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

In the Matter of: [redacted] File No.: A[redacted] The respondent.	**IN REMOVAL PROCEEDINGS**

SCHEUDLING ORDER

The Court orders the respondent to file any applications for relief, including for potential relief under former INA § 212(c), and supporting documents within sixty days of the date of the issuance of this order. The Department of Homeland Security will have thirty days from the date of respondent's filing to submit any of its own documentation. The parties may at any time, up to the call-up date, move to dismiss the matter, stipulate to a grant of relief, or stipulate to administrative closure.

Date: 12/1, 2021

Alice Segal
Immigration Judge

UNITED STATES DEPARTMENT OF JUSTICE
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In the Matter of: [redacted]	
File No.: A[redacted]	**IN REMOVAL PROCEEDINGS**
The respondent.	

CHARGE:	INA § 237(a)(2)(A)(i)	Convicted of crime involving moral turpitude
	INA § 237(a)(2)(A)(iii)	Convicted of aggravated felony
	INA § 237(a)(2)(B)(i)	Convicted of violation of controlled substance law

APPLICATION:

ON BEHALF OF THE RESPONDENT
Michelle Gonzalez, Esq.
Neighborhood Defender Service of Harlem
317 Lenox Avenue, 10th Floor
New York, New York 10027

ON BEHALF OF THE DEPARTMENT
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Assistant Chief Counsel, DHS
26 Federal Plaza, Room 1130
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DECISION AND ORDER OF THE IMMIGRATION JUDGE

I. PROCEDURAL HISTORY

[redacted] ("the respondent"), is a native and citizen of the Dominican Republic. Notice to Appear ("NTA"). On June 11, 1991, the respondent was admitted into the United States as a Lawful Permanent Resident ("LPR"). *Id.* On July 20, 1994, the respondent pled guilty to NYPL § 110-220.16, attempted possession of a controlled substance in the third degree. Respondent's Mot. to Terminate, Exhibit ("Exh.") A. On January 4, 2016, the Department of Homeland Security ("DHS") served the respondent with the NTA, charging her as removable under the Immigration and Nationality Act ("INA") Sections 237(a)(2)(A)(i), having been convicted of a crime involving moral turpitude ("CIMT"); 237(a)(2)(A)(iii), having been convicted of an aggravated felony; and 237(a)(2)(B)(i), having been convicted of a violation

relating to a controlled substance. *See* NTA. On July 6, 2018, the respondent conceded removability under INA § 237(a)(2)(B)(i) and denied the other charges of removability.

On March 23, 2021, the respondent filed a motion to terminate proceedings. In her motion, the respondent argued that, although she had previously conceded removability under INA § 237(a)(2)(B)(i), the charge should not actually be sustained because there is a categorical mismatch between the state and federal drug schedules. On May 12, 2021, DHS filed a response in opposition to the respondent's motion. On May 26, 2021, the Court denied the respondent's motion because she had previously conceded removability, and the Court could not again consider the sustainability of the charge. The Court subsequently issued a scheduling order, ordering the respondent to either concede the remaining charges or contest their sustainability. On August 2, 2021, the respondent filed a supplemental brief contesting the remaining charges of removability. The respondent relies on the same arguments in her original motion to terminate—that there is a categorical mismatch between the state and federal drug schedules and therefore her conviction does not constitute either a CIMT or an aggravated felony. The Court will now address this substantive claim, as well as the arguments made by DHS in their opposition to the respondent's original motion. For the following reasons, the Court will not sustain the remaining charges of removability.

II. LEGAL STANDARDS AND ANALYSIS

Since removability still needs to be established, the Court notes that DHS bears the burden of establishing by clear and convincing evidence that an alien is deportable as charged. *See* INA § 240(c)(3)(A); 8 C.F.R. § 1240.8(a); *see also Woodby v. INS*, 385 U.S. 276, 286 (1966). The Supreme Court recently heard a case on the burden of proof in immigration proceedings, holding that "the party who bears the burden of proving [the] facts bears the risks associated with failing to do so." *Pereida v. Wilkinson*, 141 S. Ct. 754, 765 (U.S. 2021). Therefore, it is DHS's responsibility to clear up any ambiguities as to whether there is a categorical mismatch between the state and federal drug schedules, as well as with any of the alternative arguments it seeks to make before the Court in this case. If DHS fails to carry its burden of proof, then the Court has the authority to terminate the proceedings. *See* 8 C.F.R. § 1239.2. Relatedly, with regards to ambiguities in this case, the Court notes that the certificate of disposition does not state under what subsection of NYPL § 220.16 the respondent was convicted. *See* Exh. A. The respondent contends that because the certificate does not specify the subsection, the Court should analyze the statute in its entirety. The Court would tend to agree in this case, given that DHS has the burden of proof and has failed to provide concrete evidence as to the specific subsection that the respondent was convicted. *See Pereida*, 141 S. Ct. at 765.

