged because his sole conviction underlying his charges of removability is not a categorical match. The parties were provided the opportunity for briefing, and all of that briefing has been considered. For the reasons set forth below proceedings will be terminated.

The Respondent is a native and citizen of the [redacted] who entered the United States at an unknown location on an unknown date. His status was adjusted to Lawful Permanent Resident on [redacted] 2002. His removability is premised upon a [redacted] 2017 New York State conviction for criminal sale of a controlled substance in the third degree in violation of New York Penal Law ("NYPL") § 220.39(1) for which he was sentenced to two years imprisonment and two

years probation post confinement. He is charged with removability under two grounds: (1) INA § 237(a)(2)(A)(iii) for having been convicted of an "aggravated felony" as defined at INA § 101(A)(43)(B) (drug trafficking crime), and (2) INA § 237(a)(2)(B)(i) for having been convicted of a law "relating to a controlled substance (as defined in [21 U.S.C. § 802])."

The Department bears the burden of establishing by clear and convincing evidence that an alien who has been admitted to the United States is removable as charged. INA § 240(c)(3)(A); 8 C.F.R. § 1240.8(a).

The Court will consider each charge of removability, in turn.

A. INA § 237(a)(2)(A)(iii): Aggravated Felony for Illicit Trafficking in a Controlled Substance

The relevant statutory provisions provide as follows:

> "Any alien who is convicted of an aggravated felony at any time after admission is deportable." INA § 237(a)(2)(A)(iii).
>
> An "aggravated felony" is defined as "illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)." INA § 101(a)(43)(B).
>
> A person is guilty of criminal sale of a controlled substance in the third degree when he "knowingly and unlawfully sells: (1) a narcotic drug[.]" NYPL § 220.39(1).

In *Harbin v. Sessions*, the Court of Appeals held that fifth-degree criminal sale of a controlled substance under NYPL § 220.31 is not a drug trafficking aggravated felony as defined in 8 U.S.C. § 1101(a)(43)(B) because there was no categorical match between New York's "controlled substance" offenses and federal controlled substance offenses given that New York drug schedules are broader than the federal schedules. 860 F.3d 58, 68 (2d Cir. 2017). The Respondent contends that his conviction for criminal sale of a controlled substance in the third degree under NYPL § 220.39(1) is not a drug trafficking aggravated felony as defined in 8 U.S.C. § 1101(a)(43)(B) because like the controlled drug schedules analyzed in *Harbin*, there is no categorical match between New York's narcotics offenses and federal narcotics offenses given that New York narcotic drug schedules are broader than the federal schedules of the Controlled Substance Act ("CSA"). Resp't Motion at p. 7.

As an initial matter, the Court agrees with the Respondent that there is no need to apply the realistic probability test where, as here, "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." *Hylton v. Sessions,* 877 F.3d 57, 63 (2d Cir. 2018); *see also Williams v. Barr*, 960 F.3d 68, 78 (2d Cir. 2020); Resp't Motion at p. 15. As found by three separate three-member panel unpublished BIA decisions, "the inclusion of a single non-federally controlled substance in New York's drug schedules has been deemed sufficient to defeat a categorical match to federal laws incorporating the same 'controlled substance' definition at issue here." *See* Resp't Motion, Exhs. E-G at pp. 34, 39, 46 (BIA decisions citing, *inter alia*, *United States v. Townsend*, 897 F.3d 66, 74 (2d Cir. 2018)). This Court finds the Board's reasoning in these unpublished cases to be persuasive.

The parties fundamentally disagree that New York's drug schedules broadly control more substances than the CSA. *See* DHS Opp., p. 4; Resp't Motion at p. 7. The Court finds that the New York schedule is categorically overbroad on its face.[1] As the New York Schedule controls more substances than the federal schedule, there is a clear categorical mismatch such that the Respondent's statute of conviction under NYPL § 220.39(1) is categorically overbroad.

