UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
26 FEDERAL PLZ, 12TH FL RM1237
NEW YORK, NY 10278

Neighborhood Defender Service of Harlem
Foletta, Scott Allen
317 Lenox Ave., 10th Fl.
New York, NY 10027

In the matter of [redacted] File [redacted] DATE: Aug 13, 2020

__ 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
26 FEDERAL PLZ, 12TH FL RM1237
NEW YORK, NY 10278
__ 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.

✓ Other: IJ order

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cc: CHIEF COUNSEL, NYC
26 FEDERAL PLAZA, ROOM #1130
NEW YORK, NY, 10278

8.13.20 WG

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
26 FEDERAL PLAZA
NEW YORK, NEW YORK

File Number: [redacted]

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

CHARGE: INA § 237(a)(2)(B)(i) Controlled Substance Offense

APPLICATION: Motion to Terminate

ON BEHALF OF RESPONDENT:
Scott Foletta
Neighborhood Defender Service of Harlem
317 Lenox Avenue, 10th Floor
New York, NY 10027

ON BEHALF OF DHS:
Kelly Garner
Assistant Chief Counsel
26 Federal Plaza
New York, NY 10278

DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

[redacted] ("Respondent") entered the United States ("U.S.") on [redacted], 1987, as a Legal Permanent Resident. *See* Respondent's Motion to Terminate, Exhibit A. Respondent was arrested on [redacted], 2006 and pled guilty to possession of a controlled substance in the fourth degree in violation of New York Penal Law ("NYPL") 220.09(1). *See* Respondent's Motion to Terminate, Exhibit C. He was sentenced to five years of probation. *Id.* On [redacted], 2014, the Department of Homeland Security ("DHS") served Respondent with a Notice to Appear ("NTA"), charging him with removability under INA 237(a)(2)(B)(i), controlled substance offense. Respondent's Motion to Terminate, Exhibit A. On [redacted], 2016, Respondent appeared before me and denied both the factual allegations and removability. On July 2, 2020, Respondent

submitted a Motion to Terminate Proceedings. For the following reasons, Respondent's motion is granted.

II. LEGAL STANDARDS AND ANALYSIS

To determine whether a conviction "relates to" a controlled substance offense under federal law, I apply the categorical approach. First, I must determine whether state law is overbroad as compared to federal law. *Moncrieffe v. Holder*, 569 U.S. 184, 190 (2013). A state offense is a categorical match to a generic federal offense only if a conviction under the state statute "necessarily involved . . . facts equating to [the] generic [federal offense]." *Id.* (alterations in original) (quoting *Shepard v. United States*, 544 U.S. 13, 24 (2005)).

If the state law encompasses more conduct that federal law, I must then determine whether the statute is divisible. *Descamps v. United States*, 570 U.S. 254, 258 (2013). A divisible statute lists elements in the alternative, thereby creating a separate crime associated with each element, while an indivisible statute describes one crime that may include different means. *Descamps*, 570 U.S. at 264 (2013); *see also Harbin v. Sessions*, 860 F.3d 58, 64 (2d Cir. 2017) (referencing *Mathis v. U.S.*, 136 S.Ct. 2243 (2016)). If the statute is not divisible, then the inquiry ends and there can be no finding of a violation of a law. *See Mathis*, 136 S. Ct. at 2248-49). If the statute is divisible, and some of the alternative elements relate to a controlled substance offense while other elements do not, I may then apply the modified categorical approach and analyze Respondent's record of conviction to determine which alternative element "formed the basis of the [respondent's] prior conviction." *Descamps*, 570 U.S. at 258.

A. Over breadth

Respondent was convicted under NYPL § 220.09(1) for possession of a narcotic drug (cocaine). Initially, I must compare the federal and state definitions of "narcotic drug" and "cocaine." The federal definition of narcotic drug is found in the Controlled Substance Act ("CSA"). *See generally* 21 U.S.C.A. § 802. Cocaine is listed as a narcotic drug and includes "its salts, optical and geometric isomers, and salt of isomers." *Id.* at (17)(D). At the time of Respondent's arrest, cocaine was further defined as:

> "Coca leaves (9040) and any salt, compound, derivative or preparation of coca leaves (including cocaine (9041) and ecgonine (9180) and their salts, isomers, derivatives and salts of isomers and derivatives), and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine." 21 C.F.R. § 1308.12(b)(4) (effective June 4, 2007-September 23, 2007).

In New York, narcotic drug is defined as a controlled substance found in the New York drug schedules. NYPL § 220.00(7). According to the New York drug schedules, at the time of Respondent's guilty plea in 2006, cocaine was defined as:

> "Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances including cocaine and ecgonine, their salts, isomers, and salts of *isomers*, except that the substances shall not include decocainized coca leaves or extraction of coca leaves, which extractions do not contain cocaine or ecgonine." N.Y. Pub. Health Law § 3306 (effective August 16, 2006-October 12, 2010).