In determining whether a respondent's prior conviction is a CIMT or aggravated felony, the Court must apply the categorical approach, focusing solely on whether the elements of the offense forming the basis for the conviction sufficiently match the elements of the generic (or commonly understood) version of the enumerated crime, while ignoring the particular facts of the case. *See Mathis v. United States*, 136 S. Ct. 2243 (2016); *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013); *Mendez v. Barr*, 960 F.3d 80, 84 (2d Cir. 2020); *Flores v. Holder*, 779 F.3d 159, 165 (2d Cir. 2015). Under the categorical approach, the Court determines "whether 'the state statute defining the crime of conviction' categorically fits within the 'generic' federal definition of a

corresponding" offense rather than "the facts of the particular prior case[.]" *Moncrieffe*, 133 S. Ct. at 1684 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186 (2007) (citing *Taylor v. United States*, 495 U.S. 575, 599–600 (1990))); *see Matter of Nemis*, 28 I&N Dec. 250, 252 (BIA 2021).

The Court "must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Id.* (alterations in original) (quoting *Johnson v. United States*, 559 U.S. 133, 137 (2010)). In other words, the courts "look only to the minimum criminal conduct necessary to satisfy the essential elements of the crime." *Mendez v. Barr*, 960 F.3d 80, 84 (2d Cir. 2020) (quoting *Mendez v. Mukasey*, 547 F.3d 345, 348 (2d Cir. 2008)). 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]." *Moncrieffe*, 133 S. Ct. at 1684 (alterations in original) (quoting *Shepard v. United States*, 544 U.S. 13, 24 (2005)). If the least culpable conduct is a categorical match to the generic federal offense, the analysis ends and the conviction is a categorical match. If the least culpable conduct is not a match, then there is no categorical match.

The respondent was convicted of attempted criminal possession of a controlled substance in the third degree. Exh. A; *see* NYPL § 110-220.16. Per Section 220.16, a person is guilty of third degree criminal possession of a controlled substance when they knowingly and unlawfully possess a narcotic drug with intent to sell. Section 220.00(7) defines "narcotic drug" as "any controlled substance listed in schedule I(b), I(c), II(b) or II(c) other than methadone." Schedule II(b)(4) of the New York drug schedule includes "[c]oca 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 . . . ." NYPHL § 3306. Although New York does not statutorily define the term "isomer," the legislature, in order to close a statutory loophole of criminalizing only certain cocaine isomers, amended the drug schedule in 1978 to include "all isomers of cocaine." Sponsor Assemblyman George A. Murphy Memo, Assembly Bill 6982; Senate Bill 4798 (NY Assembly 1978).

Conversely, the federal drug schedule only criminalizes two particular cocaine isomers. The federal definition of "narcotic drug" includes "[c]ocaine, its salts, optical and geometric isomers, and salts of isomers." 21 U.S.C. § 802(17)(D). Additionally, Schedule II of the federal drug schedule includes "[c]oca 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) . . . ." 21 C.F.R. § 1308.12(b)(4). Federal regulations define "isomer" as used in § 1308.12(b)(4) to mean "the optical or geometric isomer." 21 C.F.R. § 1300.01.

The Court finds that there is not a categorical match between the definition of "narcotic drug" in New York's drug schedule and the federal drug schedule because the New York drug schedule includes more isomers of cocaine than the federal drug schedule. This textual mismatch between the state and federal definitions of "narcotic drug" means that the New York drug schedule and the federal drug schedule do not categorically match for purposes of determining the

respondent's removability. *See United States v. Fernandez-Taveras*, No. 18-CR-455, 2021 WL 66485 (E.D.N.Y. Jan. 7, 2021); *Alexis v. Barr*, 960 F.3d 722 (5th Cir. 2020) (finding no categorical match between Texas's controlled substance statute and the federal drug schedule because the state definition of cocaine included more isomers than the federal definition); *Lorenzo v. Whitaker*, 752 F. App'x 482, 485 (9th Cir. 2019) (finding California's controlled substance statute facially overbroad because its definition of "methamphetamine" included optical and geometric isomers and the federal definition only included optical isomers). Therefore, the respondent's conviction is not a CIMT or an aggravated felony.