Although both parties presented arguments concerning the inclusion or exclusion of geometric isomers of 3-methylfentanyl; naloxegel; naldemedine; and thebaine-derived butorphanol in New York's schedules and the CSA, the Court need not address these arguments because it finds New York criminalizes cocaine more broadly than the CSA. New York's definition of "narcotic drugs"[2] is categorically overbroad because it controls cocaine and *all* of its isomers, while the CSA controls only cocaine and its optical and geometric isomers. *Compare* N.Y. Pub. Health L. § 3306, Schedule II(b)(4) *with* 21 C.F.R. § 1308.12(b)(4). As noted by the Respondent, the New York definition of cocaine "places no restrictions whatsoever on the kind of isomers it covers," and is therefore "overbroad relative to the federal definition." *See* Resp't Motion at p. 11. The Court notes that New York's legislature in 1978 acted intentionally in its

[1] For instance, New York controls the optical and geometric isomers of 3-methylfentanyl, while the CSA controls only its optical isomers. *Compare* 21 C.F.R. § 13008.11(b) *with* N.Y. Pub. Health L. § 3306, Schedule I(b).

[2] The Court finds that the definition of "narcotic drugs" in NYPL § 220.39(1) is indivisible, such that the modified categorical approach does not apply; someone may be convicted if he possesses any type of narcotic drug: the specific type is irrelevant. *Harbin,* 860 F.3d at 67 ("[D]ifferent narcotic drugs do not create separate crimes under this statute," and "jurors need not agree as to the particular narcotic drug in question."). Moreover, it is clear with "no ambiguity" from the record that the Respondent was convicted under subsection (1) of NYPL § 220.39, eliminating a need to apply the modified categorical approach. *Id.*

decision, amending its controlled substance schedule to include "'*all* isomers of cocaine' in order to avoid '[e]xposing the public to the risks entailed by a legalized form of cocaine.'" *Id.* (emphasis added)(citing Sponsor's Mem., Bill Jacket, L 1978, ch. 100). Therefore, under the categorical approach, as has been articulated by the Supreme Court and the Second Circuit, the Respondent's conviction under NYPL § 220.39(1) is categorically overbroad because it prohibits the sale of several "narcotic drugs" that are not "controlled substances" under the CSA. *Townsend*, 897 F.3d at 74; *Harbin*, 860 F.3d at 68; *Hylton*, 897 F.3d at 63.

The Court acknowledges that the Board in *Matter of Navarro Guadarrama*, 27 I&N Dec. 560, 567 (BIA 2019), stated that "where an alien has been convicted of violating a State drug statute that includes a controlled substance that is not on the Federal controlled substances schedules," he must establish a realistic probability that the State would "actually apply the language of the statute to prosecute conduct involving that substance." However, the Board was careful to point out that the realistic probability test "should be applied in any circuit that does *not* have binding legal authority requiring a contrary interpretation." *Id.* (emphasis added). The Court agrees with the Respondent that the Second Circuit is one such circuit that *does* have binding legal authority to the contrary. Indeed, in *Harbin*, having determined that an offense was not an aggravated felony because New York's schedules of controlled substance included a substance that was not on the federal schedule, there was no requirement that the alien then show a realistic probability. 860 F.3d at 68.

The Department contends that the Court is bound by the Second Circuit's holding in *Pascual v. Holder*, 723 F.3d 156 (2013), which affirmed the BIA's finding that a conviction under NYPL § 220.39(1) was an aggravated felony drug trafficking offense. DHS Opp. at p. 4. The extent of *Pascual*'s binding authority is questionable now in light of the Second Circuit's holding in *Harbin*. In *Pascual*, the Second Circuit analyzed whether the proscribed act of "selling" under New York law was a categorical match with the generic federal definition of "illicit trafficking in a controlled substance" which criminalized the sale of narcotics. 723 F.3d at 158-59. Importantly, the Second Circuit's opinion in *Pascual* never addressed whether New York law criminalizes *substances* more broadly than the federal CSA. *See generally id.* In light of the Second Circuit's more recent precedent in *Harbin*, requiring not only that the proscribed conduct under New York law categorically match the federal generic offense but also requiring that the substances

criminalized by New York Law match those criminalized under the federal CSA, the Court will not blindly apply *Pascual* to the Respondent's statute of conviction.