The difference in definitions lies in which isomers are criminalized controlled substances. As seen above, the New York statute criminalizes all cocaine isomers, while the federal government defines "isomer" as optical and geometric isomers only. N.Y. Pub. Health Law § 330; 21 U.S.C.A. § 802(17)(D). This textual difference creates a categorical mismatch between the Federal and New York definitions of cocaine.[1] Therefore, the New York definition of cocaine is facially broader than the federal definition of cocaine. *Compare with Alexis v. Barr*, 960 F.3d 722 (5th Cir. 2020) (finding the Texas definition of cocaine criminalizing all isomers facially overbroad as compared to the federal definition); *see also Lorenzo v. Whitaker*, 752 F. App'x 482, 485 (9th Cir. 2019) (finding the California definition of methamphetamine criminalizing all isomers facially overbroad than the federal definition).

Consistent with recent case law, I do not apply the realistic probability test and rely solely on statutory language. *Williams v. Barr*, 960 F.3d 68 (2d Cir. 2020) (citing *Hylton v. Sessions*, 897 F.3d 57, 63 (2d Cir. 2018)) (holding that the realistic probability test has no role in the categorical analysis when the state statute of conviction is facially broader than the federal definition).

B. Divisibility

Turning to the second step of the categorical analysis, under NYPL § 220.09(1),

> "[a] person is guilty of criminal possession of a controlled substance in the fourth degree when he knowingly and unlawfully possesses one or more preparations, compounds, mixtures or substances containing a narcotic drug and said preparations, compounds, mixtures, or substances are of an aggregate weight of one-eighth ounce or more."

The face of the statute provides one set of elements: a person must knowingly and unlawfully possess a narcotic drug. The jury instructions only require that a jury agree the defendant possessed a narcotic drug. They need not agree on which drug. The statute suggests a single crime with multiple factual means by which the crime can be committed. *Harbin*, 860 F.3d at 65. Furthermore, with reference to a comparable statute involving narcotic drugs, courts have held that

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[1] The definition of "isomer" in the Code of Federal regulation lists specific combinations of isomers that are criminalized for various drugs. *See* 21 CFR § 1300.01. This demonstrates an intentional criminalization of only certain isomers. Conversely, in 1978, the New York legislature passed Bill 6982, "An Act to amend the public health law in relation to the definition of coca leaves." The bill amended the New York Public Health Law to criminalize all isomers of cocaine after three federal court cases presented arguments that certain types of cocaine were not criminalized on account of their isomer. As noted in the bill justification, the "statutory loophole" of only criminalizing certain cocaine isomers could be closed "by enacting this amendment which would include all isomers of cocaine and ecgonine in the schedule of controlled substances." Sponsor Assemblyman George A. Murphy Memo, Assembly Bill 6982; Senate Bill 4798 (NY Assembly 1978). The bill and justification suggest New York intentionally criminalized all cocaine isomers, while the federal statute clearly does not.

a list of different narcotic drugs do not create separate crimes. *People v. Martin*, 153 A.D.2d 807, 545 N.Y.S.2d 287, 288 (1989) ("Penal Law § 220.16(1) does not distinguish between the types of narcotics possessed, but treats all drugs classified as narcotics interchangeably."); *see also People v. Miller*, 15 A.D.3d 265, 789 N.Y.S.2d 423 (2005) ("Defendant should not have been convicted of two possession counts based on his possession of a single bag containing both cocaine and heroin."). Following the reasoning of *Harbin*, I find NYPL § 220.09(1) not divisible and I need not proceed to the modified categorical approach.

I find that because New York's definition of cocaine includes isomers not criminalized under the federal schedules, there is no categorical match to federal law and Respondent's conviction cannot sustain the charge of removability. Accordingly, DHS has failed to meet its burden to establish by clear and convincing evidence that Respondent is removable based on his conviction for possession of a narcotic drug.

Finally, a review of the record indicates Respondent denied both the factual allegations contained in the NTA and removability at his initial hearing on [redacted], 2016. Therefore, I need not reach the merits of the Motion to Amend Pleadings as the issue is moot.

Accordingly, after a careful review of the record, the following Orders are entered:

ORDERS

IT IS HEREBY ORDERED that Respondent's Motion to Amend Pleadings is MOOT.

IT IS FURTHER ORDERED that Respondent's Motion to Terminate his removal proceedings is GRANTED.

Douglas Schoppert

Douglas Schoppert
Immigration Judge

Date: 8-13-20
Appeal Due: 9-14-20