Next, the Court finds that the realistic probability test does not apply. The Second Circuit has been clear that when the wording of a state statute on its face extends to conduct beyond the definition of the corresponding federal offense, the realistic probability test is obviated. *Hylton v. Sessions*, 897 F.3d 57, 63 (2d Cir. 2018); *Matthews v. Barr*, 927 F.3d 606, 620 (2d Cir. 2019). Despite recent dicta by the BIA limiting the *Hylton* decision, a close examination of Second Circuit case law demonstrates a clear precedent indicating that the realistic probability test cannot be applied when a state statute is facially overbroad. *See Matter of Navarro-Guadarrama*, 27 I&N Dec. 560, 565 n.5 (BIA 2019). The Court's reliance on the *Hylton* holding is not inconsistent with the Second Circuit's recent decision in *United States v. Scott*, 990 F.3d 94 (2d Cir. 2021), which used the realistic probability specifically to determine whether a criminal defendant's conviction for manslaughter was a violent crime under the Armed Career Criminals Act.[1] The need to apply the realistic probability test is still obviated when the state and federal statutes categorically mismatch. Therefore, since the Court has determined that the state drug schedule on its face defines "narcotic drug" more broadly than the federal definition, the Court will not apply the realistic probability test.

Finally, the Court finds that New York's drug possession statutes are not divisible and it will not apply the modified categorical approach. Several state court opinions have held that a difference in narcotic drugs does not create separate crimes. *People v. Kalabakas*, 124 N.Y.S.3d 448, 454-55 (3rd Dep't 2020); *People v. Miller*, 15 A.D.3d 265 (1st Dep't 2005); *People v. Martin*, 153 A.D.2d 807 (1st Dep't 1989); *see also Harbin v. Sessions*, 860 F.3d 58, 65-67 (2d Cir. 2017). Specifically regarding drug possession, the state statutes "[do] not distinguish between the types of narcotics possessed, but treats all drugs classified as narcotics interchangeably." *Martin*, 153 A.3d at 808. Therefore, NYPL § 220.16 is indivisible and the Court will not apply the modified categorical approach. *See Mathis v. United States*, 136 S. Ct. 2243, 2249 (U.S. 2016).

Nevertheless, DHS urges the Court to employ a "flexible" categorical approach in analyzing the respondent's prior conviction, arguing, in light of several Supreme Court opinions, that the respondent's conviction involves conduct that Congress intended to find as grounds for removability. However, none of the case law cited by DHS indicates that the Court should deviate from the categorical approach originally prescribed by the Supreme Court. *See Moncrieffe*, 133 S. Ct. at 1684.

[1] The Court notes that in discussing use of the realistic probability test, the Second Circuit in *Scott* omitted any reference to *Hylton* or *Harbin* and their holdings that a facial mismatch between state and federal statutes obviates use of the reasonable probability test when analyzing prior convictions as grounds for removability.

DHS relies heavily on the Supreme Court's decision in *Mellouli v. Lynch*, where the government argued that a defendant's conviction under a drug paraphernalia possession statute qualified him as removable under INA § 237(a)(2)(B)(i) because the conviction related to a controlled substance. 575 U.S. 798, 811 (2015). Although the Kansas state drug schedule was clearly overbroad because it included at least nine substances not on the federal schedule, the government argued that the phrase "relating to" allows for a removability finding when there is substantial overlap between state and federal drug schedules. *Id.* at 802, 811. The Supreme Court disagreed, finding that § 237(a)(2)(B)(i) requires a direct link between the defendant's conviction and a particular federally controlled drug, and that authorizing removal because the state conviction has some general relation to federal drug schedules would sever that link. *Id.* at 812. The Court disagrees with DHS that *Mellouli* "invited flexibility into the categorical approach." Opp'n to Mot. to Terminate, 10. In fact, the Supreme Court chose to remain faithful to the text of § 237(a)(2)(B)(i), and declined to depart from the categorical approach, limiting removal to state convictions involving controlled substances defined by federal law.[2] *Mellouli*, 575 U.S. at 813. Therefore, the Court will not read such an expansive definition of the phrase "relating to" to find that the respondent's conviction qualifies her as removable. The Court will instead abide by the categorical approach, as the Supreme Court in *Mellouli* did, which requires the respondent's conviction to have necessarily involved, as an element, a substance listed under the federal drug schedules. *Matter of P-B-B-*, 28 I&N Dec. 43, 45-46 (BIA 2020) (citing *Mellouli*, 135 S. Ct. at 1991).