Addressing the potential staleness of *Pascual*, the Department argues that although *Pascual* predates *Harbin*, it remains binding precedent because the Second Circuit recently cited it approvingly in *Chery v. Garland*, 16 F.4th 980 (2d Cir. 2021). DHS Opp. at p. 4. The Court recognizes that the Second Circuit favorably cites *Pascual* in *Chery*, but only in the limited context of analyzing whether the offer to sell a controlled substance under Connecticut law categorically matches the federal definition of a sale. 16 F.4th at 984-85. Significantly, in *Chery*, the Second Circuit analyzed both the proscribed act and the substances involved while conducting its categorical analysis. *Id.* at 984-86. Moreover, the Second Circuit relied on *Harbin*, not *Pascual*, while analyzing whether the substances criminalized by Connecticut law are overbroad. *Id.* at 985-86. In other words, *Chery* stands for the proposition that the Court must analyze all the elements of an offence, both the proscribed acts and the involved substances, when conducting a categorical analysis.

Accordingly, the Court finds that the Department has not sustained its charge that the Respondent has been convicted of an aggravated felony.

B. INA § 237(a)(2)(B)(i): Conviction Relating to a Controlled Substance

The relevant statutory provision provides as follows:

> Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country *relating to* a controlled substance (*as defined in section 802 of Title 21*), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

INA § 237(a)(2)(B)(i) (emphasis added). Courts have repeatedly held that to determine removability for a state drug conviction, "a state drug offense must . . . 'necessarily' proscribe conduct that is an offense under the CSA." *Moncrieffe v.* Holder, 569 U.S. 184, 192 (2013); *Mellouli v. Lynch*, 575 U.S. 798, 806 (2015); ("The categorical approach has been applied routinely to assess whether a state drug conviction triggers removal under the immigration statute.").

The Supreme Court in *Mellouli*, while acknowledging that the words "relating to" *are* broad, held that to trigger removal under § 1227(a)(2)(B)(i), "the Government *must* connect an

element of the alien's conviction to a drug 'defined in [§ 802].'" 575 U.S. at 813 (emphasis added). In reaching its conclusion, the Supreme Court rejected the Government's argument that "the overlap between state and federal drug schedules supports the removal of aliens convicted of *any* drug crime . . . ." *Id.* at 811. Rather, the Court reasoned, "Congress and the BIA have long required a direct link between an alien's crime of conviction and a particular federally controlled drug," and the Government's position would "sever[] that link by authorizing deportation any time the state statute of conviction bears some general relation to federally controlled drugs." *Id.* at 812.

The Department first argues that the narcotic drugs listed in New York's drug schedules *are* listed in the CSA. *See* DHS Opp. at pp. 4-8. However, as discussed *supra*, that argument is no longer tenable.

The Department argues further that, even assuming *arguendo* a mismatch, the state and federal definitions are "substantially similar," matching INA § 237(a)(2)(B)(i), because these definitions "relate to" a controlled substance, even without a categorical match. *Id.* at pp. 9-11. At first blush, this argument is an attractive one. Indeed, the Department cites to various authorities to support its position, including the Board in *Matter of Beltran*, 20 I&N Dec. 521, 525 (BIA 1992) (The phrase "relating to . . . has long been construed to have broad coverage in the context of the controlled substance ground of removability."); *see also* DHS Opp. at p. 10. However, *Matter of Beltran* predates *Mellouli*, and, as put by the Respondent, its holding therefore is "called into question because *Mellouli* specifically held that 'relating to' is not enough, that there must be a categorical match between the state schedule and the federal CSA." Resp't Reply at pp. 11-12.

The Court finds, contrary to the Department's position, that the Supreme Court interpreted this "relating to" language *restrictively*, reasoning that the definitional parenthetical—"(as defined in section 802 of Title 21)"—provided a limitation to the meaning of "controlled substance." *Mellouli*, 575 U.S. at 813. The Court specifically rejected the argument that "*any* drug crime" renders an alien removable, and instead, held that "to trigger removal under § [237](a)(2)(B)(i), the Government must connect an element of the alien's conviction to a drug defined in § 802." *Id* (emphasis in original); *see also* Resp't Reply at p. 11. Ultimately, "[c]onstruction of § 1227(a)(2)(B)(i) must be faithful to the text." *Mellouli*, 575 U.S. at 813.

The Court agrees with the Respondent that *Mellouli* actually stands for the opposite principle articulated by the Department: that while the phrase "relating to" can be read broadly, "those words, extended to the furthest stretch of indeterminacy, stop nowhere," and "[c]ontext,

therefore, may tug in favor of a narrow reading." 575 U.S. at 812; Resp't Reply at p. 11. Applying such context-driven analysis to the present case, the Court cannot overlook the multiple substances included in the New York drug schedule that are not included or controlled under the federal CSA. It is ultimately not enough for a conviction to "relate to" a controlled substance; rather, the conviction must also specifically match the substances that are controlled under 21 U.S.C. § 802. Resp't Reply at p. 12.

There is significant persuasive authority to support such an analysis. *See, e.g., Madrigal-Barcenas v. Lynch*, 797 F.3d 643, 645 (9th Cir. 2015) (concluding a state offense does not provide a basis for removability under § 237(a)(2)(B)(i) and stating that, after *Mellouli*, "it is the fact, not degree, of overinclusiveness that matters"); *Johnson v. Barr*, 967 F.3d 1103, 1110 (10th Cir. 2020) (same and concluding the state statute is "broader than the CSA because it criminalizes possessing morpholine, while the CSA does not"). Indeed, in at least two unpublished Court of Appeals' decisions, the Court applied the reasoning articulated in *Mellouli* to possessory state drug offenses without further analysis. *See Hnatyuk v. Whitaker*, 757 Fed. Appx. 10, 12 (2d. Cir Nov. 21, 2018) (noting state "[d]rug possession . . . convictions trigger removal only if they necessarily involve a federally controlled substance" and finding that because alien was convicted under a statute that "punished conduct that was not criminal under the CSA," his conviction "is not related to a controlled substance"); *Andrews v. Barr*, 799 Fed. Appx. 26, 27 (2d Cir. Jan. 22, 2020) ("Based on the reasoning in *Harbin*, NYPL § 220.31 is also not a removable controlled substance offense under 8 U.S.C. § 1227(a)(2)(B)(i) because that provision references the same federal drug schedules, 8 U.S.C. § 1101(a)(43)(B), at issue in *Harbin*.").

Finally, the Department argues that a "flexible categorical approach" should be adopted, and that this Court should look to the Respondent's underlying record of conviction, to determine removability. *See* DHS Opp. at pp. 13-15. The Court is not persuaded. The Supreme Court in *Mellouli* specifically states that "[t]he historical background of § 1227(a)(2)(B)(i) demonstrates that Congress and the BIA have long required a *direct link* between an alien's crime of conviction and a particular federally controlled drug," leaving no room for such flexibility. 575 U.S. at 812 (emphasis added); Resp't Reply at p. 12.

As such, the Court finds that the Department has not sustained its charge that the Respondent is removable for having been convicted of a controlled substance offense.

The termination of these proceedings is without prejudice to the Department's decision to charge the Respondent with another ground of removability.

Accordingly, the following orders will be entered:

ORDERS

IT IS HEREBY ORDERED that Respondent's motion to terminate proceedings is **GRANTED.**

IT IS FURTHER ORDERED that these proceedings are **TERMINATED WITHOUT PREJUDICE.**

12/7/21
Date

Margaret M. Kolbe
Immigration Judge

EITHER PARTY HAS THE RIGHT TO APPEAL FROM THIS DECISION. IN ORDER TO BE TIMELY, A NOTICE OF APPEAL MUST BE RECEIVED AT THE BOARD OF IMMIGRATION APPEALS WITHIN THIRTY DAYS OF SERVICE OF THIS DECISION

FURTHER ORDER: THE 12/8/21 MASTER CALENDAR HEARING IS ADJOURNED AND THIS ORDER SHALL BE EMAILED TO PARTIES' COUNSEL.