DHS's reliance on other Supreme Court decisions are equally inapposite to its argument in this case. The Supreme Court's deviation from the categorical approach in *Shular v. United States*, 140 S. Ct. 779 (U.S. 2020), was in the context of determining whether a specific federal statute should be analyzed as a generic offense for sentencing enhancement purposes, which required interpretation of whether particular terms in the statute described conduct or named offenses. No such issue presents itself before the Court here; instead, the Court will abide by the categorical approach in determining whether there is a mismatch between the state and federal drug schedule. *Mellouli*, 135 S. Ct. at 1991.

DHS also argues that the Court should abandon the categorical approach in favor of two different analyses: the circumstance-specific approach and the realistic probability test. Determining if a provision may be interpreted using the circumstance-specific approach can be ascertained by resolving whether the language refers to a generic crime or whether it refers to specific acts—if it is the latter, then courts are permitted to go beyond the categorical approach and use the circumstance-specific approach. *See Nijhawan v. Holder*, 557 U.S. 29, 33–34 (2009). However, only certain provisions of INA § 101(a)(43) have been found to qualify for such an approach. *Nijhawan*, 557 U.S. at 36–41 (2009) (§ 101(a)(43)(M)(i)); *Matter of Garza-Olivares*, 26 I&N Dec. 736 (BIA 2016) (§ 101(a)(43)(T)); *Barikyan v. Barr*, 917 F.3d 142, 146 (2d Cir. 2019) (§ 101(a)(43)(D)); *Rampersaud v. Barr*, 972 F.3d 55 (2d Cir. 2020) (§ 101(a)(43)(M)). The BIA has used the approach in analyzing a controlled substance conviction under § 237(a)(2)(B)(i), however that was only when the respondent was convicted under a state marijuana statute, and the

[2] Additionally, DHS contends the Supreme Court followed a "conviction-driven approach" in *Mellouli* by referencing particular facts of the respondent's conviction in the decision. However, these facts were highlighted in the introductory paragraph of the decision, which is generally where one can find a basic factual background of the case. *See* 575 U.S. at 800. The facts were not used as part of the Supreme Court's analysis.

approach was necessary to determine whether the personal use exception for marijuana in the INA was applicable. *Matter of Dominguez-Rodriguez*, 26 I&N Dec. 408 (BIA 2014). Since that is not the case here, the Court will not apply the circumstance-specific approach. Finally, for the reasons discussed *supra*, the Court will not apply the realistic probability test.

Additionally, the Court will not find that the Federal Analogue Act ("FAA") applies in this case. DHS urges the Court to find that even if the federal drug schedule does not cover all cocaine isomers, any additional isomers are criminalized as a controlled substance analogue and thus the respondent's conviction categorically matches to a federally criminalized drug. A controlled substance analogue is a substance "the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II" and "which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II." 21 U.S.C. § 802(32)(A). Although DHS presented some documentary evidence showing the similar chemical structures an isomer has to a particular controlled substance, there is no evidence to suggest that the effects of a cocaine isomer on the central nervous system are substantially similar to a controlled substance. Given that the Court is not an expert in chemistry or molecular biology, DHS must submit evidence based on reliable scientific expertise to show that the above two requirements have been met in this case. Indeed, a review of relevant Second Circuit case law shows that expert testimony is always utilized to prove both requirements for what constitutes a controlled substance analogue. *See United States v. Demott*, 906 F.3d 231, 239-40 (2d Cir. 2018); *United States v. Roberts*, 363 F.3d 118, 121-22 (2d Cir. 2004); *United States v. Requena*, 980 F.3d 30, 46-47 (2d Cir. 2020). Therefore, DHS has failed in its burden of proof to provide adequate support to its claim, nor is there any agreement by the parties that the requirements have been met.

III. CONCLUSION

The Court will not sustain the charges of removability under INA §§ 237(a)(2)(A)(i) and 237(a)(2)(A)(iii) because there is categorical mismatch between the state and federal drug schedules. Although DHS makes several alternative arguments for sustainability of the charges, the Court does not have the scientific expertise to make such determinations without additional evidence. Therefore, the Court will not sustain the remaining charges of removability. However, since, as discussed above, the respondent is still removable under INA § 237(a)(2)(B)(i), the proceedings will not be terminated. The Court reminds the respondent here to file any applications for relief, including potential relief under former INA § 212(c), by the deadline determined in the scheduling order that was issued in conjunction with this decision.

Date: 12/1, 2021

Alice Segal
Immigration Judge